

Overdrafts & Error Resolution Procedures

Account Activity	Payment type	Details
7 Sep 07		BALANCE BROU
10 Sep 07	Direct Debit	LOANSDIRECT
10 Sep 07	Charge	100850195788
10 Sep 07	Charge	O/DRAFT INTEREST
10 Sep 07	Fixed Serv Chg	O/DRAFT EXCESS FEE
10 Sep 07	Deposit	ACCOUNT CHARGE
12 Sep 07		INT'L SERVICES CTR
		BALANCE CARRIED FORWARD

- Overdraft disclosures
- Maintenance of error resolution procedures
- Electronic transfer issues
- Non-regulatory considerations with respect to investigations
- Currently litigated issues posing the most risk to credit unions
- Best practices for policies and procedures



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Reg. E - Overdrafts

- 12 CFR Part 1005 – Reg. E promulgated by the CFPB under the Electronic Fund Transfer Act (15 USC § 1693 *et seq.*)
- 12 CFR § 1005.17 - requirements for overdraft services
- “Overdraft service” means a service under which a financial institution assesses a fee or charge on a consumer’s account held by the institution for paying a transaction



Reg. E - Overdrafts

- Does not include payment of overdrafts pursuant to:

- A line of credit subject to Regulation Z, including transfers from a credit card account, home equity line of credit, or overdraft line of credit;
- A service that transfers funds from another account held individually or jointly by a consumer, such as a savings account;
- A line of credit or other transaction exempt from Regulation Z (via § 1026.3(d); or
- A covered separate credit feature accessible by a hybrid prepaid-credit card as defined in Regulation Z; or credit extended through a negative balance on the asset feature of the prepaid account that meets the conditions of 12 CFR 1026.61(a)(4).



Reg. E - Overdrafts

- **Opt-in requirement** – in general, you cannot assess a fee or charge for paying an ATM or one-time debit card transaction under an overdraft service unless:
 - Provide the consumer with a notice in writing, or if the consumer agrees, electronically, segregated from all other information;
 - Provide a reasonable opportunity for the consumer to affirmatively consent, or opt in, to the service;
 - Obtain the consumer's affirmative consent, or opt-in, to the institution's payment (*which must be only for whether or not to opt in*); and
 - Provide the consumer with confirmation of the consumer's consent in writing (or electronically if the consumer agrees), which includes a statement informing the consumer of the right to revoke such consent.



Reg. E - Overdrafts

- **Daily or Sustained Overdraft, Negative Balance, or Similar Fee or Charge**
 - If a consumer has not opted into the institution's overdraft service for ATM or one-time debit card transactions, the fee prohibition in § 1005.17(b)(1) applies to all overdraft fees or charges for paying those transactions, including but not limited to daily or sustained overdraft, negative balance, or similar fees or charges (i.e., where a consumer's negative balance is solely attributable to an ATM or one-time debit card transaction, the rule prohibits the assessment of such fees unless the consumer has opted in)
 - The rule does not prohibit an institution from assessing daily or sustained overdraft, negative balance, or similar fees or charges if a negative balance is attributable in whole or in part to a check, ACH, or other type of transaction not subject to the fee prohibition. When the negative balance is attributable in part to an ATM or one-time debit card transaction, and in part to a check, ACH, or other type of transaction not subject to the fee prohibition, the date on which such a fee may be assessed is based on the date on which the check, ACH, or other type of transaction is paid into overdraft.



Polling Question

- Assume the following: (a) consumer has not opted in; (b) transactions are paid into overdraft because the amount of the transaction at settlement exceeded the amount authorized or the amount was not submitted for authorization; (c) the institution may charge a per-item fee of \$20 for each overdraft, and a one-time sustained overdraft fee of \$20 on the fifth consecutive day the consumer's account remains overdrawn; (d) post ATM and debit card transactions before others; and (e) the institution allocates deposits to account debits in the same order in which it posts debits.
- Assume that a consumer has a \$50 account balance on March 1. That day, the institution posts a one-time debit card transaction of \$60 and a check transaction of \$40. The institution charges an overdraft fee of \$20 for the check overdraft but cannot assess an overdraft fee for the debit card transaction. At the end of the day, the consumer has an account balance of negative \$70. The consumer does not make any deposits to the account, and no other transactions occur between March 2 and March 6. Can the institution charge a sustained overdraft fee on March 6?



Polling Question

- **Same assumptions**
- Assume that a consumer has a \$50 account balance on March 1. That day, the institution posts a one-time debit card transaction of \$60. At the end of that day, the consumer has an account balance of negative \$10. The institution may not assess an overdraft fee for the debit card transaction. On March 3, the institution pays a check transaction of \$100 and charges an overdraft fee of \$20. At the end of that day, the consumer has an account balance of negative \$130. The consumer does not make any deposits and no other transactions occur. Because the consumer's negative balance is attributable in part to the check, the institution may assess a \$20 sustained overdraft fee. What start date can the institution use for the sustained fee? (1) March 1 or (2) March 3?



Reg. E - Overdrafts

- A financial institution shall not:
 - Condition the payment of any overdrafts for checks, ACH transactions, and other types of transactions on the consumer affirmatively consenting to the institution's payment of ATM and one-time debit card transactions pursuant to the institution's overdraft service; or
 - Decline to pay checks, ACH transactions, and other types of transactions that overdraw the consumer's account because the consumer has not affirmatively consented to the institution's overdraft service for ATM and one-time debit card transactions.
 - Provide to consumers who do not affirmatively consent to the institution's overdraft service for ATM and one-time debit card transactions different account terms, conditions, and features than it provides to consumers who affirmatively consent, except for the overdraft service for ATM and one-time debit card transactions.



Reg. E - Overdrafts

- For accounts opened prior to July 1, 2010, the financial institution must not assess any fees or charges on a consumer's account on or after August 15, 2010, for paying an ATM or one-time debit card transaction pursuant to the overdraft service, unless the institution has complied with § 1005.17(b)(1) and obtained the consumer's affirmative consent.
- For accounts opened on or after July 1, 2010, the financial institution must comply with § 1005.17(b)(1) and obtain the consumer's affirmative consent before the institution assesses any fee or charge on the consumer's account for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service.



Reg. E - Overdrafts

- Content and Form of notice should be substantially similar to Model Form A-9
- Section 1005.17(d) sets forth requirements (cannot contain any info not specified in that paragraph): (1) description of service; (2) fees imposed; (3) limits on fees; (4) disclosure of opt-in right; (5) alternate plans (credit line/account transfer); (6) certain modifications/additional content



What You Need to Know about Overdrafts and Overdraft Fees

An **overdraft** occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway. We can cover your overdrafts in two different ways:

1. We have **standard overdraft practices** that come with your account.
2. We also offer **overdraft protection plans**, such as a link to a savings account, which may be less expensive than our standard overdraft practices. To learn more, ask us about these plans.

This notice explains our **standard overdraft practices**.

What are the **standard overdraft practices** that come with my account?

We do authorize and pay overdrafts for the following types of transactions:

- Checks and other transactions made using your checking account number
- Automatic bill payments

We **do not** authorize and pay overdrafts for the following types of transactions unless you ask us to (see below):

- ATM Transactions
- Everyday debit card transactions

We pay overdrafts at our discretion, which means we **do not guarantee** that we will always authorize and pay any type of transaction.

If we do not authorize and pay an overdraft, your transaction will be declined.

What fees will I be charged if [institution name] pays my overdraft?

Under our standard overdraft practices:

- We will charge you a fee of up to **\$30** each time we pay an overdraft.
- Also, if your account is overdrawn for 5 or more consecutive business days, we will charge an additional \$5 per day.
- There is **no limit** on the total fees we can charge you for overdrawing your account.

What if I want [institution name] to authorize and pay overdrafts on my ATM and everyday debit card transactions?

If you also want us to authorize and pay overdrafts on ATM and everyday debit card transactions, call [telephone number], visit [website], or complete the form below and [present it at a branch][mail it to]:

_____ I **do not** want [institution name] to authorize and pay overdrafts on my ATM and everyday debit card transactions.

_____ I want [institution name] to authorize and pay overdrafts on my ATM and everyday debit card transactions.

Printed Name: _____

Date: _____

[Account Number:] _____



Reg. E - Overdrafts

- 15 USCS § 1693m(d)(2) (Electronic Funds Transfer Act) – No provision of this section or section 916 [15 USCS § 1693n] imposing any liability shall apply to— (1) any act done or omitted in good faith in conformity with any official rule, regulation, or interpretation thereof; or (2) any failure to make disclosure in proper form if a financial institution utilized an appropriate model clause issued by the Bureau or the Board”
- Limited bona fide error defense (except as provided in section 910 [15 USCS § 1693h]), if the person shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.



Reg. E - Overdrafts

- **Joint accountholders** - the financial institution shall treat the affirmative consent of any of the joint consumers as affirmative consent for that account and revocation of affirmative consent by any of the joint consumers as revocation of consent for that account.
- **Continuing right to opt in or to revoke the opt-in** – a consumer may affirmatively consent to the financial institution's overdraft service at any time and a consumer may also revoke consent at any time in the manner made available to the consumer for providing consent.
- **Termination for excessive use** – a consumer's affirmative consent to the institution's overdraft service is effective until revoked by the consumer, or unless the financial institution terminates the service.



Overdraft Takeaways

- Most litigation involves the clarity of an institution's account agreement language on overdrafts
- Avoid contradictions with the form opt-in above, note the appropriate ordering of how different transactions are processed (high-low ordering), specify specific amounts for overdraft fees, and perhaps most importantly, define clearly how and when an insufficient funds determination is made for the purposes of assessing fees



Reg. E – Error Resolution Procedures

- 12 CFR § 1005.11
- What constitutes an “error,” requiring an investigation?
 - An unauthorized electronic fund transfer;
 - An incorrect electronic fund transfer to or from the consumer's account
 - Omission of an electronic fund transfer from a periodic statement;
 - A computational/bookkeeping error by the financial institution relating to an ETF;
 - Consumer's receipt of an incorrect amount of money from an electronic terminal;
 - An electronic fund transfer not identified in accordance with § 1005.9 (terminal receipt) or § 1005.10(a) (preauthorized transfers); or
 - Consumer's request for documentation required by § 1005.9 or § 1005.10(a) or for additional information or clarification concerning an electronic fund transfer



Reg. E – Error Resolution Procedures

- Does not include:
 - Routine inquiry regarding account balance
 - Request for information for tax or other recordkeeping purposes; or
 - Request for duplicate copies of documents



Reg. E – Error Resolution Procedures

- Trigger is notice from consumer (oral or written) that (1) is received no later than 60 days after the institution sends the periodic statement on which the alleged error is first reflected; (2) enables the institution to identify the consumer's name and account number, and (3) indicates why the consumer believes an error exists and includes to the extent possible the type, date, and amount of the error (except certain requests for documentation)



Reg. E – Error Resolution Procedures

- After receiving compliant notice, a financial institution shall investigate promptly and determine whether an error occurred within 10 business days of receiving a notice of error. The institution shall report the results to the consumer within three business days after completing its investigation. The institution shall correct the error within one business day after determining that an error occurred.
- Unable to complete investigation, can take up to 45 days from receipt of notice if it:
 - Provisionally credits the consumer's account in the amount of error (plus interest is applicable) within 10 days of notice
 - Informs consumer within two business days after provisional crediting, of the amount and date and gives full use of funds
 - Correct the error within one day of determining it occurred
 - Reports results to the consumer within three business days after investigation



Reg. E – Error Resolution Procedures

- 10 day and 45 day timelines can be extended:
 - 20 business days in place of 10 business days if the notice of error involves an electronic fund transfer to or from the account within 30 days after the first deposit to the account was made.
 - 90 days in place of 45 days under paragraph (c)(2) of this section, for completing an investigation, if a notice of error involves an electronic fund transfer that: (A) Was not initiated within a state; (B) Resulted from a point-of-sale debit card transaction; or (C) Occurred within 30 days after the first deposit to the account was made.



Card Chargebacks & Electronic Transfer Issues

- What there is a point of sale dispute and you finalized the provisional credit and new information shows the member was already refunded by the merchant or the transaction was not unauthorized?
- Regulation E explicitly states that credit unions can reverse provisional credit if there was no error or a different error occurred, but does not discuss final credit. In order to avoid, the full 90 days to investigate the dispute and ensure the credit union is monitoring the member's account during that time.



Reg. E – Error Resolution Procedures

- **Investigation** – a financial institution's review of its own records regarding an alleged error satisfies the requirements of this section if:
 - (i) The alleged error concerns a transfer to or from a third party; and
 - (ii) There is no agreement between the institution and the third party for the type of electronic fund transfer involved.



Reg. E – Error Resolution Procedures

- **No error found or different error** – requires (1) written explanation of findings and note consumer’s right to request documents relied on; and (2) upon debiting a provisionally credited amount, (a) notify the consumer of the date and amount of debiting and (b) notify the consumer that the institution will honor checks, drafts, or similar instruments payable to third parties and preauthorized transfers from the account (without charge to the consumer as a result of an overdraft) for five business days after the notification.
 - The institution shall honor items as specified in the notice, but need honor only items that it would have paid if the provisionally credited funds had not been debited.
- **Reassertion of error** – after complying, you have no further responsibilities under this section should the consumer later reassert the same error, except in the case of an error asserted by the consumer following receipt of information provided under paragraph (a)(1)(vii) of this section (documentation request).



Reg. E – Error Resolution Procedures

- Internal procedures need to specify when a triggering error has been alleged and the appropriate timeline for response
- Document steps taken during investigation; need to immediately forward notice to the appropriate department upon receipt
- Develop a process for tracking completion of each necessary step (third party vendors can also handle, but should be monitored)
- Appropriate training for appropriately resolving claimed errors



Polling Question

- A member opens an account with the first deposit occurring on August 1, 2019. She then adequately notifies you of an alleged error regarding an EFT from her account on September 1, 2019. Ignoring the potential 45-day extension, when must you report your results to the consumer?
 - A – Within 10 business days of 9/1
 - B – Within 13 business days of 9/1
 - C – Within 20 business days of 9/1
 - D – Within 23 business days of 9/1



Reg. Z Billing Error Resolution

- 12 CFR § 1026.13 – generally dealing with errors on periodic statements; 30-day acknowledgment to consumer (prohibits certain actions pending resolution of billing error)
- Reg. E relation – Reg. E for debit cards and Reg. Z for credit cards.
 - Reg. E applies where (1) an extension of credit incident to an electronic fund transfer occurs under an agreement with the consumer to extend credit when the consumer's account is overdrawn or to maintain a specified minimum balance in the consumer's account or (2) with regard to a covered separate credit feature and an asset feature of a prepaid account where both are accessible by a hybrid prepaid-credit card, an extension of credit that is incident to an electronic fund transfer occurs when the hybrid prepaid-credit card accesses both funds with respect to a particular transaction



Takeaways

- Understand the importance of Regulation E's safe harbors
- Learn how to maintain clear terminology in account agreements to avoid claims based on ambiguity
- Identify suitable policies and procedures that should be implemented to ensure compliance
- Understand how examiner training and secondary disclosure review will help minimize process errors



Overdrafts & Error Resolution Procedures

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