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OVERDRAFTS AND ERROR RESOLUTION: SAY WHAT YOU MEAN AND DO WHAT YOU SAY

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OVERDRAFTS CFPB Issues Guidance Targeting 'Phantom Opt-In Agreements'

September 17, 2024 – Consumer Financial Protection Circular 2024-05

- A bank or credit union can be in violation of the Electronic Fund Transfer Act (EFTA) and Regulation E if there is **no proof** that it obtained affirmative consent to enrollment in covered overdraft services.
- The form of the records that demonstrate consumer consent to enrollment may vary according to the channel through which the consumer opts into covered overdraft services.
 - In person or by postal mail, a copy of a form signed or initialed by the consumer.
 - Over the phone, a recording of the phone call
 - Online or through a mobile app



Reference: <https://www.consumerfinance.gov/enforcement/actions/atlantic-union-bank/>

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Regulation E requires written overdraft service disclosure

Example # 1

Websites – the Financial Institution's website improperly collects affirmative consent for ATM or one-time debit card transactions **prior** to providing disclosures.



Please fill out the fields in the form to the right. A representative will contact you shortly to complete the process.

Overdraft Protection and Privilege Coverages

- I do not want card transactions.
- I want transactions.

to authorize and pay overdrafts on my ATM and everyday debit

to authorize and pay overdrafts on my ATM and everyday debit card

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Regulation E requires written overdraft service disclosure

Example # 2

For accounts opened in the branch – A9 form with prepopulated opt-in boxes (new account personnel obtain verbal confirmation from the consumer **prior** to providing written disclosures).

I do not want to authorize and pay overdrafts on my ATM and everyday debit card transactions.

I want to authorize and pay overdrafts on my ATM and everyday debit card transactions.

Signature: _____

Printed Name: _____

Title: _____

Date: 01/09/2024

Account Number: _____

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Payment Posting Order: Initial Disclosure vs. System Parameters

In this example, per initial disclosures, the Bank posts all credits, then electronic transactions such as ATM, debit card and preauthorized transactions **from low to high dollar amount within each transaction code**, and then checks according to serial number. However, the **payment system parameters order** for these transactions is **from highest to lowest dollar amount** as noted on this periodic statement.

As specified in **2005 Joint Interagency Guidance** (FDIC, NCUA, OCC) the account agreement and operational policies or procedures should be consistent regarding the order in which items are processed.

| CHECKS AND WITHDRAWALS | | Amount |
|------------------------|---|---------|
| Date | Description | |
| | Card# [REDACTED] | HILO |
| 3/07 | POS DEB [REDACTED] WM SUPERC Wal-Mart Sup | 372.51- |
| 3/07 | Card# [REDACTED] POS DEB [REDACTED] MARSHALLS | 305.21- |
| 3/07 | Card# [REDACTED] POS DEB [REDACTED] WM SUPERC Wal-Mart Sup | 172.30- |
| 3/07 | Card# [REDACTED] POS DEB [REDACTED] TARGET | 100.23- |
| 3/07 | Card# [REDACTED] POS DEB [REDACTED] MARSHALLS | 69.83- |
| 3/07 | Card# [REDACTED] DBT CRD [REDACTED] AMZN Mktg Amzn.com/b11WA | 51.34- |
| 3/07 | Card# [REDACTED] POS DEB [REDACTED] WENDYS | 44.68- |
| 3/07 | Card# [REDACTED] POS DEB [REDACTED] MCDONALD'S | 38.77- |
| 3/07 | Card# [REDACTED] DBT CRD [REDACTED] | 20.00- |
| 3/07 | Card# [REDACTED] DBT CRD [REDACTED] BURGER KING | 19.91- |
| 3/07 | Card# [REDACTED] DBT CRD [REDACTED] APPLE CASH | 15.00- |
| 3/07 | Card# [REDACTED] DBT CRD [REDACTED] GOOGLE | 6.99- |

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Inconsistent disclosure of the balance used to pay overdrafts

The issue here is not consistently disclosing the balance against which an item is compared in order to determine whether an overdraft occurs, or to determine whether to assess a fee. Typical examples are available balance or ledger balance.

November 7, 2024 – **CFPB Orders Navy Federal Credit Union to Pay More Than \$95 Million for Illegal Surprise Overdraft Fees.** When customers received money through payment services like Zelle, PayPal, and Cash App, Navy Federal's systems showed the money as immediately available to spend. However, the credit union failed to disclose that payments received after 10:00 am Eastern (and later, after 8:00 pm Eastern) wouldn't actually post until the next business day.



2015 CFPB Supervisory highlights: The CFPB noted that several Financial Institutions changed from using a ledger balance to using an available balance to decide whether to pay/charge for an overdraft without sufficient notice and disclosure.

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The Financial Institution is unaware of the core system capabilities for Authorize Positive, Settle Negative transactions (APSN).

- As noted in the FIL 32-2023 Institutions should ensure overdraft programs provided by third parties are compliant with all applicable laws and regulations.
- Some core systems require a manual process/intervention when this module is off.

November 7, 2024 – **CFPB Orders Navy Federal Credit Union to Pay More Than \$95 Million for Illegal Surprise Overdraft Fees.** when they made purchases with their accounts showing enough money to cover the transaction, the credit union still charged them overdraft fees if the account had a negative balance once the purchase posted to the account

Question: Does your Financial Institution core system have the capabilities to identify transactions approved with "Good Funds"?

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The Continuous Overdraft Fee does not charge as disclosed

Business days vs. calendar days

- Does the system use business or calendar days for calculating when a fee will be assessed, and is this distinction clearly disclosed to consumers?
- Does the system ensure that these fees will not be charged on or before the indicated day?

Question: When did your Financial Institution last test the system parameter functionalities for the Continuous Overdraft Fee?



Reference: March 2014 FDIC Division of Depositor and Consumer Protection – Fees Associated with Extended Overdrafts

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The Continuous Overdraft Fee does not charge as disclosed

Example # 1

Improper Fee Charged*

The Financial Institution disclosure states the Continuous Overdraft Fee will be charged when the account is overdrawn five (5) consecutive days; however, in this example, the fee is charged on the **4th business day**. In addition, the disclosure is not clear if the fee will be charged **after** the account remains overdrawn for five consecutive days or at the **end** of the fifth consecutive business day.

The initial transaction in this example occurred on Friday, 12/16; the ending balance on this day was \$198.59, positive balance.

| Continuous Overdraft Fee: charged when the account is <i>overdrawn five (5) consecutive business days</i> . | | CHECKS AND WITHDRAWALS | |
|---|---|------------------------|--------------------------------|
| Date | Description | Date | Amount |
| Monday, December 19, 2022 | 1st business day the account is in a overdrawn status | 12/19 | 34.00- |
| Tuesday, December 20, 2022 | 2nd business day | 12/19 | 34.00- |
| Wednesday, December 21, 2022 | 3rd business day | 12/19 | 50.00- |
| Thursday, December 22, 2022 | 4th business day - first day the "Continuous Overdraft Fee" is charged to the account | 12/19 | 34.00- |
| Friday, December 23, 2022 | 5th business day | 12/19 | 34.00- |
| Saturday, December 24, 2022 | Weekend | 12/19 | 220.00- |
| Sunday, December 25, 2022 | Weekend | | |
| Monday, December 26, 2022 | Holiday | | |
| Tuesday, December 27, 2022 | | 12/19 | 256.65- |
| Wednesday, December 28, 2022 | | 12/22 | 216.17- |
| | | 12/28 | CONTINUOUS OVERDRAFT FEE 1.00- |
| | | 12/22 | RETURN ITEM FEE 34.00- |
| | | 12/23 | CONTINUOUS OVERDRAFT FEE 1.00- |
| | | 12/27 | CONTINUOUS OVERDRAFT FEE 1.00- |
| | | 12/28 | CONTINUOUS OVERDRAFT FEE 1.00- |

| DAILY BALANCE INFORMATION | | | |
|---------------------------|---------|-------|---------|
| Date | Balance | Date | Balance |
| 12/06 | 5.52 | 12/22 | 225.29- |
| 12/12 | 28.48- | 12/23 | 226.29- |
| 12/15 | 606.75 | 12/27 | 227.29- |
| 12/16 | 198.59 | 12/28 | 228.29- |
| 12/19 | 190.29- | 12/29 | 656.13 |

* Is the fee assessed before the decision to pay or return an item? If so, and the subsequent decision is to return the item, then no overdraft has occurred. Without an overdraft, it is improper to charge an overdraft fee. [Reference: FDIC Division of Depositor and Consumer Protection - Fees Associated with Extended Overdrafts – March 2014.](#)

The Continuous Overdraft Fee does not charge as disclosed

Example # 2

In this example, the fee **appears** to have been charged on the **7th business day**. The initial transaction that caused a negative balance was a one-time debit card transaction, but the account has an **opt-out status**. However, a recurring debit card transaction occurred 2 days after the initial transaction.

| Continuous Overdraft Fee: charged when the account is <i>overdrawn five (5) consecutive business days</i> . | | CHECKS AND WITHDRAWALS | |
|---|---|------------------------|--------------------------------|
| Date | Description | Date | Amount |
| Wednesday, February 15, 2023 | 1st business day the account is in a overdrawn status | 2/15 | 20.09- |
| Thursday, February 16, 2023 | 2nd business day | 2/15 | 16.44- |
| Friday, February 17, 2023 | 3rd business day | 2/17 | 19.99- |
| Saturday, February 18, 2023 | Weekend | | |
| Sunday, February 19, 2023 | Weekend | 2/17 | 34.00- |
| Monday, February 20, 2023 | Holiday | 2/17 | 2.99- |
| Tuesday, February 21, 2023 | 4th business day | | |
| Wednesday, February 22, 2023 | 5th business day | 2/17 | 34.00- |
| Thursday, February 23, 2023 | 6th business day | 2/24 | 1.00- |
| Friday, February 24, 2023 | 7th business day - first day the "Continuous Overdraft Fee" is charged to the account | 2/27 | CONTINUOUS OVERDRAFT FEE 1.00- |
| Saturday, February 25, 2023 | Weekend | 2/28 | CONTINUOUS OVERDRAFT FEE 1.00- |
| Sunday, February 26, 2023 | Weekend | 3/02 | CONTINUOUS OVERDRAFT FEE 1.00- |
| | | 3/02 | CONTINUOUS OVERDRAFT FEE 1.00- |

| DAILY BALANCE INFORMATION | | | |
|---------------------------|---------|------|---------|
| Date | Balance | Date | Balance |
| 2/06 | 192.71 | 2/15 | 29.41- |
| 2/07 | 152.57 | 2/17 | 120.39- |
| 2/08 | 120.65 | 2/24 | 121.39- |
| 2/09 | 98.15 | 2/27 | 122.39- |
| 2/13 | 7.12 | 2/28 | 123.39- |

NOTE: in this case, the Continuous Overdraft Fee was treated correctly; without proper affirmative consent, the Continuous Overdraft Fee should not be charged. However, keep in mind the disclosure is not clear if the fee will be charged **after** the account remains overdrawn for five consecutive days or at the **end** of the fifth consecutive business day.

ERROR RESOLUTION EFTA – Regulation E Purpose

- To protect individual consumers engaging in electronic transfers
- Require disclosures
- Establish rights, liabilities, and responsibilities of all parties involved in an electronic fund transfer (EFT)

I just checked my account balance at the ATM. It printed me a coupon for Ramen Noodles.



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Error Resolution – What's Covered?

- Unauthorized EFT
- Incorrect EFT to or from consumer account
- Omission of an EFT from statement
- Bookkeeping errors
- Incorrect amount of money dispensed at a terminal
- EFT not properly identified
- Customer requests clarification to determine whether an error was made



Improper Denial: the final determination letter provided improper reason for denial. Dispute was denied because the customer did not provide the information requested, **per VISA regulations**. However, EFTA/Regulation E supersedes Visa rules as the reasons for denial.

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More Important – What's NOT Covered?

- Consumer had intent to defraud (alone or in concert with others)
- Paper instrument transactions
- Remote deposit and mobile deposit
- Transactions completed by person other than the consumer to whom the consumer furnished the card, code, or other means of access unless the owner notified the financial institution that transfers by that other person are no longer authorized

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What about Merchant Disputes?

Reg E only covers the account if they:

- a.) did not authorize the transaction,
- b.) authorized the transaction but was charged the wrong amount; or,
- c.) the customer was promised a credit from the merchant but did not receive it.

Reg E would not apply to issues relating to missing or defective merchandise.



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Error Resolution Time Limits

- The Bank has **10 business days** after notification to either complete the investigation or provide provisional credit
- The Bank may request the notification be provided in writing or provisional credit may be denied – *the Bank must still resolve the error*
- For ATM disputes the time frame to complete **is 45 calendar days**
- For Point of Sale (POS) disputes the time frame to complete is **90 calendar days**
- For new customers (within the first 30 days) the Bank has 20 business days to provide provisional credit and 90 calendar days to complete the investigation

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Customer Responsibility

The customer must provide oral or written notice of the error:

- within two business days of discovering lost or theft OR
- within 60 calendar days of transmittal of statement containing first error
- Provide written notice within 10 business days to receive provisional credit – *if required by the Bank*

Improper Denials:

- Bank declines the claims due to untimely signature on the written statement of unauthorized debit form.
- Bank declines the entire claim due to untimely notice without an investigation.

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Issues When the Investigation Ends

- After completion of the investigation, the Financial Institution determines an error occurred and provides final credit. However, the merchant provides a refund to the customer, so the Financial Institution reverse the final credit.

Improper Revocation of Final Credit: it is improper to revoke the credit after the Financial Institution makes the final determination. After the investigation is complete, the financial institution cannot reverse the credit (exceptions apply to remittance transfers under certain condition).

- After completion of the investigation, the Financial Institution determines an error did occur and provides final credit.

Improper Correction of Error: the financial institution fails to include fees related to the error/transaction as part of the amount refunded (overdraft fees, and minimum balance fee, if applicable)

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