Quarterly Newsletter

FDIC

Division of Depositor & Consumer Protection

CHICAGO REGION

VOLUME 6, Issue 2

June 30, 2018

In This Issue:

Automated Overdraft Program and One-Time Debit and ATM Opt-In Procedure Considerations

This article addresses scenarios recently encountered involving overdraft programs and the interplay with Regulation E opt-in requirements. It includes information on effective practices to help prevent violations and potential consumer harm and considerations regarding appropriate corrective action when these situations are identified.

Background

Regulation E contains requirements impacting overdraft programs. Section 1005.17(b) prohibits a financial institution from assessing a fee or charge on a consumer's account for paying an Automated Teller Machine (ATM) or one-time debit card transaction pursuant to the institution's overdraft program, unless the institution provides the customer a notice that is substantially similar to Model Form A-9; provides a reasonable time for the consumer to affirmatively consent, or opt-in; obtains the consumer's affirmative consent, or opt-in; and provides the consumer with confirmation of the consumer's consent. Further, Section 1005.17(g) requires the bank to deactivate the customer's opt-in selection when the financial institution terminates the customer's overdraft program. Per official staff commentary, this could occur in situations where the financial institution terminates the program as a result of excessive use. We have recently encountered problematic opt-in procedures, including examples where banks have not deactivated the opt-in selection when customers are removed from an automated overdraft program. These issues are further described below.

Problematic Opt-in Practices

Some institutions have prescribed criteria to qualify for an automated overdraft program such as minimum timeframes for having a banking relationship with that institution, deposit activity and history, and other transaction requirements. For example, an account must be open for at least sixty days, have one direct deposit, and a positive balance to be eligible for the overdraft program. New accountholders are not enrolled until they have met the prescribed requirements and are not eligible to have one-time debit and ATM transactions paid. However, we are seeing situations where new account representatives will describe the automated overdraft program and one-time debit and ATM card opt-in requirements at account opening, and allow customers to complete the opt-in election at that time, implying consumers have full access to the institution's opt-in overdraft program. In effect, this could be described as a "pre-emptive" opt-in. The potential for violations and consumer harm arises when the affirmative opt-in status is activated in the deposit processing platform before automated overdraft coverage becomes effective. In such cases, most one-time debit card or ATM transactions that would overdraw the account are declined because there is no overdraft program in place. However, it is possible, either through an automated process or through manual account review, for overdraft charges to be assessed in required-pay or force-pay transactions. In such force-pay transactions, the new accountholder who has opted-in, but has not yet qualified for the overdraft program, is assessed a fee for a transaction that must be paid and for which no fee would be assessed if the consumer had not pre-emptively opted-in. These accountholders are assessed overdraft fees without receiving access to the automated overdraft payment program. In other words, accountholders who pre-emptively opt in are being charged overdraft fees that would otherwise be prohibited, a scenario that may violate the Federal Trade Commission's Section 5 prohibitions against Unfair or Deceptive Acts or Practices (Section 5).

Continued on Next Page

Deactivating the Opt-in Election

When accountholders are terminated from an overdraft program for excessive use or other reasons, they are no longer eligible for the overdraft program, including the payment of one-time debit and ATM transactions that overdraw the account. Per the previously described Regulation E requirements, the affirmative opt-in selection must be deactivated in these cases. We have seen instances where bank personnel are unaware of this requirement, and the opt-in selection remains active in the deposit account processing platform even though the accountholder is no longer enrolled in the overdraft payment program. Similar to the new accountholder scenario, potential violations and consumer harm can result from fees assessed for force-pay transactions. Because the opt-in is still active, it is possible for accountholders to be charged overdraft fees in force-pay transactions, in error.

Examiners have also identified issues related to some financial institutions' practice of continuing to assess overdraft fees after extending customers loans (often referred to as "fresh start loans") to satisfy outstanding negative balances, despite providing disclosures to the contrary. Specifically, customers sign agreements and receive disclosures stating that until the fresh start loan is fully repaid, a customer no longer has access to the overdraft program. Nevertheless, the financial institutions continue to assess fees for required-pay or force-pay transactions that overdraw customers' accounts.

This practice conflicts with the agreement terms that use of the overdraft program would be suspended during the fresh start loan repayment period. As a result of the conflicting information that is provided to customers in the fresh start loan agreement (and other disclosures) compared to the institution's actual practice, there is a potential for consumer harm, as well as violations of Regulation E and/or Section 5. The representations in the agreements and disclosures could mislead consumers to believe that once approved for a fresh start loan, they will be removed from the overdraft program and accordingly will not incur any additional overdraft fees until reinstated in the overdraft program.

When accountholders are removed from the overdraft program, financial institutions should also ensure effective internal controls are in place to deactivate the opt-in status in their systems.

Effective Practices to Help Ensure Compliance

There are steps that can be taken to avoid violations and consumer harm. One option is to adopt procedures whereby customers may only opt-in for Regulation E purposes once they actually qualify for overdraft programs. Alternatively, if pre-emptive opt-in procedures are used, strong internal controls should be in place to ensure the opt-in status is not activated in the deposit processing platform until the accountholder is actually enrolled in the overdraft program. When accountholders are removed from the overdraft program, financial institutions should also ensure effective internal controls are in place to deactivate the opt-in status in their systems. This should be the case whether the removal is due to the origination of a fresh start loan, excessive use, or other reasons. Finally, consider periodic monitoring or audits to ensure continued compliance with applicable opt-in and revocation requirements to mitigate potential for consumer harm.

Corrective Action

If you self-identify violations or potential issues described in this article, management should immediately modify procedures to prevent consumer harm, identify any customers harmed by the practices, and address any harm resulting from the practices, such as by providing any appropriate restitution. Section II-2.1 of the FDIC Compliance Examination Manual discusses Evaluating the Impact of Consumer Harm. As always, feel free to contact the FDIC with any questions.

Continued on Next Page

FDIC's Money Smart for Adults Reboot

The FDIC is gearing up for the release of its updated Money Smart for Adults Program expected in September of 2018. The updated materials will feature new content, design, activities, and modules. For example, Money Smarts for Adults will now feature information on how debt works, understanding rental agreements, and will provide more information on mobile banking. The new release will also incorporate instructional best practices, such as using shorter sentences and offering more ideas to help instructors lead effective interactive workshops. Contemporary graphics and new formatting are also enhanced features of the product. Suggestions from users of the current Money Smarts for Adults have been incorporated into the revised materials.

Hopefully, this piques your interest in the updated Money Smart for Adults Program. Banks that currently engage in financial education activities, or plan to do so in the near future, can join the new Money Smart Advance Team (MSAT), a subset of the Money Smart Alliance. Benefits to joining the MSAT include:

- Advanced copies of the updated instructor-led Money Smart for Adults products in late Summer/early Fall;
- Training for staff on the new materials prior to public offering; and
- Eligibility for recognition in a special edition of *Money Smart News* in 2019 that will highlight several noteworthy examples of program implementation.

If your bank is already a Money Smart Alliance Member, then all you have to do is add Money Smart for Adults to the bank member profile by August 1, 2018 to become a member of the MSAT. If your bank is interested in becoming a Money Smart Alliance Member and joining the MSAT, simply visit the website by July 1, 2018, and indicate your organization's planned use of Money Smart for Adults during the enrollment process.

The Money Smart Advance Team will operate through Winter 2019.

To learn more about Money Smart and other financial education resources from the FDIC, visit www.fdic.gov/education.

Using American Community Survey (ACS) Data in Community Reinvestment Act (CRA) Examinations

The U.S. Census Bureau collects certain population and demographic data not only through the decennial census but also through the ACS, which involves ongoing data collection. Beginning in 2012, the Federal Financial Institutions Examination Council (FFIEC) began refreshing the ACS dataset on a five-year cycle.[1] In February 2017, the FFIEC released an updated list of Metropolitan Statistical Areas and Metropolitan Divisions, states, counties, census tracts, and income level indicators for consistency with the information available in the 2011-2015 ACS (2015 ACS) dataset.[2]

Federal banking agencies use updated census data published every five years to ensure the use of current and accurate comparable data in CRA performance evaluations. CRA evaluations cover a bank's record of helping to meet community credit needs over multiple years. With the transition to the use of five-year ACS estimates, some examinations will include a review of performance that spans two datasets. Specifically, examiners will analyze 2012 through 2016 CRA performance data using 2010 Census information[3] and 2017 through 2021 performance data using 2015 ACS information. For example, in the case of a CRA examination that includes both 2016 and 2017 Home Mortgage Disclosure Act (HMDA) data, the CRA evaluation will include a comparison of 2016 HMDA data to 2010 Census data, and 2017 HMDA data to 2015 ACS data. When conducting a comparative analysis using aggregate HMDA data, examiners will compare a bank's performance to aggregate data for the same year. CRA data is analyzed using similar standards. If demographic (e.g., tract income data) changes have occurred in the bank's assessment areas due to the updated ACS dataset, a trend analysis of 2016 to 2017 data may not be meaningful.

While the ACS data refresh does not impact geographic boundaries, banks should be aware that census tract delineations based on the 2015 ACS data, such as race and ethnicity data and income designations, may have changed for certain geographies. Bankers may want to review the bank's assessment area boundaries to understand how any changes in the delineations may affect the bank's profile for compliance with CRA regulations.

[1] For more information, see https://www.ffiec.gov/press/pr101911_ACS.htm

[2] In addition, updated census tract demographic information, including population and housing characteristics, was released by the FFIEC on July 7, 2017.

[3] The 2012-2016 FFIEC Census Files used 2006 - 2010 ACS for the majority of its demographic fields, with selected 2010 Census Summary File 1 tables used for population-related fields. For more information, see https://www.ffiec.gov/census/htm/2010CensusInfoSheet.htm.

Continued on Next Page

Upcoming Chicago Region Community Affair Events

Date	Event Description	Location
8/14/2018	***CRA Banker Roundtable, "Financing Affordable Homeownership"*** This CRA Banker Roundtable hosted by the FDIC, Office of the Comptroller of the Currency, and Federal Reserve Bank of Cleveland will highlight community development opportunities in financing affordable housing in Northeast Ohio. Panelists will include a national bank that is originating high loan-to-value loans, a community development corporation that is rehabbing homes (without subsidies) to sell to low- and moderate-income (LMI) borrowers, and a homeownership counseling agency that will provide a broader context of challenges for LMI borrowers. The FDIC will highlight its Affordable Mortgage Lending Guide publications and the online Affordable Mortgage Lending Center.	Cleveland, OH
8/16/2018	***Southeast Michigan Quarterly Membership Meeting*** FDIC will convene a meeting of the Alliance for Economic Inclusion (AEI) coalition, which is comprised of financial institutions, community-based organizations, and other partners in several markets across the country focused on bringing all unbanked and underserved populations into the financial mainstream.	TBA *(Washtenaw, Wayne, Macomb or Oakland Counties)*
August/ September 2018	***Advancing Economic Inclusion in Appalachia - Community-based Organization Roundtables*** FDIC will convene two roundtables in Ohio to identify the top economic inclusion, credit and investment needs for LMI consumers and communities in the Ohio Appalachian Region. This information will be used to develop a multi-year strategy to enhance banking relationships, economic inclusion, and collaboration opportunities.	Athens and Youngstown, OH
September 2018	***Advancing Economic Inclusion in Appalachia - Community-based Organization Roundtables*** FDIC will convene two roundtables in Kentucky to identify the top economic inclusion, credit, and investment needs for LMI consumers and communities in the Kentucky Appalachian Region. This information will be used to develop a multi-year strategy to enhance banking relationships, economic inclusion and collaboration opportunities.	Pikeville and Morehead, KY
9/12/2018	***Interagency CRA Training for Community-based Organizations*** The training will provide the community-based organizations in the market current information and training on CRA and how it can benefit their organization, and explore constructive ways to work with banks to improve their neighborhoods and communities.	Louisville, KY
9/12/2018	***Southeast Michigan AEI Summit to Reach Youth and Young Adults*** FDIC will convene a one-day summit for financial institutions, community organizations, non-profits, education providers, service organizations, and other stakeholders to promote banking relationships, facilitate collaborations, and share best practices on delivering financial education and low-cost savings accounts to youth and young adults.	Detroit, MI
For more information on any of these events contact FDIC Chicago Community Affairs Program at (312) 382-6000.		

Back to First Page