

## Overdraft Policies Require More Than Compliance With Regulation E

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In the past few years, the Consumer Financial Protection Bureau ("CFPB") has focused on taking action against multiple financial institutions for their overdraft services practices. These practices are regulated by the Federal Reserve Board's "Regulation E", as restated by the CFPB in 12 C.F.R. § 1005.17.

Regulation E prohibits financial institutions from assessing overdraft fees for paying ATM or one-time debit card transactions pursuant to the institution's overdraft service, unless the consumer chooses to opt-in or affirmatively consents to those services. In order to promote compliance with this regulation, the Federal Reserve Board provides a **model consent form** for financial institutions to use to attain consent for these overdraft services. Notably, this rule does not prevent financial institutions from charging overdraft fees without the consumer's consent for standard overdraft practices, such as the bank authorizing overdrafts for checks or automatic bill payments.

If a consumer chooses to opt-in to overdraft services for ATM or one-time debit card transactions, a financial institution may charge an overdraft fee each time it pays an overdraft and may also charge a daily fee for each day the account remains overdrawn. Regulation E provides no limit or cap to the fees that may be assessed once a consumer chooses to opt-in.

With revenues for overdraft and non-sufficient funds fees averaging around \$17 billion annually, some financial institutions have attempted to minimize the effect of Regulation E on their income. For example, on January 19, 2017, the CFPB sued TCF National Bank ("TCF") in the United States District Court of Minnesota for devising a strategy to persuade its customers to opt-in to overdraft services. TCF's strategy included: (i) providing monetary incentives to promote TCF employees to aggressively persuade customers to opt-in; (ii) providing TCF employees with a sales pitch that failed to mention fees assessed by choosing to opt-in; (iii) explicitly instructing TCF employees not to explain the overdraft program in a way that would prevent customers from opting in; and (iv) a telephone call campaign to convince existing customers to opt-in by tricking them into believing the TCF services would change if they did not opt-in. Through this strategy, TCF successfully persuaded approximately two-thirds of customers to opt-in to the overdraft services for ATM or one-time debit card transactions. According to the CFPB, this was more than three times the average opt-in rate of other banks.

The CFPB alleged that these unfair and deceptive practices violated Regulation E and the Consumer Financial Protection Act ("CFPA"). The CFPA prevents a bank from engaging in any unfair, deceptive, or abusive act or practice in connection with any transaction with a consumer for a consumer financial product or service, such as overdraft services. An act is considered abusive if it materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service. TCF moved to dismiss the CFPB's causes of action.

On September 8, 2017, the Court dismissed CFPB's causes of action pursuant to Regulation E but denied TCF's motion with respect to the CFPA causes of action. The Court dismissed the causes of action pursuant to Regulation E—regardless of TCF's likely deceptive conduct—because TCF complied with Regulation E's requirements: (i) it provided

costumers a reasonable opportunity to consent to overdraft services; and (ii) it attained affirmative consent from consumers. In analyzing the CFPA causes of action, the Court evaluated the entire transaction or course of dealing to determine whether deceptive or abusive practices occurred. The Court's holding makes clear that compliance with Regulation E alone will not protect a financial institution undertaking conduct that misleads or confuses a consumer in order to cause the consumer to opt-in to overdraft services.

#### **What does this holding mean for financial institutions?**

The CFPB is focused on unlawful overdraft practices. Banks should comply with the requirements of Regulation E and ensure that their policies in attaining the required consent are not viewed as unfair, abusive, or deceptive. Although liability will be based on the facts and circumstances of each case, **the ruling in the TCF case** provides financial institutions with some insight about the practices CFPB may view as violations of the CFPA. These practices include:

- Requiring employees to provide the mandated Regulation E notice early in the account opening process and asking customer to opt in later, after providing immense amounts of account information;
- Requiring employees to ask consumers to initial their *optional* opt-in authorization immediately after being asked to initial other items that are *mandatory* in opening an account;
- Providing bank employees a script that falsely conveys the impression that authorizing overdraft services for ATM and one-time debit card transactions are necessary to open an account; and
- Policies that institute monetary incentives for employees that encourage customers to opt-in.