RESCINDED

Transmittal

TR-446

This rescission does not change the applicability of the conveyed document. To determine the applicability of the conveyed document, refer to the original issuer of the document.

Federal Register, Vol. 75, No. 39, pp. 9120-9125

Number TR-446

On March 1, 2010 the Board of Governors of the Federal Reserve System issued a proposed rule and request for comment regarding amending Regulation E and the official staff commentary to clarify certain aspects of the final rule issued on November 17, 2009.

Proposed Rules

Federal Register
Vol. 75, No. 39
Monday, March 1, 2010

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF ENERGY

10 CFR Part 431

[Docket No. EERE–2008–BT–TP–0014]

RIN 1904–AB85

Energy Conservation Program: Public Meeting and Availability of the Notice of Proposed Rulemaking for Walk-In Coolers and Walk-In Freezers; Date Change

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Proposed rulemaking; date change.

SUMMARY: The Department of Energy published a proposed rule in the **Federal Register** on January 4, 2010, concerning a public meeting and availability of the notice of proposed rulemaking (NOPR) regarding test procedures for walk-in coolers and walk-in freezers. This document changes the date of the public meeting, the date of the deadline for requesting to speak at the public meeting, and the date of the deadline for submitting written comments on the framework document because the scheduled public meeting of February 11, 2010, was cancelled due to inclement weather, which forced a Federal Government shutdown. The public meeting will now be held on Wednesday, March 24, 2010, beginning at 9 a.m. The close of the comment period has been changed to March 31, 2010 in order to accommodate comments received at the public meeting and comments that may be submitted based on issues raised at the public meeting.

FOR FURTHER INFORMATION CONTACT: Mr. Charles Llenza, U.S. Department of Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–2192, *Charles.Llenza@ee.doe.gov* or Mr. Michael Kido, Esq., U.S. Department of Energy, Office of General Counsel, GC–72, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–8145, *Michael.Kido@hq.doe.gov*.

DATES: DOE will hold a public meeting in Washington, DC on Wednesday, March 24, 2010, beginning at 9 a.m. DOE must receive requests to speak at the meeting before 4 p.m., Wednesday, March 10, 2010. DOE must receive a signed original and an electronic copy of statements to be given at the public meeting before 4 p.m., Wednesday, March 17, 2010. Written comments on the NOPR are welcome, especially following the public meeting, and should be submitted by Wednesday, March 31, 2010.

ADDRESSES: The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room 8E–089, 1000 Independence Avenue, SW., Washington, DC 20585–0121. To attend the public meeting, please notify Ms. Brenda Edwards at (202) 586–2945. Please note that foreign nationals participating in the public meeting are subject to advance security screening procedures, requiring a 30-day advance notice. If you are a foreign national and wish to participate in the public meeting, please inform DOE as soon as possible by contacting Ms. Brenda Edwards at (202) 586–2945 so that the necessary procedures can be completed.

SUPPLEMENTARY INFORMATION: As noted above, DOE will hold a public meeting on Wednesday, March 24, 2010 in Washington, DC. The purpose of the meeting is to discuss the NOPR regarding test procedures for walk-in coolers and walk-in freezers. For additional information regarding the NOPR and the meeting, including detailed instructions for the submission of comments and access to the docket to read background documents or comments received, please refer to the January 4, 2010 proposed rule. 75 FR 186. The Department welcomes all interested parties, regardless of whether they participate in the public meeting, to submit written comments regarding matters addressed in the NOPR, as well as any other related issues, by March 31, 2010.

Issued in Washington, DC, on February 22, 2010.

Cathy Zoi,

Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. 2010–4124 Filed 2–26–10; 8:45 am]

BILLING CODE 6450–01–P

FEDERAL RESERVE SYSTEM

12 CFR Part 205

[Regulation E; Docket No. R–1343]

Electronic Fund Transfers

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Proposed rule; request for public comment.

SUMMARY: On November 17, 2009, the Board published final rules amending Regulation E, which implements the Electronic Fund Transfer Act, and the official staff commentary to the regulation. The final rule limited the ability of financial institutions to assess overdraft fees for paying automated teller machine (ATM) and one-time debit card transactions that overdraw a consumer's account, unless the consumer affirmatively consents, or opts in, to the institution's payment of overdrafts for those transactions. The Board proposes to amend Regulation E and the official staff commentary to clarify certain aspects of the final rule.

DATES: Comments must be received on or before March 31, 2010.

ADDRESSES: You may submit comments, identified by Docket No. R–1343, by any of the following methods:

- *Agency Web Site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: regs.comments@federalreserve.gov.* Include the docket number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in

paper form in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Dana E. Miller or Vivian W. Wong, Senior Attorneys, or Ky Tran-Trong, Counsel, Division of Consumer and Community Affairs, at (202) 452–3667 or (202) 452–2412, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

SUPPLEMENTARY INFORMATION:

I. Background

In November 2009, the Board adopted a final rule under Regulation E, which implements the Electronic Fund Transfer Act, limiting a financial institution's ability to assess fees for paying ATM and one-time debit card transactions pursuant to the institution's discretionary overdraft service without the consumer's affirmative consent to such payment. The rule was published in the **Federal Register** on November 17, 2009 and has a mandatory compliance date of July 1, 2010. *See* 74 FR 59033 (Regulation E final rule).

Since publication of the Regulation E final rule, institutions have requested clarification of particular aspects of the rule and further guidance regarding compliance with the rule. In addition, certain technical corrections are necessary. Accordingly, the Board is proposing to amend certain provisions of Regulation E and the official staff commentary, as discussed in Section III of this **SUPPLEMENTARY INFORMATION**. Separately, the Board is also proposing elsewhere in today's **Federal Register** to amend Regulation DD to make certain clarifications and conforming amendments in light of particular provisions adopted in the Regulation E final rule.

Although comment is requested on the proposed amendments, the Board emphasizes that the purpose of this rulemaking is to clarify and facilitate compliance with the final rule, not to reconsider the need for—or the extent of—the protections that the rule affords consumers. Thus, commenters are encouraged to limit their submissions accordingly.

In addition, because the Board does not intend to extend the mandatory compliance date for the Regulation E final rule, any amendments must be adopted in final form promptly to give institutions sufficient time to implement the amended rule by July 1, 2010. In order to ensure that final clarifications can be provided as soon as possible, comments on this proposal must be submitted within 30 days from publication in the **Federal Register**.

II. Statutory Authority

The Electronic Fund Transfer Act, 15 U.S.C. 1693 *et seq.,* is implemented by the Board's Regulation E (12 CFR part 205). The purpose of the act and regulation is to provide a framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. An official staff commentary interprets the requirements of Regulation E (12 CFR part 205 (Supp. I)). In the **SUPPLEMENTARY INFORMATION** to the Regulation E final rule, the Board described its statutory authority and applied that authority to the requirements of the rule. For purposes of this rulemaking, the Board continues to rely on the description of its legal authority and analysis in the Regulation E final rule.

III. Section-by-Section Analysis

A. Section 205.17(a)—Definition

Section 205.17(a) of the Regulation E final rule defines the term "overdraft service" for purposes of § 205.17. In particular, § 205.17(a)(3) of the final rule explains that the term does not include payments of overdrafts pursuant to a line of credit or other credit exempt from Regulation Z pursuant to 12 CFR 226.3(d)—that is, credit secured by margin securities in brokerage accounts extended by Securities and Exchange Commission or Commodity Futures Trading Commission-registered broker-dealers. Comment 17(a)–1 provided further guidance on this exception. However, comment 17(a)–1 inadvertently stated that "§ 205.17(a)(3) does not apply" to margin credit transactions. As drafted, this would mean that the § 205.17(a)(3) exception to the definition of "overdraft service" does not apply to margin credit. The proposed rule revises comment 17(a)–1 to eliminate the incorrect reference.

B. Section 205.17(b)—Opt-In Requirement

17(b)(1), 17(b)(4)—General Rule and Scope of Opt-In; Notice and Opt-In Requirements

Section 205.17(b)(1) of the Regulation E final rule sets forth the general rule prohibiting an account-holding financial institution from assessing a fee or charge on a consumer's account held at the institution for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service, unless the institution satisfies several requirements, including providing consumers notice and obtaining the consumer's affirmative consent to the overdraft service. Section 205.17(b)(4) includes an exception from the notice and opt-in requirements of § 205.17(b)(1) for institutions that have a policy and practice of declining ATM and one-time debit card transactions for which authorization is requested, when the institution has a reasonable belief that the consumer's account has insufficient funds at the time of the authorization request.

Since the issuance of the final rule, questions have been raised whether the § 205.17(b)(4) exception would permit institutions with such a policy and practice to assess an overdraft fee without the consumer's affirmative consent if an authorized transaction settles on insufficient funds. To clarify the scope of this provision, the Board is proposing to amend §§ 205.17(b)(1), (b)(4), and the related commentary to explain that the fee prohibition of § 205.17(b)(1) applies to all institutions, and that § 205.17(b)(4) provides relief only from the requirements of §§ 205.17(b)(1)(i)–(iv), including the notice and opt-in requirements, when no overdraft fees are assessed. The proposal thus clarifies the Board's intent that institutions cannot assess a fee for the payment of ATM and one-time debit card overdrafts if the consumer does not opt in, even if the institution has a policy and practice of declining ATM and one-time debit card transactions upon a reasonable belief that an account has insufficient funds.

An institution may not be able to avoid paying certain ATM or one-time debit card transactions that overdraw a consumer's account, even if a consumer does not opt in. This can occur in limited circumstances. For example, an institution may authorize a debit card transaction on the reasonable belief that there are sufficient funds in the account, but intervening transactions, such as checks, may reduce the available funds in the checking account before the debit card transaction is presented for settlement, causing an overdraft. Or, a merchant may request authorization of an amount that is less than the amount later submitted for settlement, or not request authorization at all. The proposal clarifies that in such circumstances, an institution may not assess an overdraft fee for paying the debit card transaction into overdraft.

In the January 2009 proposed rule, the Board proposed two limited exceptions to the fee prohibition under proposed § 205.17(b)(5), including one which would have permitted an institution to assess overdraft fees, even if the

consumer had not opted in, if the institution had a reasonable belief that there were sufficient funds available in the consumer's account at the time it authorized an ATM or one-time debit card transaction. This exception did not extend to transactions for which the merchant did not request authorization.

The Board declined to adopt the proposed exceptions to the fee prohibition under § 205.17(b)(5). *See* 74 FR 59033, 59046 (Nov. 17, 2009). As explained in the **SUPPLEMENTARY INFORMATION** to the Regulation E final rule, consumers who choose not to opt in may reasonably expect that an ATM or one-time debit card transaction will be declined if there are insufficient funds in their account, and that they will not be assessed overdraft fees. Adopting exceptions to the fee prohibition would undermine the consumer's ability to understand the institution's overdraft practices and make an informed choice. While the Board recognized that both financial institutions and consumers can have imperfect account balance information, the Board stated that financial institutions are in a better position to mitigate the information gap than consumers, such as through improvements to payment processing systems.

By contrast, the exception adopted by the Board in § 205.17(b)(4) of the Regulation E final rule was intended to provide relief from the requirements of §§ 205.17(b)(1)(i)–(iv), including but not limited to the requirement to provide an opt-in notice.[1] The exception was not intended to permit institutions to assess fees for paying overdrafts absent consumer consent.

If § 205.17(b)(4) were read to permit an exception from the fee prohibition, consumers with accounts at institutions that do not offer discretionary overdraft programs would be treated differently and provided fewer protections than consumers at institutions that do offer such programs, where an institution cannot prevent paying overdrafts resulting from ATM and one-time debit card transactions. Specifically, consumers with accounts at institutions that do not offer discretionary overdraft services could be assessed an overdraft fee without consenting to the payment of overdrafts. In contrast, consumers with accounts at institutions that do offer discretionary overdraft services and who did not opt in could not be assessed such fees. Such a result would not promote transparency or benefit consumers overall.

Nonetheless, the Board understands that the § 205.17(b)(4) exception could be read to permit institutions to assess overdraft fees, even if the consumer did not opt in. Accordingly, the Board is proposing to revise § 205.17(b)(4) and the related commentary to clarify that the prohibition on assessing overdraft fees under § 205.17(b)(1) applies to all institutions, including those institutions that have 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.[2] The proposal adds new comment 17(b)(4)–1 to explain that, assuming a consumer has not opted in, if an institution with such a policy and practice authorizes an ATM or one-time debit card transaction on the reasonable belief that the consumer has sufficient funds in the account to cover the transaction, but at settlement the consumer has insufficient funds in the account (for instance, due to intervening transactions that post to the consumer's account), the institution may not assess an overdraft fee or charge for paying that transaction.[3] However, institutions that have such a policy and practice are not required to comply with the requirements of §§ 205.17(b)(1)(i)–(iv), including the notice and opt-in requirements, if no fees are assessed.[4]

17(b)(1)(iv)—Written Confirmation

Section 205.17(b)(1)(iv) states that an institution must provide the consumer a written confirmation of his or her opt-in choice before charging overdraft fees. The written confirmation helps ensure that a consumer intended to opt into an institution's overdraft service by providing the consumer with a written record of that choice. Written confirmation is particularly appropriate to evidence the consumer's choice where a consumer opts in by telephone. Some institutions have asked whether the written confirmation required by § 205.17(b)(1)(iv) must be sent to the consumer before the institution may assess overdraft fees.

The requirement to provide the confirmation before charging overdraft fees balances the interest in ensuring that consumers understand their choice, with the interest in providing consumers access to overdraft services expeditiously when requested. The requirement ensures that institutions send out the written confirmation promptly, which minimizes the time until consumers receive the confirmation, while recognizing that a consumer may not opt into an institution's overdraft service until the time the service is needed. Permitting fees to be assessed once the written confirmation has been sent permits institutions to pay the transaction with minimal delay to the consumer. Consumers who did not intend to opt in would be able to revoke the opt-in at any time.

To provide additional clarity, the Board is proposing to revise comment 17(b)–7 to clarify that an institution may not assess any overdraft fees or charges on the consumer's account until the institution has sent the written confirmation. To address concerns about operational and litigation risks related to tracking compliance with the requirements for charging overdraft fees, the proposed comment also states that an institution complies with § 205.17(b)(1)(iv) if it has adopted reasonable procedures designed to ensure that the written confirmation is sent before fees are assessed.

Comment 17(b)–8—Outstanding Negative Balance

While many institutions charge the same per-item overdraft fee amount regardless of the amount of the consumer's negative balance, some institutions impose tiered fees based on the amount of the consumer's outstanding negative balance at the end of the day. For example, an institution may impose a $10 per-item overdraft fee if the consumer's account is overdrawn by less than $20, and a $25 per-item overdraft fee if the account is overdrawn by $20 or more. Questions have been raised as to how overdraft fees may be assessed in these circumstances.

[1] *See* 74 FR 59045 (noting that the proposed rule "created an exception *to the notice and opt-in requirement* for institutions that have a policy and practice of declining to pay any ATM withdrawals or one-time debit card transactions for which authorization is requested, when the institution has a reasonable belief that the consumer's account does not have sufficient funds available to cover the transaction at the time of the authorization request" (emphasis added)).

[2] The Board is also proposing conforming revisions to § 205.17(b)(1).

[3] The proposal also revises comment 17(b)(4)–1, redesignated as comment 17(b)(4)–2, to address the application of the final rule when institutions follow different practices for different types of accounts. The proposed comment is also revised to eliminate text now reflected in proposed new comment 17(b)(4)–1.

[4] Some institutions have asked whether they may provide supplemental materials with the opt-in notices that describe their overdraft services. In footnote 39 to the Regulation E final rule, the Board explained that institutions may provide consumers other information about their overdraft services and other overdraft protection plans in a separate document outside of the opt-in notice. See 74 FR at 59047. However, institutions are reminded that, to the extent such additional materials promote the payment of overdrafts under Regulation DD, those materials may be subject to additional disclosure requirements under 12 CFR 230.11(b).

To the extent institutions impose tiered fees based on the amount of the consumer's outstanding negative balance, proposed new comment 17(b)–8 clarifies that the fee or charge must be based on the amount of the negative balance attributable solely to check, ACH, or other transactions not subject to the fee prohibition. For instance, if a consumer's negative balance of $30 is attributable in part to a debit card transaction that initially overdrew the account, and in part to a $10 check that the bank subsequently paid, the institution should base any overdraft fees solely on an outstanding negative balance of $10.

Comment 17(b)–9—Daily or Sustained Overdraft, Negative Balance, or Similar Fees or Charges

Some institutions assess daily or sustained overdraft, negative balance, or similar fees or charges when a consumer has overdrawn an account and has not repaid the amount overdrawn within a specified period of time. For example, today, if a consumer overdraws his or her account by $30, the institution may assess an overdraft fee of $20. If the resulting negative $50 balance is not paid back on the fifth day, the institution may assess an additional $20 sustained overdraft fee.

In certain circumstances, an ATM or one-time debit card transaction may overdraw a consumer's account, even if the consumer has not opted in, as discussed above. The Board has been asked whether the prohibition in § 205.17(b)(1) against assessing overdraft fees on ATM and one-time debit card transactions where the consumer has not opted in also extends to daily or sustained overdraft, negative balance, or similar fees or charges.

In addition, a consumer who has not opted in may sometimes overdraw his or her account as a consequence of the payment both of ATM or one-time debit card transactions and of check, ACH, or other transactions not subject to the fee prohibition in § 205.17(b)(1). The Board has also been asked to clarify whether a daily or sustained overdraft, negative balance, or similar fee or charge may be assessed if an account is overdrawn based in part on an ATM or one-time debit card transaction and in part to a check, ACH or other type of transaction not subject to the final rule. The proposed clarifications would address both questions.

Under the final rule, consumers who do not opt in may not be assessed any overdraft fees for paying ATM or one-time debit card transactions, including daily or sustained overdraft, negative balance, or similar fees or charges. As noted above, consumers who do not opt in may reasonably expect not to incur per-item overdraft fees for ATM and one-time debit card transactions, even if such transactions overdraw their account. Similarly, such consumers would reasonably expect not to incur daily or sustained overdraft, negative balance, or similar fees or charges due to these transactions. For clarity, proposed comment 17(b)–9.i explains that if a consumer has not opted in, the prohibition on assessing overdraft fees and charges in § 205.17(b)(1) applies to all overdraft fees or charges, including but not limited to daily or sustained overdraft, negative balance, or similar fees or charges, assessed for paying an ATM or one-time debit card transaction. Thus, where a consumer's negative balance is attributable solely to an ATM or one-time debit card transaction, the rule prohibits the assessment of such sustained overdraft fees if the consumer has not opted in. For example, if a consumer who has not opted in has a $50 account balance, and the institution nonetheless pays a $60 debit card transaction (and no other transactions occur), the institution may not charge any overdraft fees, including a daily or sustained overdraft, negative balance, or similar fee or charge, for paying that debit card transaction.

The Regulation E final rule applies solely to ATM and one-time debit card transactions. That is, the final rule does not apply to overdraft fees imposed in connection with other types of transactions, including check, ACH or recurring debit card transactions. As a result, institutions may impose daily or sustained overdraft, negative balance, or similar fees or charges associated with paying overdrafts for such transactions. For example, where a consumer has a $50 account balance, and the institution pays a $60 check, the institution may charge a per-item overdraft fee, as well as a daily or sustained, negative balance, or similar fee or charge if a negative balance remains outstanding.

Similarly, proposed comment 17(b)–9.i clarifies that where the consumer's negative balance is attributable in part to a check, ACH or other transaction not subject to the fee prohibition of § 205.17(b)(1), an institution is not prohibited from assessing a daily or sustained overdraft, negative balance, or sustained fee, even if the negative balance is also attributable in part to an ATM or one-time debit card transaction. The Board believes this result is consistent with the general scope of the Regulation E final rule, which prohibits fees only with respect to ATM and one-time debit card transactions. For example, if a consumer has a $50 account balance, and the institution posts a one-time debit card transaction of $60 and a check transaction of $40 that same day, the institution may charge a per-item fee for the check overdraft (but cannot assess any overdraft fees for the debit card transaction because the consumer has not opted in). Likewise, assuming no other transactions occur or deposits are made to the account, because the consumer's negative balance is attributable in part to the $40 check, the institution may charge a sustained overdraft fee when permitted by the account agreement.

The proposal also provides guidance on the date on which such a fee may be assessed. Specifically, proposed comment 17(b)–9.i states that the date is determined by the date on which the check, ACH, or other transaction is paid into overdraft. Because the rule does not cover checks, ACH, or other transactions, the Board believes institutions may charge per-item overdraft fees, or sustained or other similar fees. Nonetheless, the Board believes it is appropriate to base the date on which fees may be charged on the date that the transaction not subject to the rule is paid.

Proposed comment 17(b)–9.ii includes three examples illustrating how fees may be applied when a negative balance is attributable in part to a check, ACH, or other transaction not subject to § 205.17(b)(1). The first example demonstrates the general application of the rule. The second example addresses the result when a consumer with an outstanding negative balance makes a deposit that diminishes the negative balance, but does not bring the account current. The third example demonstrates how to determine the date when fees may apply when the check, ACH or other transaction is paid on a different date than the ATM or one-time debit card transaction that overdraws the account.

The examples are based on certain assumptions. Among them are that the institution posts ATM and debit card transactions before it posts other transactions, and that it allocates deposits to debits in the same order in which it posts debits. Thus, the examples assume that deposits made to the account are allocated first to debit card transactions, then to checks. The proposed rule does not, however, require transactions to be posted or deposits to be allocated in the manner set forth in the example. Institutions may post transactions or allocate deposits as permitted by applicable law.

The Board recognizes that programming systems to conform to the

proposed rule may raise operational and cost concerns, and could be challenging to implement by July 1, 2010. Institutions that do not make the necessary systems changes could not assess daily or sustained, negative balance or similar overdraft fees or charges, even on checks and other transactions not subject to the opt-in requirement, after the final rule's mandatory compliance date of July 1, 2010.

17(b)(3)—Same Account Terms, Conditions, and Features

Comment 17(b)(3)–2 provides guidance on limited-feature deposit account products in light of the requirement under § 205.17(b)(3) to offer consumers the same account terms, conditions, and features regardless of their opt-in choice. This comment inadvertently included an incorrect cross-reference. The proposal revises the comment to omit the cross-reference.

IV. Regulatory Analysis

Sections VII and VIII of the **SUPPLEMENTARY INFORMATION** to the Regulation E final rule set forth the Board's analyses under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR part 1320 Appendix A.1). *See* 74 FR 59050–59052. Because the proposed amendments are clarifications and would not, if adopted, alter the substance of the analyses and determinations accompanying the Regulation E final rule, the Board continues to rely on those analyses and determinations for purposes of this rulemaking.

Text of Proposed Revisions

Certain conventions have been used to highlight the proposed revisions. New language is shown inside ►bold-type arrows◄ while language that would be deleted is set off with **[**bold-type brackets**]**.

List of Subjects in 12 CFR Part 205

Consumer protection, Electronic fund transfers, Federal Reserve System, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons discussed in the preamble, the Board proposes to amend 12 CFR part 205 and the Official Staff Commentary, as follows:

PART 205—ELECTRONIC FUND TRANSFERS (REGULATION E)

1. The authority citation for part 205 continues to read as follows:

Authority: 15 U.S.C. 1693b.

2. Section 205.17 is amended by revising paragraphs (b)(1) introductory text and (b)(4) to read as follows:

* * * * *

(b) *Opt-in requirement.* (1) *General.* Except as provided under paragraph**[**s (b)(4) and**]** (c) of this section, a financial institution holding a consumer's account shall not assess a fee or charge on a consumer's account for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service, unless the institution:

* * * * *

(4) **[***Exception to***]**►*Application to certain financial institutions;*◄ *notice and opt-in requirements.* **[**The requirements of § 205.17(b)(1) do not apply to an institution that has**]**►The prohibition on assessing overdraft fees under § 205.17(b)(1) applies to all institutions, including 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.► However, such an institution is not required to comply with the requirements of §§ 205.17(b)(1)(i)–(iv), including the notice and opt-in requirements, if it does not assess overdraft fees.◄ Financial institutions may ► rely on◄**[**apply**]** this ►provision◄**[**exception**]** on an account► type◄-by-account► type◄ basis.

* * * * *

3. In Supplement I to part 205,

a. In Section 205.17(a), paragraph 1. is revised.

b. In Section 205.17(b), paragraph 7. is revised.

c. In Section 205.17(b), new paragraphs 8. and 9. are added.

d. In Section 205.17(b), paragraph 17(b)(3)–2. is revised.

e. In Section 205.17(b), paragraph 17(b)(4)–1. is redesignated as 17(b)(4)–2. and revised, and new paragraph 17(b)(4)–1. is added.

Supplement I to Part 205—Official Staff Interpretations

* * * * *

Section 205.17(a)—Requirements for Overdraft Services

17(a) Definition

1. *Exempt securities- and commodities-related lines of credit.* **[**Section 205.17(a)(3)**]**►The definition of "overdraft service"◄ does not **[**apply to**]**►include the payment of◄ transactions in a securities or commodities account pursuant to which credit is extended by a broker-dealer registered with the Securities and Exchange Commission or the Commodity Futures Trading Commission.

17(b) Opt-In Requirement

* * * * *

7. *Written confirmation.* A financial institution may comply with the requirement in § 205.17(b)(1)(iv) by providing to the consumer a copy of the consumer's completed opt-in form or by sending a letter or notice to the consumer acknowledging that the consumer has elected to opt into the institution's service. The written confirmation notice must include a statement informing the consumer of his or her right to revoke the opt-in at any time. To the extent the institution complies with the written confirmation requirement by providing a copy of the completed opt-in form, the institution may include the statement about revocation on the initial opt-in notice.► An institution may not assess any overdraft fees or charges on the consumer's account until the institution has sent the written confirmation. An institution complies with this requirement if it has adopted reasonable procedures designed to ensure that the written confirmation is sent before fees are charged.

8. *Outstanding Negative Balance.* For a consumer who has not opted in, to the extent that a fee or charge is based on the amount of the outstanding negative balance, the fee or charge must be based on the amount of the negative balance attributable solely to check, ACH, or other transactions not subject to the fee prohibition. For instance, if a consumer's negative balance of $30 is attributable in part to a debit card transaction that overdrew the account, and in part to a $10 check subsequently paid by the institution, the institution should base any overdraft fees solely on an outstanding negative balance of $10.

9. *Daily or Sustained Overdraft, Negative Balance, or Similar Fee or Charge*

i. *Daily or sustained overdraft, negative balance, or similar fees or charges.* If a consumer has not opted into the institution's overdraft service, the prohibition on assessing overdraft fees or charges in § 205.17(b)(1) applies to all overdraft fees or charges, including but not limited to daily or sustained overdraft, negative balance, or similar fees or charges. Thus, 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. However, 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 transaction not subject to the fee prohibition of § 205.17(b)(1). In such case, the date on which such a fee may be assessed is determined by the date on which the check, ACH, or other transaction is paid into overdraft.

ii. *Examples.* The following examples illustrate the application of the rule. For each example, assume the following: (a) The debit card transactions are paid into overdraft, even though the consumer has not opted in, because the amount of the transaction at settlement exceeded the amount authorized or the amount was not submitted for authorization; (b) under the terms of the account agreement, the institution may charge a one-time sustained overdraft fee of $20 on the fifth consecutive day the consumer's account remains overdrawn; (c) the institution posts ATM and debit card transactions before other transactions; and (d) the allocates deposits to account debits in the same order in which it posts debits.

a. 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 any overdraft fees for the debit card transaction because the consumer has not opted in. 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. Because the consumer's negative balance is attributable in part to the $40 check (and associated overdraft fee), the institution may charge a sustained overdraft fee on March 6.

b. Same facts as in a., except that on March 3, the consumer deposits $40 in the account. The institution allocates the $40 to the debit card transaction first, consistent with its posting order policy. At the end of the day on March 3, the consumer has an account balance of negative $30, which is attributable to the check transaction (and associated overdraft fee). The consumer does not make any further deposits to the account, and no other transactions occur between March 4 and March 6. Because the remaining negative balance is attributable to the March 1 check transaction, the institution may charge a sustained overdraft fee on March 6.

c. 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 the day on March 1, the consumer has an account balance of negative $10. Because the consumer did not opt in, 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 the day on March 3, the consumer has an account balance of negative $130. The consumer does not make any further deposits to the account, and no other transactions occur between March 4 and March 8. Because the consumer's negative balance is attributable in part to the check, the institution may assess a $20 sustained overdraft fee. However, because the check was paid on March 3, the institution must use March 3 as the start date for determining the date on which the sustained overdraft fee may be assessed under the terms of the account agreement. Thus, the institution may charge a $20 sustained overdraft fee on March 8.◄

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Paragraph 17(b)(3)—Same Account Terms, Conditions, and Features

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2. *Limited-feature bank accounts.* Section 205.17(b)(3) does not prohibit institutions from offering deposit account products with limited features, provided that a consumer is not required to open such an account because the consumer did not opt in [(see comment 17(b)(3)–2)]. For example, § 205.17(b)(3) does not prohibit an institution from offering a checking account designed to comply with state basic banking laws, or designed for consumers who are not eligible for a checking account because of their credit or checking account history, which may include features limiting the payment of overdrafts. However, a consumer who applies, and is otherwise eligible, for a full-service or other particular deposit account product may not be provided instead with the account with more limited features because the consumer has declined to opt in.

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Paragraph 17(b)(4)—[Exception to]►Application to certain financial institutions;◄ notice and opt-in requirements.

►1. *Application of fee prohibition.* Although the fee prohibition in § 205.17(b)(1) applies to all institutions, an institution that has a policy and practice of declining to authorize and pay ATM or one-time debit card transactions when it has a reasonable belief that the consumer does not have sufficient funds to cover the transaction is not required to provide an opt-in notice or comply with the other requirements of §§ 205.17(b)(1)(i)–(iv). Nonetheless, the prohibition against assessing overdraft fees or charges in § 205.17(b)(1) still applies. For example, if an institution with such a policy and practice authorizes an ATM or one-time debit card transaction on the reasonable belief that the consumer has sufficient funds in the account to cover the transaction, but at settlement, the consumer has insufficient funds in the account (for example, due to intervening transactions that post to the consumer's account), the institution may not assess an overdraft fee or charge for paying that transaction, and it is not required to provide an opt-in notice.

2◄[1]. *Account►type◄-by-account ►type application◄[exception]*. [If a financial institution has a policy and practice of declining to authorize and pay any ATM or one-time debit card transactions with respect to one type of deposit account offered by the institution, 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, that account is not subject to § 205.17(b)(1), even if other accounts that the institution offers are subject to the rule. For example, if the institution] ►If a financial institution ◄offers three types of checking accounts, and the institution has [such] a policy and practice ►of declining to authorize and pay any ATM or one-time debit card transactions when it has a reasonable belief that the consumer does not have sufficient funds to cover the transaction ◄with respect to only one of the three types of accounts, that [one] type of account is not subject to the notice ►and opt-in ◄requirement►s, assuming no fees are charged◄. However, the other two types of accounts offered by the institution remain subject to the notice ►and opt-in ◄requirement►s◄.

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By order of the Board of Governors of the Federal Reserve System, February 18, 2010.

Jennifer J. Johnson,

Secretary of the Board.

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