

**NEW YORK STATE
DEPARTMENT OF FINANCIAL SERVICES**

AMENDMENTS TO 3 NYCRR PARTS 32 AND 6

DEPOSIT ACCOUNT TRANSACTIONS AND ASSOCIATED CHARGES

I, Adrienne A. Harris, Superintendent of Financial Services, pursuant to sections 9-y, 10, 12-a, 14, 14-c, 108(8), 202, 202-a(3), 235-c, 383(13), 454(1) and of the Banking Law and section 302 of the Financial Services Law, do hereby amend Part 32 of Title 3 of the Official Compilation of Codes, Rules, and Regulations of the State of New York, to take effect upon publication of the Notice of Adoption in the State Register, to read as follows:

(NEW MATTER UNDERSCORED; DELETED MATTER IN BRACKETS)

Existing section 32.1 is renumbered to subdivisions (a) and (b) of section 32.9 and a new section 32.1 is added as follows:

Section 32.1 Definitions.

For purposes of this Part:

(a) *Banking institution* means any banking organization as defined in subdivision 11 of section 2 of the Banking Law, but excluding any private banker, safe deposit company or investment company, as such terms are defined in section 2 of the Banking Law.

(b) *Consumer account* has the same meaning as provided in subdivision 3 of section 9-y of the Banking Law.

(c) *Credit* means an addition of funds to a consumer account.

(d) *Debit* means a deduction or attempted deduction of funds from a consumer account.

(e) *Electronic debit* means a debit via use of debit card, Automated Clearing House and/or other electronic means.

(f) *Insufficient funds charge* means an NSF charge or an overdraft charge.

(g) *Insufficient funds transaction* means either an NSF transaction or an overdraft transaction.

(h) *NSF charge* means a charge imposed by a banking institution on a consumer account in connection with an NSF transaction. NSF charge does not include interest charged by a banking institution on a negative account balance. The designation used by the banking institution to describe a charge is not determinative of whether or not it is an NSF charge.

(i) NSF transaction means a check drawn or other written order upon, or electronic debit sought to be effectuated against, insufficient funds or uncollected balances in a consumer account, wherein the banking institution does not pay such check, written order or electronic debit.

(j) Overdraft charge means a charge imposed by a banking institution on a consumer account in connection with an overdraft transaction. Overdraft charge does not include interest charged by a banking institution on a negative account balance. The designation used by the banking institution to describe a charge is not determinative of whether or not it is an overdraft charge.

(k) Overdraft transaction means a check drawn or other written order upon, or electronic debit sought to be effectuated against, insufficient funds or uncollected balances in a consumer account, wherein the banking institution pays such check, written order, or electronic debit.

(l) Return deposit item means a check or other written order received by a banking institution for deposit or collection and subsequently dishonored and returned for any reason by the drawee.

(m) Return deposit item charge means a charge imposed in connection with a return deposit item by the banking institution to which the payee presented the item for deposit. Return deposit item charge does not include interest charged by a banking institution on a negative account balance.

Existing section 32.2 is renumbered to subdivision (c) of section 32.9 and a new section 32.2 added as follows:

Section 32.2 Ordering of Electronic Debits and Credits in Consumer Accounts.

(a) Settlement of electronic debits.

(1) A banking institution shall not settle or otherwise complete electronic debits in a manner that maximizes insufficient funds charges.

(2) A banking institution is presumed to comply with this subdivision if the banking institution settles or otherwise completes such electronic debits:

(i) in the order in which the banking institution authorized such electronic debits;

ii) in the order in which the banking institution received such electronic debits for settlement; or

(iii) as to electronic debits available to be settled or otherwise completed at a particular time, in the order of lowest to highest dollar amounts.

(3) A banking institution is presumed to violate this subdivision if the banking institution settles or otherwise completes electronic debits available for settlement at a particular time in the order of highest to lowest dollar amounts and such order is not also consistent with a method permitted by paragraph (2) of this subdivision.

(4) The occurrence of an NSF transaction in a consumer account shall not prevent subsequent settlements of electronic debits in the same consumer account.

(b) Application of credits. A banking institution shall apply all available credits before settling or otherwise completing any electronic debit.

Existing section 32.3 is renumbered to subdivision (d) of section 32.9 and a new section 32.3 added as follows:

Section 32.3 Prohibited Insufficient Funds Charges in Relation to Consumer Accounts.

(a) NSF charges for declined electronic debits. No banking institution shall impose an NSF charge in connection with an electronic debit that is declined instantaneously or near-instantaneously.

(b) Multiple insufficient funds charges.

(1) No banking institution shall, on any single insufficient funds transaction, impose more than one insufficient funds charge.

(2) Should a payee re-initiate or re-present a debit upon which the banking institution has imposed an insufficient funds charge, the banking institution shall not impose an insufficient funds charge on the re-initiated or re-presented debit.

(c) Overdraft charges on “authorize-positive/settle-negative” transactions. No banking institution shall impose an overdraft charge on any electronic debit if the available balance of the consumer account, as would be displayed to the consumer by the banking institution in a mobile application, on a website, at an automated teller machine, or by telephone at the time the electronic debit is authorized, is greater than or equal to the authorized amount of the electronic debit, regardless of whether the consumer’s available balance is less than the amount of the electronic debit at the time such electronic debit is received for settlement.

Existing section 32.4 is renumbered to section 32.10 and a new section 32.4 added as follows:

Section 32.4 Prohibition of Charges for Futile Transfers to Prevent or Reduce Insufficient Funds Charges on Consumer Accounts.

No banking institution shall impose a charge for the service of transferring funds into a consumer account from another source for the purpose of reducing the amount of, or avoiding altogether, an insufficient funds charge, if the transfer does not in fact prevent the imposition of an insufficient funds charge.

A new section 32.5 is added to read as follows:

Section 32.5 Limits on Amounts of Insufficient Funds Charges on Consumer Accounts.

(a) Requirement that insufficient funds charges be of fixed amounts. Each banking institution that imposes insufficient funds charges shall set, at any time, no more than one amount of overdraft charge and no more than one amount of NSF charge, each of which such amounts respectively shall be a sum certain. Disclosures notifying accountholders of any change to either such amount shall be made in accordance with subdivision (d) of section 32.7 of this Part.

(b) Prohibition of NSF charges exceeding overdraft charges. No banking institution shall set an amount of NSF charge that is greater than the amount of overdraft charge, if any, set by the same banking institution.

(c) Prohibition of insufficient funds charges exceeding overdraft amount or NSF transaction amount.

(1) No banking institution shall impose an overdraft charge on an overdraft transaction if the overdrawn amount in connection with the overdraft transaction is less than the amount of the overdraft charge set in accordance with subdivision (a) of this section.

(2) No banking institution shall impose an NSF charge on an NSF transaction if the amount of the NSF transaction is less than the amount of the NSF charge set in accordance with subdivision (a) of this section.

(d) Prohibition of imposition of insufficient funds charges on insufficient funds transaction amounts below \$20. No banking institution shall impose any insufficient funds charge on an insufficient funds transaction if the dollar amount of such insufficient funds transaction is less than \$20.

For purposes of this section, “set” includes, without limitation, any corporate action taken to amend, modify, supplement, or otherwise vary the terms and conditions of or agreements governing both existing and newly opened consumer accounts.

A new section 32.6 is added to read as follows:

Section 32.6 Limit on the Number of Insufficient Funds Charges Imposed per Day on Consumer Accounts.

(a) No banking institution shall impose more than three insufficient funds charges on any consumer account in a single calendar day.

(b) Prohibition of “continuous,” “sustained,” “extended” or “daily” overdraft charges. Without limiting section 32.3(b)(1) of this Part, no banking institution shall impose any charge on any overdraft transaction other than interest and one overdraft charge.

A new section 32.7 is added to read as follows:

Section 32.7 Limits on Return Deposit Item Charges.

No banking institution shall impose a return deposit item charge on a consumer account for a return deposit item drawn against a consumer account unless the check that the accountholder attempted to deposit:

(a) is from the same originator as another check that the accountholder attempted to deposit within the previous year that was also dishonored;

(b) lacks a signature;

(c) bears a date later than the date on which the accountholder attempted to deposit the check; or

(d) was presented for deposit by the accountholder to the banking institution after the time allowed for deposit stated on the check had expired.

A new section 32.8 is added to read as follows:

32.8 Alerts, Notices, and Other Disclosures Relating to Insufficient Funds Transactions and Return Deposit Items in Relation to Consumer Accounts.

(a) *Notice upon initiation of an electronic debit likely to result in an overdraft charge.* In addition to the requirements of 12 C.F.R. § 1005.17 and any other requirements of federal or State law, no banking institution may impose an overdraft charge on a consumer account in connection with any electronic debit, unless the banking institution sends to the accountholder, via the most immediate and rapid means of communication otherwise utilized by the banking institution to deliver written notices to consumer accountholders, a notice informing the accountholder that the accountholder has initiated an electronic debit that may result in the imposition of an overdraft charge, of the amount of the banking institution's overdraft charge, and of the overdraft policy applicable to the subject account in plain language or of a link to, or internet address of, such a plain language policy statement.

(b) *Notice following first imposition of an insufficient funds charge in a calendar year.* In addition to the requirements of 12 C.F.R. § 1005.17 and any other requirements of federal or State law, within 10 business days after a banking institution imposes the first insufficient funds charge on a consumer account within a calendar year, the banking institution shall send notice, either by mail to the address of record of the accountholder or by electronic mail if the accountholder has consented to communication via electronic mail, identifying the insufficient funds charge imposed, explaining why the insufficient funds charge was imposed and describing how the accountholder can avoid the imposition of such insufficient funds charges in the future, including in the case of an overdraft charge that the accountholder can revoke the accountholder's opt-in to certain specified overdraft services pursuant to 12 C.F.R. § 1005.17 and the applicable account agreement. As part of such notice, the banking institution shall describe all means made available by the banking institution by which an accountholder may learn the available balance in the accountholder's account.

(c) Notice following first return deposit item in a calendar year. In addition to the requirements of 12 C.F.R. § 229.33(h) and any other requirements of federal or State law, for the first return deposit item in a consumer account occurring in a calendar year, within 10 business days after the banking institution dishonors and returns the return deposit item, the banking institution shall send notice, either by mail to the address of record of the accountholder or by electronic mail if the accountholder has consented to communication via electronic mail, identifying the instrument that was the return deposit item, stating that the amount of the return deposit item was not finally credited to the consumer account because the drawee bank dishonored and did not pay the return deposit item and, if the banking institution imposed a return deposit item charge, stating the amount of the return deposit item charge.

(d) Advance notice required. Unless applicable law provides a longer notice period, a banking institution shall give advance notice to consumer account holders of any change in the amount of an insufficient funds charge. The notice shall include the effective date of the change. The notice shall be mailed or delivered at least 30 calendar days before the effective date of the change.

Sections 32.1 through 32.3 are renumbered to section 32.9 and amended to read as follows:

Section [32.1]32.9 [Maximum] Other Charges.

(a) *Insufficient funds.* Except as otherwise provided by this Part, [The]the establishment of charges that are imposed by a bank, trust company, savings bank, savings and loan association or licensed branch of a foreign banking corporation [(collectively for purposes of this part a “banking institution”)] in connection with a check drawn or other written order upon, or electronic transfer sought to be effectuated against, insufficient funds or uncollected balances, irrespective of whether the check, order or electronic transaction (collectively for purposes of this [part] section, an “item”) is paid, accepted or returned by such [the banking] institution, is a business decision to be made by each such [banking] institution, in its discretion, according to sound banking [judgement] judgment and safe and sound banking principles. A bank, trust company, savings bank, savings and loan association or licensed branch of a foreign banking corporation [banking institution] shall be deemed to have reasonably established such charges if it considered the following factors, among others:

- (1) the cost incurred by [the banking] such institution, plus a profit margin, in providing the service;
- (2) the deterrence of misuse by customers of banking services;
- (3) the enhancement of the competitive position of [the banking] such institution in accordance with its marketing strategy; and
- (4) the maintenance of the safety and soundness of the [banking] such institution.

In establishing charges under this subdivision, a bank, trust company, savings bank, savings and loan association or licensed branch of a foreign banking corporation [banking institution] may consider the nature of the account and may determine to establish different charges for [an account that is opened and maintained primarily for personal, household or family purposes than for an account that is not,] accounts of different types or determine that no charge should apply to certain types of accounts, and, in determining such charges, or whether not to impose a charge, may also consider whether the item is to be paid, accepted or returned.

(b) *Return items.* The maximum charge which may be imposed by a bank, trust company, savings bank, savings and loan association, credit union, or licensed branch of a foreign banking corporation in connection with a check or other written order received by it for deposit or collection and subsequently dishonored and returned for any reason by the drawee is \$10.

(c) *Charges imposed in connection with overdraft items.* No bank, trust company, savings bank, savings and loan association or licensed branch of a foreign banking corporation shall, in connection with the payment, acceptance or return of [such check or order] an item impose any fee, fine, commission or other charge, however designated, in addition to the any maximum charge established by section [32.1] 32.9(a) of this Part, except that nothing in this [Part] section shall prevent a bank, trust company, savings bank, savings and loan association or licensed branch of a foreign banking corporation from taking, receiving, reserving or charging interest, as authorized by law in connection with credit extended in connection with the payment of such [check or order] item, or, except as otherwise provided by this Part, from imposing any charge in accordance with a written agreement established as provided by sections 108(5), 235(8-b)[, 235-c, 380-g.] and 380-i [and 202(8)] of the Banking Law.

(d) *Lesser charges.* A bank, trust company, savings bank, savings and loan association, credit union, or licensed branch of a foreign banking corporation may, as an accommodation to [its] a [customers] customer, pay, accept, or return an item without charge or at a lesser charge than the [maximum] charge established in accordance with the provisions of this Part [by the superintendent].

Section 32.4 is renumbered to Section 32.10 and amended to read as follows:

Section 32.10. Required disclosures.

In addition to any disclosure required by 12 C.F.R. Parts 1030 or 707 or Part 13 of the General Regulations of the Superintendent or any other law with regard to consumer deposit accounts, and only to the extent not inconsistent with sections 32.2 and 32.7 of this Part or subdivision (1) of section 9-y of the Banking Law, a [banking institution] bank, trust company, savings bank, savings and loan association or licensed branch of a foreign banking corporation shall disclose in writing to its depositors the order in which it pays items drawn against a depositor's account. By way of illustration, and without limitation, such disclosure may inform the depositor that the banking institution pays the largest items first, the smallest items first, by the number of the item, or in the order received. Such disclosure shall be given to the depositor at the time the account is opened and [30] thirty days prior to the time such payment policy is changed.

Subdivision (d) of 3 N.Y.C.R.R. Section 6.8 is hereby amended as follows:

(d) Notwithstanding any other provision of law or regulation other than Part 32 of this Title, State-chartered banks and trust companies, and savings banks and savings and loan associations may impose charges, in addition to the charge provided for in section [32.1(a)] 32.9(a) of this Title, for paying or accepting checks or other written orders drawn on, or effectuating electronic transactions from, accounts containing insufficient funds in cases in which the drawer of the check or other written order, or the account holder seeking to effectuate the electronic transaction, does not have a written agreement for an over-draft line of credit pursuant to section 108(5), 235(8-

b) or 380(2) of the Banking Law to the same extent, and subject to the same conditions, as national banks and federal savings associations, respectively.

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