

product may not be provided instead with the account with more limited features because the consumer has declined to opt in.

\* \* \* \* \*

#### Paragraph 17(c) Timing

\* \* \* \* \*

2. *Permitted fees or charges.* Fees or charges for ATM and one-time debit card overdrafts may be assessed only for overdrafts paid on or after the date the financial institution receives the consumer's affirmative consent to the institution's overdraft service. See also comment 17(b)–7.

#### Paragraph 17(d) Content and Format

\* \* \* \* \*

3. *Opt-in methods.* The opt-in notice must include the methods by which the consumer may consent to the overdraft service for ATM and one-time debit card transactions. Institutions may tailor Model Form A–9 to the methods offered to consumers for affirmatively consenting to the service. For example, an institution need not provide the tear-off portion of Model Form A–9 if it is only permitting consumers to opt-in telephonically or electronically. Institutions may, but are not required, to provide a signature line or check box where the consumer can indicate that he or she declines to opt in.

4. *Identification of consumer's account.* An institution may use any reasonable method to identify the account for which the consumer submits the opt-in notice. For example, the institution may include a line for a printed name and an account number, as shown in Model Form A–9. Or, the institution may print a bar code or use other tracking information. See also comment 17(b)–6, which describes how an institution obtains a consumer's affirmative consent.

5. *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. For example, the notice might state "We also offer overdraft protection plans, such as a link to a savings account or to an overdraft line of credit, which may be less expensive than our standard overdraft practices." 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.

By order of the Board of Governors of the Federal Reserve System, May 27, 2010.

**Jennifer J. Johnson,**  
Secretary of the Board.

[FR Doc. 2010–13280 Filed 6–3–10; 8:45 am]

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## FEDERAL RESERVE SYSTEM

### 12 CFR Part 230

[Regulation DD; Docket No. R–1315]

#### Truth in Savings

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Final rule.

**SUMMARY:** On January 29, 2009, the Board published final rules amending Regulation DD, which implements the Truth in Savings Act, and the official staff commentary to the regulation. The final rule addressed depository institutions' disclosure practices related to overdraft services, including balances disclosed to consumers through automated systems. The Board is amending Regulation DD and the official staff commentary to address the application of the rule to retail sweep programs and the terminology for overdraft fee disclosures, and to make amendments that conform to the Board's final Regulation E amendments addressing overdraft services, adopted in November 2009.

**DATES:** The final rule is effective July 6, 2010, except for § 230.11(a)(1)(i), which is effective October 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** Dana E. Miller or Vivian W. Wong, Senior Attorneys, or Ky Tran-Trong, Counsel, Division of Consumer and Community Affairs, at (202) 452–3667 or (202) 452–2412, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

In December 2008, the Board adopted a final rule amending Regulation DD, which implements the Truth in Savings Act, and the official staff commentary to the regulation. The final rule addressed depository institutions' disclosure practices related to overdraft services, including balances disclosed to consumers through automated systems. The rule was published in the **Federal Register** on January 29, 2009 and became effective January 1, 2010. See 74 FR 5584 (Regulation DD final rule).<sup>1</sup>

<sup>1</sup> The Board published a technical amendment in April 2009 correcting a printing error with respect to Sample Form B–10. Depository institutions must use Sample Form B–10, or a substantially similar form, including the box and gridlines, to provide totals for overdraft fees and returned item fees for the statement cycle and year-to-date. 74 FR 17768 (April 17, 2009). See § 230.11(a).

In November 2009, the Board adopted a final rule under Regulation E, which implements the Electronic Fund Transfer Act, limiting a financial institution's ability to assess fees for paying ATM and one-time debit card transactions pursuant to the institution's discretionary overdraft service without the consumer's affirmative consent to such payment. The rule was published in the **Federal Register** on November 17, 2009 and has a mandatory compliance date of July 1, 2010. See 74 FR 59033 (Regulation E final rule).

Since publication of the two rules, institutions and others have requested clarification of particular aspects of the rule and further guidance regarding compliance with the rule. In addition, conforming amendments to the Regulation DD final rule are necessary in light of certain provisions subsequently adopted in the Regulation E final rule. Accordingly, the Board proposed to amend Regulation DD and the official staff commentary. 75 FR 9126 (March 1, 2010).

The Board received twelve comments on the proposed rule, including from financial institutions and their trade associations, as well as from a consortium of consumer groups. The final rule adopts the proposed rule substantially as proposed, with certain clarifications. Similarly, elsewhere in today's **Federal Register**, the Board is amending certain aspects of the Regulation E final rule.

##### II. Statutory Authority

The Truth in Savings Act, 12 U.S.C. 4301 *et seq.*, is implemented by the Board's Regulation DD (12 CFR part 230). The purpose of the act and regulation is to assist consumers in comparing deposit accounts offered by depository institutions, principally through the disclosure of fees, the annual percentage yield, the interest rate, and other account terms. An official staff commentary interprets the requirements of Regulation DD (12 CFR part 230 (Supp. I)). Credit unions are governed by a substantially similar regulation issued by the National Credit Union Administration. In the **SUPPLEMENTARY INFORMATION** to the Regulation DD final rule, the Board described its statutory authority and applied that authority to the requirements of the rule. For purposes of this rulemaking, the Board continues to rely on that legal authority and analysis.

### III. Section-by-Section Analysis

#### A. Section 230.6(a)—Periodic Statement Disclosures; General Rule

Section 230.6(a) describes disclosures that are required to be made when periodic statements are provided, including certain fees or charges. The Board proposed two technical amendments to § 230.6(a) and the related staff commentary. First, the Board proposed to add a new § 230.6(a)(5) to explicitly state that the aggregate fee disclosures required by § 230.11(a)(1), discussed below, are among the disclosures that are required to be provided on periodic statements for purposes of § 230.6(a). Second, the Board proposed to revise comment 6(a)(3)–2, to eliminate the reference to the promotion of the payment of overdrafts because the Regulation DD final rule extended the aggregate fee disclosure to all institutions. The Board did not receive comment on the proposed amendments, which are adopted substantially as proposed. Section 230.6(a)(5) has been revised from the proposal to indicate that the aggregate fee disclosure is required on periodic statements “if applicable,” because § 230.11(a) does not require aggregate fee disclosures when a consumer has not incurred any overdraft fees for the calendar year-to-date.

#### B. Section 230.11(a)—Disclosure of Total Fees on Periodic Statements

Section 230.11(a)(1)(i) requires institutions to disclose on each periodic statement, as applicable, the total dollar amount of all fees or charges imposed on the account for paying checks or other items when there are insufficient or unavailable funds and the account becomes overdrawn for the month and calendar year-to-date. Sample Form B–10 displays this total as “Total Overdraft Fees.” Section 230.11(a)(1)(ii) requires institutions to disclose separately the total dollar amount of all fees or charges imposed on the account for returning items unpaid for the month and calendar year-to-date. 12 CFR 230.11(a)(1)(ii). Comment 230.11(a)(1)–3 states that institutions may use terminology such as “returned item fee” or “NSF fee” to describe fees for returning items unpaid. These fee totals must be disclosed in a tabular format substantially similar to Sample Form B–10. 12 CFR 230.11(a)(3).

Some institutions may use terms other than “Overdraft Fee” to describe per-item overdraft fees in their account agreements. Comment 3(a)–2 to Regulation DD provides that institutions must use consistent terminology in their

account-opening disclosures, periodic statements, and other disclosures. In light of this comment, questions have been raised as to whether institutions may use terminology other than “Total Overdraft Fees” in the periodic statement aggregate fee disclosure to describe the total amount of all fees or charges imposed on the account for paying overdrafts.

The Board proposed to revise § 230.11(a)(1)(i) to clarify that the periodic statement aggregate fee disclosure must state the total dollar amount for all fees or charges imposed on the account for paying overdrafts, using the term “Total Overdraft Fees.” Proposed comment 11(a)(1)–2 explained that this provision supersedes comment 3(a)–2. Consumer group commenters supported the proposed requirement. In particular, these commenters suggested that the use of the terms “NSF Fee” and “Overdraft Fee” interchangeably has led to confusion for consumers. Several industry commenters objected to the proposed terminology requirement, stating that customers are used to seeing certain terms used to describe overdraft fees, such as “NSF Items Paid.”<sup>2</sup> Other commenters stated that the Board should permit alternative terminology, such as “Total Overdraft Fees for Paid Items.” The Board is adopting the revisions generally as proposed, with minor revisions for clarity.

Section 230.11(a)(1)(i) requires institutions to provide a fee total that includes *all* overdraft fees, including any additional daily or sustained overdraft, negative balance, or similar fees or charges imposed by the institution. *See* comment 11(a)(1)–2. Thus, the use of terminology other than “Total Overdraft Fees” may not capture the various fees associated with an overdraft service. Moreover, the purpose of the aggregate fee disclosure is to provide consumers who use overdraft services with additional information about fees to help them better understand the costs associated with the service. Permitting the use of terminology other than “Total Overdraft Fees” could be confusing to consumers and potentially undermines their ability to compare costs, particularly if a consumer has accounts at different institutions that each use different terminology. The Board does not believe the alternative terminology suggested by

<sup>2</sup> The official staff commentary to Regulation DD provides that institutions should not use the generic term “insufficient funds fee” or “NSF fee” to describe both fees for paying overdrafts and fees for returning items unpaid. *See, e.g.,* comment 6(a)(3)–2.iv (institutions may group itemized fees, but may not group together fees for paying overdrafts and fees for returning checks or other items unpaid).

commenters furthers consumer understanding.

#### C. Section 230.11(c)—Disclosure of Account Balances

##### Comment 11(c)–2—Retail Sweep Programs

Section 230.11(c) of the Regulation DD final rule addresses the disclosure of account balance information to a consumer through an automated system. Under § 230.11(c), institutions must disclose a balance that does not include additional amounts that the institution may provide to cover an item when there are insufficient or unavailable funds in the consumer’s account, including under a service to transfer funds from another account of the consumer. The Board adopted this provision to ensure that consumers receive accurate information about their account balances and to help avoid consumer confusion as to whether an account has sufficient funds to cover a transaction.

After publication of the Regulation DD final rule, questions were raised about the application of the rule to retail sweep programs. In a retail sweep program, an institution establishes two legally distinct subaccounts, a transaction subaccount and a savings subaccount, which together make up the consumer’s account. The institution allocates and transfers funds between the two subaccounts in order to maximize the balance in the savings subaccount while complying with the monthly limitations on transfers out of savings accounts under the Board’s Regulation D, 12 CFR 204.2(d)(2). Certain characteristics distinguish retail sweep programs from overdraft services. Therefore, the Board proposed to add a new comment 11(c)–2 to clarify that, when disclosing a transaction account balance, § 230.11(c) does not require an institution to exclude from the consumer’s balance funds that may be transferred from another account pursuant to a retail sweep program. Commenters supported this clarification, but stated that the comment should also permit institutions to include in the disclosed balance funds in investment products linked to transaction accounts pursuant to investment sweep programs. The comment is adopted substantially as proposed.

Retail sweep programs are distinguishable in several respects from overdraft protection plans that transfer funds from a consumer’s linked accounts. In particular, retail sweep programs are generally not established for the purpose of covering overdrafts.

Rather, institutions typically establish retail sweep programs by agreement with the consumer, in order for the institution to minimize its transaction account reserve requirements and, in some cases, to provide a higher interest rate than the consumer would earn on a transaction account alone. Furthermore, most retail sweep programs are structured so that the consumer (or person acting on behalf of the consumer) cannot independently access the funds in the savings subaccount; all transfers out of, and deposits or transfers into, the savings subaccount component of a retail sweep program are effected through the transaction subaccount. Notwithstanding the establishment of two legally distinct subaccounts under a retail sweep program, the periodic statements that consumers receive show a single consumer account balance, and a single account on which all transactions into and out of the account are reflected.

By contrast, linked accounts can be used and funded independently of one another. For example, a consumer can directly make deposits into, and withdrawals from, a savings account whether or not it is linked to a checking account. The link between accounts under an overdraft protection program is primarily established for purposes of providing funds from the savings account in the event that the consumer has insufficient funds in the checking account. Additionally, while retail sweep programs typically do not impose fees on transfers between the savings subaccount and the transaction subaccount, institutions typically charge fees for transfers from linked accounts to cover an overdraft.

Based on the foregoing, the Board believes that consumers under a retail sweep program may reasonably expect to see a single balance combining the funds in the transaction subaccount and the savings subaccount when they request an account balance. Consumers could be confused if a balance that only includes funds in the transaction subaccount were provided because, in some cases, the balance in the transaction subaccount could be zero (to the extent funds had been transferred to the savings subaccount at the time of the balance inquiry). Thus, the final comment clarifies that § 230.11(c) does not require an institution to exclude from the consumer's balance funds that may be transferred from another account pursuant to a retail sweep program.

Some industry commenters stated that the Board should also permit institutions to include in the disclosed balance funds in investment products

linked to transaction accounts pursuant to investment sweep programs. In an investment sweep program, a consumer links a transaction account at a depository institution with an investment product at a broker-dealer, investment institution, or the depository institution. The transaction account and the linked investment product are generally established contemporaneously. Investment sweep programs are normally not established for the purpose of covering overdrafts. Rather, deposits and other credits to the transaction account are swept on a regular basis to the investment product to provide the consumer a potentially higher rate of return, while providing consumers access to the funds through the transaction account. Fees are typically not charged for the transfers. For these reasons, the Board believes that investment sweep programs with these characteristics are also distinguishable from overdraft protection plans that transfer funds from a consumer's linked accounts, and the balances in the linked investment product could be included in the balance disclosed under § 230.11(c).

#### Comment 11(c)-3—Additional Balance

Section 230.11(c) of the Regulation DD final rule permitted institutions to disclose an additional balance including overdraft funds, so long as the institution prominently states that the balance contains additional overdraft funds. Comment 11(c)-2 of the final rule provided guidance on how institutions could appropriately identify the additional funds. However, the comment only addressed opt-outs. The Board subsequently adopted the November 2009 Regulation E final rule, which requires institutions to obtain a consumer's affirmative consent, or opt-in, to the institution's overdraft service, before charging any fees for paying ATM and one-time debit card transactions. In light of the final Regulation E opt-in requirement, the Board proposed to amend comment 11(c)-2, redesignated as comment 11(c)-3, to include references to the opt-in requirement. References to opt-outs were retained in some instances because some institutions may provide an opt-out choice with respect to checks, ACH, and other types of transactions not subject to the Regulation E final rule restrictions.

The Board also proposed to extend the requirement to indicate, when applicable, that funds in the additional balance may not be available for all transactions. For example, if a consumer has an overdraft line of credit, but under the terms of the agreement with the institution, the consumer cannot access

the line of credit when using a debit card at a point-of-sale transaction, the proposed comment should state that any additional balance displayed through an automated system should indicate that the overdraft funds are not available for all transactions.

The Board did not receive comment on the proposed comment, which is adopted substantially as proposed with non-substantive revisions.<sup>3</sup>

#### D. Effective Date

Because some depository institutions may be using terminology other than "Total Overdraft Fees" in their aggregate fee disclosure under § 230.11(a)(1), the Board proposed to make the proposed revisions to § 230.11(a)(1)(i) effective approximately 90 days after publication of the final rule in the **Federal Register**. The Board solicited comment on whether this would be an appropriate time period for implementation. Consumer group commenters stated that this time frame would be reasonable, but that the Board should not extend the effective date further. Two industry trade associates urged the Board to provide an implementation time of six to nine months because institutions' resources are currently devoted to coming into compliance with the Regulation E final rule.

Section 302 of the Riegle Community Improvement Development and Regulatory Improvement Act of 1994, 12 U.S.C. 4802, requires regulations that impose additional disclosure requirements to take effect on the first day of a calendar quarter beginning on or after the date on which the regulations are published in final form, unless the agency determines, for good cause published with the regulation, that the regulation should become effective before such time. The Board believes that an approximately 90-day effective date is appropriate because final § 230.11(a)(1)(i) will require some institutions to modify the disclosures provided to consumers. An effective date of July 1, 2010, which is the first calendar quarter following publication of this final rule, would not provide sufficient time for compliance. Thus, § 230.11(a)(1)(i) is effective October 1, 2010, which is the first day of the subsequent calendar quarter. The remaining provisions of the final rule are effective July 6, 2010.

#### IV. Regulatory Analysis

Sections VI and VII of the **SUPPLEMENTARY INFORMATION** to the

<sup>3</sup> Due to the clarifications finalized by the Board today, comment 11(c)-3 of the Regulation DD final rule has been redesignated as comment 11(c)-4.

Regulation DD final rule set forth the Board's analyses under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) and the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR part 1320 Appendix A.1). See 74 FR 5591-5593. Because the final amendments are clarifications and do not alter the substance of the analyses and determinations accompanying the Regulation DD final rule, the Board continues to rely on those analyses and determinations for purposes of this rulemaking.

List of Subjects in 12 CFR Part 230

Advertising, Banks, Banking, Consumer protection, Reporting and recordkeeping requirements, Truth in savings.

Authority and Issuance

For the reasons set forth above, the Board amends 12 CFR part 230 and the Official Staff Commentary, as set forth below:

PART 230—TRUTH IN SAVINGS (REGULATION DD)

1. The authority citation for part 230 continues to read as follows:

Authority: 12 U.S.C. 4301 et seq.

2. Section 230.6 is amended by adding paragraph (a)(5) to read as follows:

§ 230.6 Periodic statement disclosures.

(a) \* \* \* (5) Aggregate fee disclosure. If applicable, the total overdraft and returned item fees required to be disclosed by § 230.11(a).

3. Section 230.11 is amended by revising paragraph (a)(1)(i) to read as follows:

§ 230.11 Additional disclosure requirements for overdraft services.

(a) \* \* \* (1) \* \* \* (i) The total dollar amount for all fees or charges imposed on the account for paying checks or other items when there are insufficient or unavailable funds and the account becomes overdrawn, using the term "Total Overdraft Fees"; and

- 4. In Supplement I to part 230, a. In Section 230.6(a)(3), the first two sentences of paragraph 2. are revised. b. In Section 230.11(a)(1), paragraph 2. is revised. c. In Section 230.11(c), paragraphs 2. and 3. are redesignated as paragraphs 3. and 4. respectively. d. In Section 230.11(c), new paragraph 2. is added. e. In Section 230.11(c), newly designated paragraph 3. is revised.

Supplement I to Part 230—Official Staff Interpretations

Section 230.6 Periodic Statement Disclosures

(a) General Rule (a)(3) Fees Imposed 2. Itemizing fees by type. In itemizing fees imposed more than once in the period, institutions may group fees if they are the same type. (See § 230.11(a)(1) of this part regarding certain fees that are required to be grouped.)

Section 230.11 Additional Disclosures Regarding the Payment of Overdrafts

(a) Disclosure of total fees on periodic statements (a)(1) General 2. Fees for paying overdrafts. Institutions must disclose on periodic statements a total dollar amount for all fees or charges imposed on the account for paying overdrafts. The institution must disclose separate totals for the statement period and for the calendar year-to-date. The total dollar amount for each of these periods includes per-item fees as well as interest charges, daily or other periodic fees, or fees charged for maintaining an account in overdraft status, whether the overdraft is by check, debit card transaction, or by any other transaction type. It also includes fees charged when there are insufficient funds because previously deposited funds are subject to a hold or are uncollected. It does not include fees for transferring funds from another account of the consumer to avoid an overdraft, or fees charged under a service subject to the Board's Regulation Z (12 CFR part 226). See also comment 11(c)-2. Under § 230.11(a)(1)(i), the disclosure must describe the total dollar amount for all fees or charges imposed on the account for the statement period and calendar year-to-date for paying overdrafts using the term "Total Overdraft Fees." This requirement applies notwithstanding comment 3(a)-2.

(c) Disclosure of account balances

2. Retail sweep programs. In a retail sweep program, an institution establishes two legally distinct subaccounts, a transaction subaccount and a savings subaccount, which together make up the consumer's account. The institution allocates and transfers funds between the two subaccounts in order to maximize the balance in the savings account while complying with the monthly limitations on transfers out of savings accounts under the Board's Regulation D, 12 CFR 204.2(d)(2). Retail sweep programs are generally not established for the purpose of covering overdrafts. Rather, institutions typically establish retail sweep programs by agreement with the consumer, in order for the institution to minimize its transaction account reserve requirements and, in some cases, to provide a higher interest rate than the consumer would earn on a transaction

account alone. Section 230.11(c) does not require an institution to exclude from the consumer's balance funds that may be transferred from another account pursuant to a retail sweep program that is established for such purposes and that has the following characteristics:

- i. The account involved complies with the Board's Regulation D, 12 CFR 204.2(d)(2),
ii. The consumer does not have direct access to the non-transaction subaccount that is part of the retail sweep program, and
iii. The consumer's periodic statements show the account balance as the combined balance in the subaccounts.

3. Additional balance. The institution may disclose additional balances supplemented by funds that may be provided by the institution to cover an overdraft, whether pursuant to a discretionary overdraft service, a service subject to the Board's Regulation Z (12 CFR part 226), or a service that transfers funds from another account held individually or jointly by the consumer, so long as the institution prominently states that any additional balance includes these additional overdraft amounts. The institution may not simply state, for instance, that the second balance is the consumer's "available balance," or contains "available funds." Rather, the institution should provide enough information to convey that the second balance includes these amounts. For example, the institution may state that the balance includes "overdraft funds." Where a consumer has not opted into, or as applicable, has opted out of the institution's discretionary overdraft service, any additional balance disclosed should not include funds that otherwise might be available under that service. Where a consumer has not opted into, or as applicable, has opted out of, the institution's discretionary overdraft service for some, but not all transactions (e.g., the consumer has not opted into overdraft services for ATM and one-time debit card transactions), an institution that includes these additional overdraft funds in the second balance should convey that the overdraft funds are not available for all transactions. For example, the institution could state that overdraft funds are not available for ATM and one-time (or everyday) debit card transactions. Similarly, if funds are not available for all transactions pursuant to a service subject to the Board's Regulation Z (12 CFR part 226) or a service that transfers funds from another account, a second balance that includes such funds should also indicate this fact.

By order of the Board of Governors of the Federal Reserve System, May 27, 2010.

Jennifer J. Johnson, Secretary of the Board.

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