



December 19, 2008

## **Overdraft and Debit Holds Federal Reserve Proposal**

Yesterday the Federal Reserve issued a proposal dealing with overdrafts and debit holds for comment under Regulation E. There will be a 60 day comment period after the proposal is published in the Federal Register. Originally, the Fed had proposed changes under UDAP but after receiving comments from CBA and others, decided that this alternative--Regulation E--was preferable.

At yesterday's meeting however, the Fed did finalize two changes to Regulation DD--the Truth in Savings Act--that affect overdrafts. These changes are:

Periodic statements will have to have year to date and monthly dollar amounts for NSF and overdraft fees;  
ATM receipts and balance inquiries will have to show balances without including amounts available through overdraft privileges.

These changes take effect January 2010.

CBA will be scheduling a call in January to discuss the Regulation E proposal. If you would like to participate and/or have any questions, please feel free to contact Marcia Sullivan at [msullivan@cbanet.org](mailto:msullivan@cbanet.org) or Steve Zeisel at [szeisel@cbanet.org](mailto:szeisel@cbanet.org).

### **Summary of Regulation E Proposal: Overdrafts and Debit Holds**

#### **OVERDRAFTS**

##### **Opt-Out Alternative**

- *General Rule.* An account-holding institution may not assess a fee or charge on a consumer's account for paying an overdraft on an ATM withdrawal or a one-time debit card transaction pursuant to the institution's overdraft service unless the consumer is given notice and a reasonable opportunity to opt out. (The initial notice requirement does not apply to existing accounts.)
- *Reasonable Method to Opt Out.* Reasonable methods to opt out include:  
providing a written form the consumer can mail in, providing a toll-free telephone

number, or providing an electronic means to opt out. In these circumstances, the example of a reasonable method to opt out includes a 30-day period for the consumer to opt out. A bank may also provide an opt-out notice and require the consumer to decide whether to opt out as a necessary step to opening the account.

- *Scope of Opt Out.* The Board is proposing to limit the scope of the opt out to ATM withdrawals and one-time debit card transactions, and not allowing banks to condition a consumer's opt-out right on also opting out of overdraft services with respect to other transactions (*e.g.*, checks). The Board proposes to allow substantial lead time for banks to implement the necessary programming changes.
  - Alternatively, the Board is also proposing a modified version that would expressly permit banks to condition the consumer's ability to opt out on the consumer also opting out of other types of overdraft services.
- *Account Variations.* The Board proposes that if the consumer opts out, the bank must provide an account that has the same terms, conditions, and features, including interest rates paid and fees assessed, as are provided to consumers who do not opt out.
  - Alternatively, the Board is also proposing a modified version that would allow a bank to provide an account on the same or reasonably comparable terms provided that the difference in terms, conditions, or features are not so substantial that they would discourage a reasonable consumer from exercising his or her right to opt out of the payment of overdrafts.
- *Exceptions to Fee Prohibition.* A bank may assess an overdraft fee, regardless of the consumer's opt out, if: (i) the institution has a reasonable belief that there are sufficient funds available in the account at the time of authorization (*e.g.*, authorization balance not real time, deposited item returned, settlement amount exceeds authorization, or transaction is force-posted even if there have been intervening transactions between authorization and settlement); or the debit transaction is paper-based.
  - *No Exception.* The exception does not apply if the merchant did not submit the transaction for authorization (*e.g.*, the transaction is below a floor limit) or if the bank uses a stand-in processor and an overdraft is paid as a result.
- *Subsequent Notice.* The bank must provide an opt-out notice (either the initial notice or a more concise notice) following the assessment of any overdraft fees or charges for paying an ATM withdrawal or one-time debit transaction. (The subsequent notice requirement would apply to existing accounts.) The notice can be placed on the periodic statement reflecting the charge or on any notice sent promptly after the overdraft.

- *Exception.* Subsequent notice is not required if the consumer has opted out and is charged an overdraft due to one of the exceptions.

### **Opt-In Alternative**

- *General Rule.* An account-holding institution may not assess a fee or charge on a consumer's account for paying an overdraft on an ATM withdrawal or a one-time debit card transaction pursuant to the institution's overdraft service unless the consumer is given notice and a reasonable opportunity to affirmatively consent. (The opt-in notice requirement would apply to existing accounts.) If the consumer opts in, the bank must provide written confirmation of the consumer's consent.
- *Notice Requirements.* Unlike the opt-out notice, the opt-in notice would be a segregated notice and the content of the notice would be limited to that specified by the Board.
- *Reasonable Opportunity to Opt In.* Reasonable methods to opt in include: providing a written form the consumer can mail in, providing a toll-free telephone number, or providing an electronic means to opt out. A bank may also provide an opt-in notice and require the consumer to decide whether to opt out as a necessary step to opening the account.
- *Scope of Opt In.* The Board is proposing to limit the scope of the opt-in to ATM withdrawals and one-time debit card transactions, and not allowing banks to condition the payment of other overdrafts on a consumer's opt-in selection for ATM withdrawals and one-time debit transactions.
  - Alternatively, the Board is also proposing a modified version that would expressly permit banks to condition payment of other overdrafts on the consumer's opt-in election.
- *Account Variations.* The Board proposes that, if the consumer does not opt in, the bank must provide an account that has the same terms, conditions, and features, including interest rates paid and fees assessed, as are provided to consumers who do opt in.
  - Alternatively, the Board is also proposing a modified version that would allow a bank to provide an account on the same or reasonably comparable terms provided that the difference in terms, conditions, or features are not so substantial that they would effectively compel a reasonable consumer to affirmatively opt in.
- *Exception to Notice Requirement.* No notice is required when the institution has a policy and practice of not paying any ATM withdrawals or one-time debit card transactions for which authorization is requested if the institution has a reasonable

belief that if the consumer's account does not have sufficient funds available to cover the transaction at the time of the authorization request.

- *Exceptions to Fee Prohibition.* The same exceptions (and lack of exceptions) are provided as exist in the Opt-Out Alternative.

### **DEBIT HOLDS**

- *General Rule.* A bank may not assess a fee or charge for paying an overdraft pursuant to the institution's overdraft service if the overdraft would not have occurred but for a debit card hold placed in a consumer's account if the amount of the hold exceeds the actual transaction amount.
- *Limit of Applicability.* The scope would be limited to debit card transactions in which the actual transaction amount generally can be determined by the merchant or other payee within a short period of time after the institution authorizes the transaction. It would not apply where the actual transaction amount generally cannot be determined for a considerable period of time after the merchant has submitted a transaction for authorization.
- *Safe Harbor.* A bank may assess a fee or charge for paying an overdraft that is caused solely by a debit hold if the bank has adopted procedures and practices designed to remove the hold within a reasonable period of time. The proposal provides having policies and procedures to remove a hold within two hours of authorization would satisfy the safe harbor.

If you have any questions, contact Steve Zeisel, [szeisel@cbanet.org](mailto:szeisel@cbanet.org) or Marcia Sullivan, [msullivan@cbanet.org](mailto:msullivan@cbanet.org).