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NEW RULES WILL REQUIRE CONSUMER CONSENT FOR ASSESSING OVERDRAFT FEES ON ATM AND ONE-TIME DEBIT CARD TRANSACTIONS

Under new rules adopted by the Federal Reserve Board, financial institutions will not be permitted to assess an overdraft fee for paying ATM and one-time debit card transactions that overdraw a consumer's account, unless the consumer affirmatively consents, or opts in, to the payment of overdrafts for these transactions.

This new requirement is set forth in amendments to Regulation E, the regulation implementing the Electronic Funds Transfer Act. Compliance with these amendments is mandatory as of July 1, 2010.

I. Requirements for Assessing Overdraft Fees for ATM Withdrawals and One-Time Debit Card Transactions

Under current rules, a financial institution may impose an overdraft fee if a consumer overdraws an account through either check or non-check transactions. Examples of non-check transactions that could potentially cause an overdraft include an ATM withdrawal, a debit card transaction at a point-of-sale terminal, an on-line transaction, a preauthorized transfer, and an ACH transaction. The amendments to Regulation E will now prohibit an institution from assessing an overdraft fee for two of these types of transactions—ATM withdrawals and one-time debit card transactions—unless the institution:

- Provides the consumer with a notice in writing, or if the consumer agrees, electronically, segregated from all other information, describing the institution's overdraft service;
- Provides a reasonable opportunity for the consumer to affirmatively consent, or opt in, to the service for ATM and one-time debit card transactions;
- Obtains the consumer's affirmative consent, or opt-in, to the institution's payment of ATM or one-time debit card transactions; and

- Provides the consumer with confirmation of the consumer's consent in writing, or if the consumer agrees, electronically, which includes a statement informing the consumer of the right to revoke such consent.

II. Written Notice Describing Overdraft Service

The written notice describing the financial institution's overdraft service must be substantially similar to the model form developed by the Federal Reserve Board (a copy of which is attached), and must include the following information:

- A brief description of the institution's overdraft service and the types of transactions for which a fee or charge for paying an overdraft may be imposed, including ATM and one-time debit card transactions;
- The dollar amount of any fees or charges assessed by the institution for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service, including any daily or other overdraft fees. If the amount of the fee is determined on the basis of the number of times the consumer has overdrawn the account, the amount of the overdraft, or other factors, the institution must disclose the maximum fee that may be imposed;
- The maximum number of overdraft fees or charges that may be assessed per day, or if applicable, that there is no limit;
- An explanation of the consumer's right to affirmatively consent to the institution's payment of overdrafts for ATM and one-time debit card transactions pursuant to the institution's overdraft service, including the methods by which the consumer may consent to the service;
- If the institution offers a line of credit subject to Regulation Z or a service that transfers funds from another account of the consumer held at the institution to cover overdrafts, the institution must state that fact. An institution may, but is not required to, list additional alternatives for the payment of overdrafts; and
- The institution may modify the content of the notice to provide certain other information specifically permitted under the amendments.

III. Timing of Requirements

Compliance with the amendments to Regulation E is mandatory effective July 1, 2010. Accordingly, for accounts opened on or after July 1, 2010, a financial institution must comply with the new requirements and obtain the consumer's affirmative consent before the institution assesses any fee or charge for paying an ATM or one-time debit card transaction.

For accounts opened prior to July 1, 2010, the financial institution cannot assess any fees or charges on or after August 15, 2010 for paying an ATM or one-time debit card transaction, unless the institution has complied with the new requirements and obtained the consumer's affirmative consent.

IV. Additional Provisions

The amendments contain some additional provisions regarding the new notice and opt-in requirements. These provisions include the following:

- If two or more consumers jointly hold an account, the affirmative consent of any of the joint consumers constitutes affirmative consent for that account; similarly, revocation of consent by any of the joint consumers should be treated as revocation of consent for that account.
- A consumer may affirmatively consent to the overdraft service at any time, and a consumer may also revoke consent at any time.
- An institution cannot 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 policy.
- An institution cannot 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.
- An institution must provide to consumers who do not affirmatively consent to the institution's overdraft service for ATM and one-time debit card transactions the same account terms, conditions, and features that it provides to consumers who affirmatively consent, except for the overdraft service for ATM and one-time debit card transactions.
- The new requirements do not apply to an institution that has a policy and practice of declining to authorize and pay any ATM or one-time debit card transactions when the institution has a reasonable belief at the time of the authorization request that the consumer does not have sufficient funds available to cover the transaction. Institutions may apply this exception on an account-by-account basis.

V. Further Information

Please note that this advisory is a general overview of the amendments to Regulation E and is not intended as a comprehensive explanation of all of the provisions of the amendments or as formal legal advice. For further information, please feel free to contact Joseph D. Simon at (516) 357-3710 or via email at jsimon@cullenanddykman.com.

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Model Consent Form for Overdraft Services

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 [Web site], 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]: _____]