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**Understanding Regulation E  
- Overdrafts**  
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**Presented by:**  
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Sr. Regulatory Compliance Consultant

Boston • Springfield • Albany

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**Welcome!**

**Brian Shea, CRCM**

- Senior Regulatory Compliance Consultant
- Certified Regulatory Compliance Manager

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### Objectives

Significant changes to Regulation E take effect with respect to overdrafts on July 1, 2010.

**After attending this session, you will:**

- Understand the new overdraft requirements added to Regulation E;
- Understand how the new rules impact your financial institution;
- Be familiar with potential ways to approach the new requirements; and
- Know what your institution can and cannot do to address the new requirements.



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### Agenda

1. Background on Overdrafts
2. Regulatory Timeline
3. Step-by-Step analysis of the new requirements
4. Clarifications
5. Questions



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### Background

- An overdraft can occur when a customer presents an item and their deposit account does not have sufficient funds to pay the item.
- If the institution chooses to pay the item, an overdraft is created, resulting in a negative balance, and typically a one time fee is assessed.
- Traditionally, institutions chose whether to pay overdrafts on a case-by-case basis, and only on checks.
- As technology has improved, this process has become more automated and overdrafts occur on many different types of transactions.



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### Background

- Typically, a financial institution will pay overdrafts via one of three methods:
  - Overdraft Line of Credit;
  - Sweep transfers from other deposit accounts; or
  - On a discretionary basis, without a written agreement.

**The new requirements we will be talking about today deal principally with the third method.**



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### Background

- Traditional features of a formal overdraft protection program:
  - No written agreement to pay overdrafts;
  - Customers automatically enrolled after waiting period with ability to opt-out if desired;
  - Payment of overdrafts paid automatically based on system created criteria;
  - Overdrafts paid on various types of transactions, including checks, ATM withdrawals, point of sale transactions, ACH debits, etc.; and
  - One time fee assessed for each overdraft transaction.



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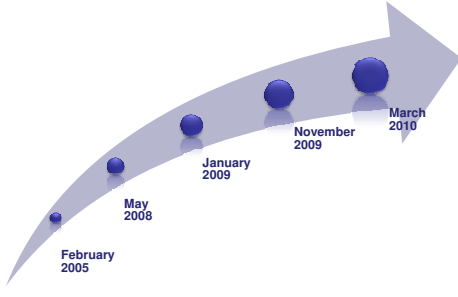
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### Regulatory Timeline





February 2005

May 2008

January 2009

November 2009

March 2010



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### Regulatory Timeline

**February 2005** Federal Banking Agencies issue Overdraft Guidance, covering Safety and Soundness risks, Legal risks and "Best Practices".

**May 2008** Agencies propose authority under FTC act to regulate overdraft activities, including requirement of consumer opt-out rights, which would be included under Regulation DD.

**January 2009** Agencies move proposed overdraft activity rules from Regulation DD to E, offering "opt-in" and "opt-out" proposals.



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### Regulatory Timeline

**November 2009** Agencies finalize Regulation E overdraft rules, implementing "opt-in" proposed rule, effective July 2010.

**March 2010** Agencies issue additional proposed clarifications on the Regulation E overdraft rules; expectation is that these will be finalized by the July 1, 2010 date and that institutions will need to comply with the clarifications.



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### New Requirements

- I. Definition/Scope
- II. Opt-in Requirement
- III. Prohibition on Certain Conditioning
- IV. Similar Account Features
- V. Disclosure
- VI. Continuous Opt-Out Right
- VII. Timing/Important Dates



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### I. Definition/Scope

**Overdraft Service**  
A service under which an institution assesses a fee or a charge on a consumer's account for paying a transaction (including a check or other item) when the customer has insufficient or unavailable funds in the account.

**Note: Even if your institution doesn't have a formal program, these rules apply if you pay overdrafts under this definition.**



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### I. Definition/Scope

**Overdraft Service**  
Does not include:

- Lines of credit subject to Regulation Z;
- Transfers of funds from another account held individually or jointly by consumer (i.e. savings account);
- Lines of credit or other transactions exempt from Regulation Z under 226.3(d); or
- Transactions in securities or commodity accounts where credit is extended by broker-dealer registered with SEC/CFTC.



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### II. Opt-in Requirement

An institution holding a consumer's account **cannot** assess a fee or charge on the account for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service unless the institution:

- Provides the consumer with a segregated notice in writing, describing the overdraft service;
- Provides the consumer a reasonable opportunity to affirmatively consent/opt-in to the service for these transactions;
- Obtains the consumer's affirmative consent/opt-in to the service for these transactions; and
- Provides the consumer with confirmation of their consent/opt-in in writing, which includes a statement of their right to revoke consent.



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## II. Opt-in Requirement

- These rules apply to **any** one-time debit card transaction, including, but not limited to:
  - Point of sale transactions;
  - Online transactions; and
  - Telephone transactions.
- An institution is considered in compliance if it adapts its systems to identify debit card transactions as one-time or recurring.
- If it does so, the institution may rely on the transaction coding by merchants or other institutions to determine whether a transaction is one-time or recurring.



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## II. Opt-in Requirement

- The regulation does not require the institution to authorize or pay any overdraft on transactions, even if a consumer has affirmatively opted in.
- The institution may pay overdrafts on these types of transactions without an opt in, **however**, the institution cannot charge a fee without the opt-in.
- Fees for overdrafts can only be assessed for those transactions that occur on or after the date that the institution receives the opt-in.



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## II. Opt-in Requirement

**Samples of acceptable opt-ins:**

- The institution provides a form that the consumer can fill out and mail to the institution.
- The institution provides a readily available telephone line for the consumer to call and provide an opt-in.
- The institution provides an electronic means for the consumer to opt in (ex. Web site check box).
- The institution provides a form that the consumer completes and submits while in person at a branch.



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## II. Opt-in Requirement

**Samples of unacceptable opt-ins:**

- Preprinted language in a disclosure provided with a signature card that the consumer must sign to open the account and acknowledge account terms.
- Providing a signature card or form with pre-filled boxes indicating affirmative consent to opt-in.



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## II. Opt-in Requirement

**Confirmation**

- The confirmation requirement can be complied with by:
  - Providing the consumer a copy of the opt-in form; or
  - Sending a notice or letter acknowledging the opt-in.
- The notice **must** contain a statement informing the customer of the right to revoke the opt-in at any time.



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## II. Opt-in Requirement

The opt-in 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. Financial institutions may apply this exception on an account-by-account basis (ex. certain types of accounts that may not have this service).

However, institutions **cannot** charge a fee in these situations.



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### III. Prohibition on Certain Conditioning

The institution is forbidden from:

- Conditioning the payment of any overdrafts for checks, ACH transactions and other types of transactions on the consumer affirmatively consenting to the payment of ATM and one-time debit card transactions pursuant to the overdraft service.
- Declining to pay checks, ACH transactions, and other types of transactions on the account because the consumer has not affirmatively consented to the payment of ATM and one-time debit card transactions.



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### IV. Similar Account Features

- The institution must provide consumers who do not opt-in with the same account terms, conditions and features that it provides to consumers who do opt-in, with the exception of the overdraft service for ATM and one-time debit card transactions.

**This includes:**

- Interest rates and fees assessed;
- The type of ATM or debit card provided (including card functionality);
- Minimum balance requirements; and
- Account features (ex. Online bill payment).



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### IV. Similar Account Features

- The institution is not prohibited from offering accounts with limited features; it just cannot require the customer to open such an account because they didn't opt-in.
- Institutions can have a separate account type for consumers who do not opt-in, as long as the features on that account comply with the requirements of this section of the regulation.



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### V. Disclosure

- The notice/disclosure that the institution provides describing its overdraft services must be substantially similar to a model notice (A-9) provided within the regulation.
- The disclosure must contain all specific items requested in the regulation, and may not contain any information not specified or permitted.
- The disclosure must be segregated from other documents.



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### V. Disclosure

**Required Disclosure Content**

A 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.

This section should:

- 1) Indicate the consumer's right to affirmatively opt-in;
- 2) Discuss policies regarding payment of other transactions, such as check, ACH, etc., but should not do so more prominent than the opt-in right; and
- 3) Indicate (as applicable) that the institution pays overdrafts at its discretion and that if it doesn't authorize an overdraft, it may decline the transaction.



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### V. Disclosure

**Required Disclosure Content**



The dollar amount of any fees or charges for paying an ATM or one-time debit card transaction pursuant to the overdraft service.

If the amount of the fee is based on the number of times overdrawn, the overdraft amount or other factors, the institution must disclose the maximum fee that may be imposed.

This includes:

- 1) Transaction based, daily or other overdraft fees; and
- 2) Fees for sustained overdrafts or negative balances.

If the maximum fee can vary, the institution may disclose that the consumer may be assessed a fee "up to" the maximum fee.



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### V. Disclosure



**Required Disclosure Content**

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 payment of overdrafts via ATM and one-time debit card transactions pursuant to the overdraft service, including the methods by which this may be done.

Alternative plans for covering overdrafts. This must include at least the following, if offered:

- 1) Overdraft line of credit; and
- 2) Automatic sweep of funds from another deposit account



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### V. Disclosure

**Required Disclosure Content**



If applicable, the institution may modify the content of the disclosure to:

- 1) Indicate that the consumer has the right to opt-in or opt-out of other types of transactions, such as checks, ACH, etc.;
- 2) Provide a means for the consumer to exercise this choice; and
- 3) Disclose the associated returned item fee and additional merchant choices that may apply.

The institution may also disclose the consumer's right to revoke consent.

For customers who have opened accounts prior to July 1, 2010, the institution may describe the overdraft service with respect to ATM and one-time debit card transactions with a statement such as:

*"After August 15, 2010, we will not authorize and pay overdrafts for the following types of transactions unless you ask us to (see below)."*



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### VI. Continuous Opt-Out Right

- A consumer can opt-in to the overdraft service at any time as long as the rules discussed previously are followed.
- The institution must also permit the consumer the right to opt-out of the overdraft service at any time thereafter (previously this was just a "best practice"). The consumer's opt-in is considered effective until such an opt-out right is exercised.
- This must be made effective as soon as reasonably possible.



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### VI. Continuous Opt-Out Right

- On joint accounts, an opt-in from either owner is considered sufficient such that the institution can start assessing fees. However, an opt-out request from either owner is considered effective for the entire account.
- The institution does not have to go back and waive or refund overdraft fees assessed prior to the consumer's opt-out.
- Nothing in the regulation prohibits the institution from terminating overdraft services at its discretion, such as if a consumer abuses the service.



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### VII. Timing/Important Dates

**New Accounts – July 1, 2010**  
The institution must comply with the opt-in requirements for all new accounts opened on or after this date.



**Existing Accounts – August 15, 2010**  
The institution must receive the opt-in before this date in order to continue to assess fees for overdrafts on these transactions; otherwise no fees can be charged until the opt-in is received.



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### VII. Timing/Important Dates

**Complying early**  
The institution can choose to comply early with the requirements as long as it complies with all of the new regulatory requirements imposed by the regulation.



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### Clarifications

- On March 1, 2010, the agencies issued additional clarifications to the Regulation E rules. Comments were due on March 31, 2010.
- These are not yet final, but the agencies expect that institutions will be in compliance with these clarifications by the July 1, 2010 deadline.
- A listing of these clarifications follows.



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### Clarifications

- Correction of a mistaken reference in the commentary that implied that margin credit was not exempt from the definition of "overdraft service".
- An exception to the opt-in requirements included in section 205.17(b)(4) does not permit the institution to assess a fee without an opt-in.



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### Clarifications

- The institution cannot assess an overdraft fee until after the institution has sent written confirmation of the opt-in.
  - The institution is considered in compliance if it develops reasonable procedures designed to ensure the written confirmation is sent before fees are assessed.
- When the institution charges a tiered fee based on the amount of the negative balance, the fee must be based on the amount of the negative balance attributable solely due to check, ACH or other transactions not subject to the fee prohibitions.
  - This rule applies only if the consumer has not opted in.



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### Clarifications

- Additionally, daily/sustained overdraft fees based on the amount of time overdrawn cannot be assessed solely due to overdrafts that occurred due to ATM and one-time debit card transactions.
  - The institution can charge the fee if it is based on other transactions that caused an overdraft.
  - The timeframe for assessing these should be based on the date that the transaction not subject to these rules was paid.
  - This rule also applies only if the consumer has not opted in.



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### Clarifications



**Examples – 5 Day Sustained Overdraft Fee**  
**Customer has NOT opted in**

**3/1: Customer has \$50.00 balance**

- \$60 one-time debit card transaction presented
- \$60 check transaction presented
- Both are paid, and a \$20 OD fee is assessed on the check transaction

**3/6: Customer has -\$90.00 balance**

- Institution can assess fee since account would still be negative if card transaction didn't go through



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### Clarifications



**Examples – 5 Day Sustained Overdraft Fee**  
**Customer has NOT opted in**

**3/1: Customer has \$50.00 balance**

- \$60 one-time debit card transaction presented
- \$10 check transaction presented
- Both are paid, and a \$20 OD fee is assessed on the check transaction

**3/6: Customer has -\$40.00 balance**

- Institution cannot assess fee since account is only negative due to debit card transaction



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### Clarifications

**Examples – 5 Day Sustained Overdraft Fee**  
Customer has NOT opted in

**3/1: Customer has \$50.00 balance**



- \$60 one-time debit card transaction presented
- Transaction is paid

**3/3: Customer has -\$10.00 balance**

- \$100 check is presented
- Transaction is paid, and \$20 OD fee is assessed

**3/8: Customer has -\$130.00 balance**

- Institution can start assessing sustained overdraft fee since it has been five days since the check transaction



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### Questions?



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### Thank you!

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