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MEMORANDUM

November 12, 2009

To Our Clients and Friends

Re: Regulation E Amendments Regarding Overdraft Services

The Federal Reserve Board (the “Board”) has issued rules amending Regulation E,¹ which implements the Electronic Fund Transfer Act, to prohibit financial institutions from charging fees to consumers where the institution pays an overdraft due to an ATM or one-time debit card transaction unless the consumer has affirmatively consented, or opted in, to the overdraft service for that type of transaction. The final rules are effective 60 days after publication in the *Federal Register*, with a mandatory compliance date of July 1, 2010.

COVERAGE

The rules apply to all accounts covered by Regulation E, including payroll card accounts, to the extent overdraft fees may be imposed for transactions originating at an ATM or for one-time debit card transactions made with a debit card issued by or on behalf of the account-holding institution. The rules do not apply to other types of transactions, such as check, ACH or recurring debit transactions.

OPT-IN REQUIREMENT

A financial institution holding the consumer’s account must provide written, segregated notice of the institution’s overdraft service and the consumer’s opt-in right that is substantially similar to the rule’s model form. If a consumer opts in, the institution must provide the consumer with written confirmation of his or her consent, including notice of the right to revoke his or her consent.

No overdraft fee for an ATM or one-time debit card transaction can be assessed for accounts opened on or after July 1, 2010 without the consumer’s consent. For

¹ 12 C.F.R. Part 205.

accounts opened prior to July 1, 2010, no overdraft fee for such transactions can be assessed after August 15, 2010 without the consumer's consent.

The opt-in requirement does not apply to an institution that has a policy and practice of declining to authorize and pay any ATM or one-time debit card transaction 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.

The rules provide a safe harbor for financial institutions that adapt their systems to identify debit card transactions as either one-time or recurring. Institutions may rely on the transaction coding by merchants, other institutions and other third parties for purposes of an overdraft fee applied to a recurring debit card transaction.

PROHIBITIONS

Under the rules, financial institutions must provide consumers who do not affirmatively consent to the institution's overdraft service for ATM or one-time debit card transactions with the same account terms, conditions and features that they provide to consumers who do affirmatively consent (except for the overdraft service).

Financial institutions are prohibited from conditioning or declining the payment of overdrafts for checks, ACH transactions or other types of transactions on the consumer affirmatively consenting to the payment of overdrafts for ATM and one-time debit card transactions under the institution's overdraft service.

PROPOSED RULES NOT ADOPTED

The Board did not adopt the proposed prohibition on assessing fees for overdrafts that would not have occurred but for a debit hold placed on funds in an amount that exceeded the actual transaction amount. The Board stated that a more comprehensive approach involving financial institutions, card networks, and merchants may be required to address this issue, and it will continue to assess whether to take further action. The final rules also do not include the proposed exception to the fee prohibition for transactions authorized on an institution's "reasonable belief" that the consumer's account had sufficient funds to cover the transaction. However, the rules do not prohibit a financial institution from paying overdrafts for ATM and one-time debit card transactions if a consumer has not opted in to the overdraft service, as long as no fee is imposed.

A copy of the final rules can be found at our website at http://www.schwartzandballen.com/whats_new.html

If you have any questions, please call Gilbert Schwartz, Robert Ballen, Tom Fox or Heidi Wicker at (202) 776-0700.