

# RESCINDED

## Electronic Fund Transfer Act Program

This document and any attachments are superseded by Comptroller's Handbook - Consumer Compliance - Electronic Fund Transfer Act.

### EXAMINATION OBJECTIVES

To determine the financial institution's compliance with Regulation E.

To assess the quality of the financial institution's compliance risk management systems and its policies and procedures for implementing Regulation E.

To determine the reliance that can be placed on the financial institution's internal controls and procedures for monitoring the financial institution's compliance with Regulation E.

To direct corrective action when violations of law are identified or when the financial institution's policies or internal controls are deficient.

### EXAMINATION PROCEDURES

#### LEVEL I

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1. Review the Matters Requiring Board Attention and Corrective Actions from the three or four previous ROEs to ensure that the board and management have taken appropriate corrective action where necessary and persistent problems have not recurred.

2. Through a review of all written policies and procedures, management's self-assessments, customer complaints, prior examination reports, and any compliance audit material, including work papers and reports, determine whether:

- The scope of the audit addresses all provisions as applicable.
- Management has taken corrective actions to follow-up on previously identified deficiencies.
- The testing includes samples covering all product types and decision centers.
- The work performed is accurate.

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- Significant deficiencies and their causes are included in reports to management and/or to the Board of Directors.
  - The frequency of review is appropriate.
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3. Through discussions with management and review of available information, determine whether the financial institution's internal controls are adequate to ensure compliance in Regulation E area under review. Consider the following:

- Organization charts
  - Process flowcharts
  - Policies and procedures
  - Account documentation
  - Checklists
  - Computer program documentation.
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4. Through a review of the financial institution's training materials, determine whether:

- The financial institution provides appropriate training to individuals responsible for Regulation E compliance and operational procedures.
  - The training is comprehensive and covers the various aspects of Regulation E that apply to the individual financial institution's product offerings and operations.
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5. Through discussions with management and review of available information, determine whether the financial institution's Overdraft Protection Program has incorporated the agency's applicable guidance. In addition to ATM and one time debit card transactions, consider other types of transactions as well. Consider the institution's contravention of the guidance when assessing the institution's compliance management system and in determining the overall compliance rating.
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## LEVEL II

If upon conclusion of the management and policy-related examination procedures, you note procedural weaknesses or other risks requiring further investigation, conduct transaction testing, as necessary, using the following examination procedures. Use your judgment in deciding the size of each sample of deposit account disclosures, notices, and advertisements. Increase the sample size until you are confident you have sufficiently reviewed all aspects of the financial institution's activities and policies subject to the regulation.

6. Obtain and review copies of the following:
- Disclosure forms.
  - Advertising and scripts for overdraft opt-ins.
  - Account agreements.
  - Procedural manuals and written policies.
  - Merchant agreements.
  - Automated teller machine receipts and periodic statements.
  - Error resolution statements/files.
  - Form letters used in case of errors or questions concerning an account.

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- Any agreements with third parties allocating compliance responsibilities.
  - Consumer complaint files.
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7. Determine the extent and adequacy of the financial institution's policies, procedures, and practices for ensuring compliance with the regulation. In particular, verify that:
- Access devices are issued in compliance with the regulation (12 CFR 205.5(b)). Required disclosures are given at time the account is opened or prior to the first EFT (12 CFR 205.4 and 205.7(c)). Unauthorized transfer claims are processed in compliance with the regulation (12 CFR 205.6 and 205.11).
  - Liability for unauthorized transfer claims is assessed in compliance with the regulation (12 CFR 205.6).
  - Negligence is not a factor in determining customer liability. The deposit agreement may not impose greater liability than Regulation E provides but may provide for less consumer liability (12 CFR 205.6).
  - Preauthorized debits and credits comply with the regulation (12 CFR 205.10).
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8. If the financial institution has changed the terms or conditions since the last examination that required a written notice to the customer, determine that the institution provided the proper notice in a timely manner (12 CFR 205.8(a)).
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9. Review a sample of periodic statements to determine that they contain sufficient information for the consumer to identify transactions adequately and that they otherwise comply with regulatory requirements (12 CFR 205.9).
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10. Verify that the financial institution does not require compulsory use of EFTs, except as authorized (12 CFR 205.10(e)).
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11. Review documents relating to a sample of unauthorized transfers, lost or stolen ATM cards, and EFT consumer complaints, and their respective periodic statements. During this review:
- Evaluate the financial institution's compliance with its error resolution procedures to isolate any apparent deficiencies in the financial institution's operations and to ensure that the institution follows its policies for unauthorized transfers (12 CFR 205.6 and 205.11).
  - Determine whether the financial institution investigates alleged errors and notifies consumers of the results within allotted time frames and, when appropriate, provisionally re-credits the account (12 CFR 205.11(c)).
  - Verify that the financial institution follows regulatory procedures after it completes its investigation and determines either that an error occurred (12 CFR 205.11(c)(1)) or that no error occurred (12 CFR 205.11(d)).
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12. Review a periodic statement for *each* type of account in which electronic fund transfers occur to make sure that the statements comply with the requirements of the regulation (12 CFR 205.9(b)).
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13. Review ATM and point-of-sale transfer receipts to determine whether they provide a clear description of the transaction (12 CFR 205.9(a)).
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14. Determine that the financial institution is maintaining records of compliance for a period of not less than two years from the date disclosures are required to be made or action is required to be taken (12 CFR 205.13(b)).
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15. If the financial institution maintains payroll card accounts, review a sample of the payroll card accounts. If the financial institution does not provide periodic statements under 12 CFR 205.9(b) for these accounts, verify that the institution makes available the account balance by telephone, an electronic history of account

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transactions, and (upon request) a written history of account transactions (12 CFR 205.18(b)).

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16. If the financial institution maintains payroll card accounts, verify that the financial institution complies with the modified requirements with respect to the required initial disclosures, error resolution notices, limitations on liability, and error resolution procedures (12 CFR 205.18(c)).
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17. If the financial institution operates one or more ATMs for which it charges a fee for use, determine that the financial institution provides notice of the fee and the amount of the fee both on the machine and on the screen or paper before the consumer is committed to paying the fee (12 CFR 205.16).
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18. Determine that the financial institution holding a consumer's account does 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,<sup>1</sup> unless the institution (§ 205.17(b)(1)):
- Provides the consumer with a notice in writing (or if the consumer agrees, electronically), that is segregated from all other information and describes the institution's overdraft service;
  - Provides a reasonable opportunity for the consumer to affirmatively consent, or opt in, to the service for ATM and one-time debit card transactions;
  - Obtains the consumer's affirmative consent, or opt-in, to the institution's payment of ATM or one-time debit card transactions; and
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<sup>1</sup> The term "overdraft service" means a service under which a financial institution assesses a fee or charge on a consumer's account held by the institution for paying a transaction (including a check or other item) when the consumer has insufficient or unavailable funds in the account (§ 205.17(a)). "Overdraft service" does not include a service that transfers funds from another account held by a consumer or a line of credit.

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- Provides the consumer with confirmation of the consumer's consent in writing (or if the consumer agrees, electronically), which includes a statement informing the consumer of the right to revoke such consent.

An institution does not have to meet the notice requirements described above if it has a policy and practice of declining to authorize and pay any ATM or one-time debit card transactions when it 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, it is still prohibited from charging fees for paying an ATM or one-time debit transaction overdraft. Commentary 205.17(b)-1(iv))

(Note: this section was mandatory on July 1, 2010. However, for accounts opened before July 1, the section was mandatory on August 15, 2010 (§ 205.17(c)).

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19. Determine that in assessing overdraft fees for consumers who have not opted in, the institution charges fees only for negative balances, daily, or sustained overdraft, or similar fees, when the negative balance is attributable in whole or in part to checks, ACH or other transactions not subject to the fee prohibition, and the fee is assessed based on the date when the check is paid into overdraft, not the date of the ATM or one-time debit transaction (Commentary 205.17(b)-9).
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20. Determine that the financial institution does not (§ 205.17(b)(2)):

- Condition the payment of any overdrafts for checks, ACH transactions, and other types of transactions on the consumer affirmatively consenting to the institution's payment of ATM and one-time debit card transactions pursuant to the institution's overdraft service; or
  - Decline to pay checks, ACH transactions, and other types of transactions that overdraw the consumer's account because the consumer has not affirmatively consented to the institution's overdraft service for ATM and one-time debit card transactions.
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21. Determine that the financial institution provides to consumers who do not affirmatively consent to the institution's overdraft service for ATM and one-time debit card transactions the same account terms, conditions, and features that it provides to consumers who affirmatively consent, except for the overdraft service for ATM and one-time debit card transactions (§ 205.17(b)(3)).
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22. Ensure that the notice required by § 205.17(b)(1)(i) is substantially similar to Model Form A-9, includes all applicable items in the following list, and does not contain any additional information (§ 205.17(d) and Commentary 205.17(d)-1 through -5):
- *Overdraft service.* A brief description of the financial institution's overdraft service and the types of transactions for which a fee or charge for paying an overdraft may be imposed, including ATM and one-time debit card transactions.
  - *Fees imposed.* The dollar amount of any fees or charges assessed by the financial institution for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service, including any daily or other overdraft fees. If the amount of the fee is determined on the basis of the number of times the consumer has overdrawn the account, the amount of the overdraft, or other factors, the institution must disclose the maximum fee that may be imposed.
  - *Limits on fees charged.* The maximum number of overdraft fees or charges that may be assessed per day, or, if applicable, that there is no limit.
  - *Disclosure of opt-in right.* An explanation of the consumer's right to affirmatively consent to the financial institution's payment of overdrafts for ATM and one-time debit card transactions pursuant to the institution's overdraft service, including the methods by which the consumer may consent to the service; and
  - *Alternative plans for covering overdrafts.* If the institution offers both a line of credit subject to the Board's Regulation Z (12 CFR part 226) and a service that transfers funds from another account of the consumer held at the institution to cover overdrafts, the institution must state in its opt-in notice that both alternative plans are offered. If the institution offers one, but not the other, it must state in its opt-in notice the alternative plan that it offers. If the institution does not offer either plan, it should omit the reference to the alternative plans. If the financial institution offers additional alternatives for paying overdrafts, it

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may (but is not required to) disclose those alternatives.

- *Permitted modifications and additional content.* If applicable, the institution may modify the content required by § 205.17(d) to indicate that the consumer has the right to opt into, or opt out of, the payment of overdrafts under the institution's overdraft service for other types of transactions, such as checks, ACH transactions, or automatic bill payments; to provide a means for the consumer to exercise this choice; and to disclose the associated returned item fee and that additional merchant fees may apply. The institution may also disclose the consumer's right to revoke consent. The response portion of Model Form A-9 may be tailored to the methods offered for opting in, and may include reasonable methods to identify the account, such as a bar code. For notices provided to consumers who have opened accounts prior to July 1, 2010, the financial institution may describe the institution's overdraft service with respect to ATM and one-time debit card transactions with a statement such as "After August 15, 2010, we will not authorize and pay overdrafts for the following types of transactions unless you ask us to (see below)."

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23. Determine that, when two or more consumers jointly hold an account, the financial institution treats the affirmative consent of any of the joint consumers as affirmative consent for that account, and treats a revocation of affirmative consent by any of the joint consumers as revocation of consent for that account (§ 205.17(e)).

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24. Ensure that a consumer may affirmatively consent to the financial institution's overdraft service at any time in the manner described in the institution's (Section 205.17(b)(1)(i)) notice, and that a consumer may also revoke consent at any time in the manner made available to the consumer for providing consent (§ 205.17(f)).

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25. Determine that the financial institution implements a consumer's revocation of consent as soon as reasonably practicable (§ 205(17)(f)).

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26. Determine that a consumer's affirmative consent to the institution's overdraft service is effective until revoked by the consumer, or until the financial institution terminates the service (§ 205.17(g)).

27. Determine that gift card disclosures (made under Section 205.20 of Regulation E) are clear and conspicuous (§ 205.20(c)(1)). Further determine that the disclosures are provided to the consumer in a retainable written or electronic form. Only disclosures provided under § 205.20(c)(3) (prior to purchase of a gift certificate, store gift card or general-use prepaid card) [or (h)(2), if applicable<sup>2</sup>] may be given orally (§ 205.20(c)(2)).

(Note: as explained by the rulemaking's prefatory material, permitting oral disclosures is necessary in limited circumstances where disclosures cannot be made prior to purchase unless made orally, such as when a certificate or card is purchased by telephone. Though disclosures required to be made prior to purchase can be made orally, the rule still requires written or electronic disclosures to be provided on or with the certificate or card.)

28. Determine that the disclosures required by §§ 205.20(a)(4)(iii) (loyalty, award, or promotional gift card), (d)(2) (dormancy/inactivity/service fees), (e)(3) (expiration date, phone and web, regarding replacement), and (f)(2) (phone and web, regarding fees), are made on the certificate or card, or in the case of a loyalty, award, or promotional gift card, on the card, code, or other device\*\*\*

Note: A disclosure made in an accompanying terms and conditions document, on packaging surrounding a certificate or card, or on a sticker or other label affixed to the certificate or card does not constitute a disclosure on the certificate or card.

If the certificate or card is electronic, determine that disclosures are provided electronically on the certificate or card provided to the consumer.

<sup>2</sup> Section 205.20(h)(2) allows for a delayed effective date – until January 31, 2011 - for disclosures on the card for gift cards that were produced before April 1, 2010. Throughout the remainder of the examination procedures, such sections are denoted by a triple asterisk \*\*\*.

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If an issuer provides a code or confirmation to a consumer orally, determine that the issuer provides to the consumer a written or electronic copy of the code or confirmation promptly, and the applicable disclosures are provided on the written copy of the code or confirmation (§ 205.20(c)(4)).

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29. Determine that the following are stated, as applicable, clearly and conspicuously on the gift certificate, store gift card, or general-use prepaid card (§ 205.20(d)(2)): \*\*\*

- The amount of any dormancy, inactivity, or service fee that may be charged;
  - How often such fee may be assessed; and
  - That such fee may be assessed for inactivity.
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30. Determine that the following disclosures are provided in connection with a gift certificate, store gift card, or general-use prepaid card as applicable (§ 205.20(f)): \*\*\*

- For each type of fee that may be imposed in connection with the certificate or card (other than a dormancy, inactivity, or service fee, which are discussed above) the following information must be provided on or with the certificate or card: §205.20(f)(1)
    - The type of fee;
    - The amount of the fee (or an explanation of how the fee will be determined); and
    - The conditions under which the fee may be imposed.
  - A toll-free telephone number and, if one is maintained, a Web site, that a consumer may use to obtain information about fees described in paragraphs (d)(2) and (f)(1) (described immediately above) of this section must be disclosed on the certificate or card (§ 205.20(f)(2)).
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31. If an expiration date applies to a certificate or card, determine that the following disclosures are provided on the certificate or card, as applicable (§ 205.20(e)(3)): \*\*\*

- The expiration date for the underlying funds or, if the underlying funds do not expire, that fact;
- A toll-free telephone number and, if one is maintained, a Web site that a consumer may use to obtain a replacement certificate or card after the certificate or card expires if the underlying funds may be available; and
- Except where a non-reloadable certificate or card bears an expiration date that is at least seven years from the date of manufacture, a statement, disclosed with equal prominence and in close proximity to the certificate or card expiration date, that:
  - The certificate or card expires, but the underlying funds either do not expire or expire later than the certificate or card, and
  - The consumer may contact the issuer for a replacement card.

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32. Determine that a loyalty, award, or promotional gift card sold or issued by the examined institution sets forth the following disclosures, as applicable (§ 205.20(a)(4)(iii)):

- A statement on the front of the card, code, or other device, indicating that the card, code, or other device is issued for loyalty, award, or promotional purposes;
- The expiration date for the underlying funds on the front of the card, code, or other device;
- The amount of any fees that may be imposed in connection with the card, code, or other device, and the conditions under which they may be imposed. This disclosure must be provided on or with the card, code, or other device; and

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- A toll-free telephone number and, if one is maintained, a Web site that a consumer may use to obtain fee information on the card, code, or other device.

33. Determine that a person (examined institution) that issues or sells a gift certificate, store gift card, or general-use prepaid card discloses to the consumer, prior to purchase, the information required by §§ 205.20(d)(2) (dormancy/inactivity/service fees), (e)(3) (expiration date, phone and web, regarding replacement), and (f)(1) (other fees) (§ 205.20(c)(3)). \*\*\*

34. Determine that the fees and terms and conditions of expiration that are required to be disclosed prior to purchase are not changed after purchase (§ 205.20(c)(3)). \*\*\*

35. Determine that no person (examined institution) imposes a dormancy, inactivity, or service fee with respect to a gift certificate, store gift card, or general-use prepaid card, unless (§ 205.20(d)):

- There has been no activity with respect to the certificate or card, in the one year period ending on the date on which the fee is imposed;
- Required disclosures are provided;
- Not more than one dormancy, inactivity, or service fee is imposed in any given calendar month.

36. Determine that the person (examined institution) does not sell or issue a gift certificate, store gift card, or general-use prepaid card with an expiration date unless (§ 205.20(e)). \*\*\*

- Required expiration date disclosures are provided on the certificate or card, as applicable;

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- It has established policies and procedures to provide consumers with a reasonable opportunity to purchase a certificate or card with at least five years remaining until the certificate or card expiration date;
  - The expiration date for the underlying funds is at least the later of:
    - Five years after the date the gift certificate was initially issued, or the date on which funds were last loaded to a store gift card or general-use prepaid card; or
    - The certificate or card expiration date, if any; and
  - No fee or charge is imposed on the cardholder for replacing the gift certificate, store gift card, or general-use prepaid card or for providing the certificate or card holder with the remaining balance in some other manner prior to the funds expiration date, unless such certificate or card has been lost or stolen.
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37. For cards produced prior to April 1, 2010, sections 205.20 (c)(3), (d)(2), (e)(1), (e)(3), and (f) do not apply until January 31, 2011 if certain conditions are met. If applicable, determine that the issuer:

- Complies with all other non-suspended provisions of the gift card rules;
- Does not impose an expiration date with respect to the funds underlying such certificate or card and, at the consumer's request, replaces such certificate or card if it has funds remaining, at no cost to the consumer;
- Discloses through in-store signage, messages during customer service calls, web sites, and general advertising, that:
  - The underlying funds of such certificate or card do not expire;
  - Consumers holding such certificate or card have a right to a free replacement certificate or card, accompanied by the packaging and materials typically associated with such certificate or card; and
  - Any dormancy, inactivity, or service fee for such certificate or card that might otherwise be charged will not be charged if such fees do not comply with Section 915 of the Electronic Fund Transfer Act.

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- Determine that the above disclosures (i) are provided until January 31, 2011, with respect to in-store signage and general advertising, (ii) and are provided until January 31, 2013, with respect to messages during customer service calls and Web sites.
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## PROGRAM CONCLUSIONS

1. Summarize the findings, supervisory concerns and regulatory violations.

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2. For the violations noted, determine the root cause by identifying weaknesses in internal controls, audit and compliance reviews, training, management oversight, or other factors. Determine whether the violation(s) are repetitive or systemic.

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3. Identify action needed to correct violations and weaknesses in the institution's compliance system.

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4. Discuss findings with the institution's management and, if necessary, obtain a commitment for corrective action.

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5. Record violations according to agency policy in the EDS/ROE system to facilitate analysis and reporting.

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### Endnote

\*\*\* Section 205.20(h)(2) allows for a delayed effective date – until January 31, 2011 - for disclosures on the card for gift cards that were produced before April 1, 2010.

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## EXAMINER'S SUMMARY, RECOMMENDATIONS, AND COMMENTS

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