

billing cycle. If it charges \$125 during the first billing cycle, it may then charge no more than \$25 in each of the next five billing cycles. If it chooses, the federal credit union may spread the additional security deposits and fees over a longer period, such as by charging \$12.50 in each of the ten billing cycles following the first billing cycle.

ii. Same facts as above except that on July 1 the federal credit union increases the credit limit on the account from \$500 to \$750. Because the prohibition in § 706.26(a) is based on the initial credit limit of \$500, the increase in credit limit does not permit the federal credit union to charge to the account additional security deposits and fees for the issuance or availability of credit, such as a fee for increasing the credit limit.

26(c) Evasion Prohibited

1. *Evasion.* Section 706.26(c) prohibits a federal credit union from evading the requirements of this section by providing the consumer with additional credit to fund the consumer's payment of security deposits and fees that exceed the total amounts permitted by § 706.26(a) and (b). For example, assume that on January 1 a consumer opens a consumer credit card account with an initial credit limit of \$400 and the federal credit union charges to that account \$100 in fees for the issuance or availability of credit. Assume also that the billing cycles for the account coincide with the days of the month and that the federal credit union will charge \$20 in fees for the issuance or availability of credit in the February, March, April, May, and June billing cycles. The federal credit union violates § 706.26(c) if it provides the consumer with a separate credit product to fund additional security deposits or fees for the issuance or availability of credit.

2. *Payment with funds not obtained from the federal credit union.* A federal credit union does not violate § 706.26(c) if it requires the consumer to pay security deposits or fees for the issuance or availability of credit using funds that are not obtained, directly or indirectly, from the federal credit union. For example, a federal credit union does not violate § 706.26(c) if a \$400 security deposit paid by a consumer to obtain a consumer credit card account with a credit line of \$400 is not charged to a credit account provided by the federal credit union or its affiliate.

26(d) Definitions

1. *Membership fees.* Membership fees for opening an account are fees for the issuance or availability of credit. A membership fee to join an organization that provides a credit or charge card as a privilege of membership is a fee for the issuance or availability of credit only if the card is issued automatically upon membership. If membership results merely in eligibility to apply for an account, then such a fee is not a fee for the issuance or availability of credit.

2. *Enhancements.* Fees for optional services in addition to basic membership privileges in a credit or charge card account, for example, travel insurance or card-registration services, are not fees for the issuance or availability of credit if the basic account may be opened without paying such fees. Issuing a card to each primary

cardholder, not authorized users, is considered a basic membership privilege and fees for additional cards, beyond the first card on the account, are fees for the issuance or availability of credit. Thus, a fee to obtain an additional card on the account beyond the first card, so that each cardholder would have his or her own card, is a fee for the issuance or availability of credit even if the fee is optional; that is, if the fee is charged only if the cardholder requests one or more additional cards.

3. *One-time fees.* Non-periodic fees related to opening an account, such as application fees or one-time membership or participation fees, are fees for the issuance or availability of credit. Fees for reissuing a lost or stolen card, statement reproduction fees, and fees for late payment or other violations of the account terms are examples of fees that are not fees for the issuance or availability of credit.

By order of the Board of Governors of the Federal Reserve System, December 18, 2008.

Jennifer J. Johnson,

Secretary of the Board.

Dated: December 16, 2008.

By the Office of Thrift Supervision,

John M. Reich,

Director.

By the National Credit Union Administration Board, on December 18, 2008.

Mary F. Rupp,

Secretary of the Board.

[FR Doc. E8-31186 Filed 1-28-09; 8:45 am]

BILLING CODE 6720-01-P; 6720-01-P; 7535-01-P

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; official staff commentary.

SUMMARY: The Federal Reserve Board (Board) is amending Regulation DD, which implements the Truth in Savings Act, and the official staff commentary to the regulation to require all depository institutions to disclose aggregate overdraft fees on periodic statements, and not solely institutions that promote the payment of overdrafts. The final rule also addresses balance disclosures provided to consumers through automated systems. In addition, the Board is separately issuing a proposed rulemaking, published in today's **Federal Register**, to incorporate the notice requirements into Regulation E that were previously proposed under Regulation DD.

DATES: *Effective Date:* The rule is effective January 1, 2010.

FOR FURTHER INFORMATION CONTACT:

Dana E. Miller, Attorney, or Ky Tran-Trong, Counsel, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, Washington, DC 20551, at (202) 452-3667. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263-4869.

SUPPLEMENTARY INFORMATION:

I. The Truth in Savings Act

The Truth in Savings Act (TISA), 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 (NCUA).

The Board's authority under section 269(a) of TISA provides that its regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of accounts as, in the judgment of the Board, are necessary or proper to carry out the purposes of TISA, to prevent circumvention or evasion of the requirements of TISA, or to facilitate compliance with the requirements of TISA. 12 U.S.C. 4308. It is the purpose of TISA to require the clear and uniform disclosure of the fees that are assessable against deposit accounts, so that consumers can make a meaningful comparison between the competing claims of depository institutions with regard to deposit accounts. 12 U.S.C. 4301.

In addition, under TISA and Regulation DD, account disclosures must be provided upon a consumer's request and before an account is opened. Institutions are not required to provide periodic statements; but if they do, the act requires that fees, yields, and other information be provided on the statements.

TISA and Regulation DD contain rules for advertising deposit accounts. TISA and Regulation DD prohibit inaccurate or misleading advertisements, announcements, or solicitations, or those that misrepresent the deposit contract. TISA and Regulation DD also prohibit institutions from advertising an

account as free (or using words of similar meaning) if a regular service or transaction fee is imposed, if a minimum balance must be maintained, or if a fee is imposed when a customer exceeds a specified number of transactions.

II. Background on Overdraft Services and Regulatory Action to Date

Historically, if a consumer attempted to engage in a transaction that would overdraw his or her deposit account, the consumer's depository institution used its discretion on an ad hoc basis to determine whether to pay the overdraft. If an overdraft was paid, the institution usually imposed a fee on the consumer's account.¹ In recent years, many institutions have largely automated the overdraft payment process. Automation is used to set specific criteria for determining whether to honor overdrafts and set limits on the amount of the coverage provided.

Overdraft services vary among institutions but often share certain common characteristics. In general, consumers who meet the institution's criteria are automatically enrolled in overdraft services.² While institutions generally do not initially underwrite on an individual account basis when enrolling a consumer in the service, most institutions will review individual accounts periodically to determine whether the consumer continues to qualify for the service, and the amounts that may be covered. Most institutions disclose to consumers that the payment of overdrafts is discretionary, and that the institution has no legal obligation to pay any overdraft.

In the past, institutions generally provided overdraft coverage only for check transactions.³ In recent years,

however, the service has been extended to cover overdrafts resulting from non-check transactions, including withdrawals at automated teller machines (ATMs), automated clearinghouse transactions, debit card transactions at point-of-sale, pre-authorized automatic debits from a consumer's account, telephone-initiated funds transfers, and online banking transactions.⁴

A flat fee is charged each time an overdraft is paid, regardless of the amount of the overdraft. Institutions commonly charge the same amount for paying the overdraft as they would if they returned the item unpaid. A daily fee also may apply for each day the account remains overdrawn.

The Board, Federal Deposit Insurance Corporation (FDIC), NCUA and Office of the Comptroller of the Currency published guidance on overdraft protection programs in February 2005 (Joint Guidance) in response to concerns about aspects of the growing marketing, disclosure, and implementation of overdraft services. The Joint Guidance addressed three primary areas—safety and soundness considerations, legal risks, and best practices. The Office of Thrift Supervision (OTS) published similar guidance which focused on safety and soundness considerations and best practices (OTS Guidance). The best practices described in the Joint Guidance and the OTS Guidance focused on the marketing of overdraft services and the disclosure and operation of program features, including distinguishing actual available account balances from account balances that include overdraft protection amounts.

In May 2005, the Board separately published revisions to Regulation DD and the official staff commentary to address concerns about the uniformity and adequacy of institutions' disclosure of overdraft fees generally, and the advertisement of overdraft services in particular. 70 FR 29582, May 24, 2005.⁵ Under the May 2005 final rule, which became effective July 1, 2006, all depository institutions were required to

specify in their account disclosures the categories of transactions for which an overdraft fee may be imposed.

Depository institutions that promote the payment of overdrafts in an advertisement were required to include in such advertisements certain information about the costs associated with the service and the circumstances under which the institution would not pay an overdraft. These institutions were also required to disclose separately on their periodic statements the total amount of fees or charges imposed on the account for paying overdrafts and the total amount of fees charged for returning items unpaid. These disclosures were required to be provided for the statement period and for the calendar year-to-date.

III. The Board's Proposed Revisions to Regulation DD

In May 2008, the Board issued two proposals relating to overdraft services. These proposals were intended to address concerns that consumers may not adequately understand the costs of overdraft services or how overdraft services operate generally. The Board, along with the OTS and the NCUA, proposed to adopt substantive protections using their authority under the Federal Trade Commission Act (FTC Act).⁶ The Board also separately proposed to add a new Subpart D on overdraft services to the Board's Regulation AA, Unfair or Deceptive Acts or Practices (FTC Act Proposal) (12 CFR part 227). Among other provisions, the proposed rules would require institutions to provide consumers the right to opt out of their institutions' payment of overdrafts.

Pursuant to its authority under sections 263, 264, 268 and 269(a) of TISA,⁷ the Board also proposed new disclosure requirements under Regulation DD to facilitate consumers' ability to make informed judgments about the use of their accounts.⁸ The proposed revisions to Regulation DD addressed three types of overdraft disclosures. First, the Board proposed to revise § 230.10 to establish format, content, and timing requirements for the notices given to consumers by their depository institution informing them about their right to opt out of their

¹ The Board recognized this longstanding practice when it initially adopted Regulation Z in 1969 to implement the Truth in Lending Act (TILA). The regulation provided that these transactions are generally not covered under Regulation Z where there is no written agreement between the consumer and institution to pay an overdraft and impose a fee. See 12 CFR 226.4(c)(3). The treatment of overdrafts in Regulation Z was designed to facilitate depository institutions' ability to accommodate consumer's transactions on any ad hoc basis.

² These criteria may include whether the account has been open a certain number of days, whether the account is in "good standing," and whether deposits are regularly made to the account.

³ According to the FDIC's Study of Bank Overdraft Programs, nearly 70 percent of banks surveyed implemented their automated overdraft program after 2001. In addition, 81 percent of banks surveyed that operate automated programs allow overdrafts to be paid at ATMs and POS debit card terminals. See FDIC Study of Bank Overdraft Programs 8, 10 (November 2008) (available at: http://www.fdic.gov/bank/analytical/overdraft/FDIC138_Report_FinalTOC.pdf) (FDIC Study). See also *Overdraft Protection: Fair Practices for*

*Consumers: Hearing before the House Subcomm. on Financial Institutions and Consumer Credit, House Comm. on Financial Services 110th Cong., at 72 (2007) (hereinafter, *Overdraft Protection Hearing*) (available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/hr0705072.shtml) (stating that as recently as 2004, 80 percent of banks still declined ATM and debit card transactions without charging a fee when account holders did not have sufficient funds in their account).*

⁴ See Interagency Guidance on Overdraft Protection Programs, 70 FR 9127, Feb. 24, 2005, and OTS Guidance on Overdraft Protection Programs, 70 FR 8428, Feb. 18, 2005.

⁵ A substantively similar rule applying to credit unions was issued separately by the NCUA. 71 FR 24568, Apr. 26, 2006.

⁶ 73 FR 28904, May 19, 2008. For simplicity, this notice will refer only to the Board's proposal.

⁷ 12 U.S.C. 4302(e), 4303(b) & (d), 4307, 4308(a). While the NCUA did not separately propose amendments to its 12 CFR part 707 in May 2008, TISA requires the NCUA to promulgate regulations substantially similar to Regulation DD. Accordingly, the NCUA anticipates issuing proposed amendments to part 707 shortly after the Board's adoption of final rules under Regulation DD.

⁸ 73 FR 28739, May 19, 2008.

institution's overdraft service. The proposal included a model opt-out form. Second, the Board proposed to extend to all institutions the requirement to disclose on periodic statements the aggregate dollar amounts charged for overdraft fees and for returned-item fees (for the statement period and the year-to-date). Currently, Regulation DD requires that only institutions that promote or advertise the payment of overdrafts must disclose aggregate amounts. Third, the Board proposed to require institutions that provide account balance information through an automated system to disclose the amount of funds available for the consumer's immediate use or withdrawal, without including additional funds the institution may provide to cover overdrafts. Under the proposal, institutions would be permitted to disclose a second account balance that includes funds available for paying overdrafts, provided the institution prominently discloses at the same time that this balance includes additional funds provided by the institution to cover overdrafts.

Overview of Public Comments

The Board received over 600 comments on the Regulation DD proposal. Additionally, a number of comments submitted in connection with the FTC Act Proposal contained comments on the Regulation DD proposal. Commenters included individual consumers, consumer advocates, federal and state regulators and officials, large financial institutions, credit unions, community banks, industry trade associations, members of Congress, core systems providers, and vendors of overdraft services.

Most commenters focused on the proposed model opt-out form.⁹ Consumer groups supported the proposed model form for notifying consumers of their right to opt out of overdraft services, but urged the Board to enhance the model form in various ways, including making the opt-out right more prominent. Most industry commenters stated that the proposed model form was unduly biased towards encouraging consumers to opt out and did not sufficiently explain that payment of overdrafts is discretionary. These commenters maintained that the

model form could mislead consumers into believing that overdrafts will be paid in all cases.

Consumers and consumer groups supported extending the aggregate overdraft fee disclosures on periodic statements to all financial institutions. These commenters maintained that streamlined disclosures will ensure that consumers fully understand the consequences of overdrawing their account. However, most industry commenters objected to extending the aggregate fee disclosures to all institutions, stating the burden would outweigh the limited benefits of the disclosure.

Consumer groups also supported the proposed requirement that institutions disclose account balance information without including any overdraft funds provided by the institution. Consumer groups urged the Board to apply the same requirement to balance information provided in person, by telephone or e-mail, or in Internet "chats" with bank personnel. Some consumer groups argued that institutions also should be prohibited from disclosing a second balance that includes these overdraft funds because it could mislead consumers. Industry response to the balance disclosure proposal was mixed; of those commenters that supported the proposal, some argued that it should only apply to proprietary ATMs. Other industry commenters requested the rule be revised to clarify what funds must be excluded from the balance (and from any second balance that might be disclosed).

Subsequent to the issuance of the Regulation DD proposal, the Board used a testing consultant, Macro International, Inc. (Macro), to conduct qualitative consumer testing to assess consumer understanding of the model form. Macro also conducted qualitative consumer testing of various model opt-out language and aggregate fee tables. Except where relevant to this final rule, the testing results are discussed in the final FTC Act rule and the Board's Regulation E proposal, where appropriate. These rulemakings are published elsewhere in today's **Federal Register**.

IV. Summary of the Final Rule

The following is a summary of the significant revisions to the regulation and the official staff commentary. The revisions are discussed in more detail below in the section-by-section analysis.

The Board is adopting final revisions to Regulation DD and the official staff commentary to expand the requirement to disclose overdraft fees on periodic

statements to apply to all institutions, and not solely to institutions that promote the payment of overdrafts. The final rule adds format requirements to help make the aggregate fee disclosures more effective and noticeable to consumers.

In addition, the final rule requires an account balance disclosed to a consumer through any automated system (including, but not limited to, an ATM, Internet Web site, or telephone response system) to exclude additional amounts that the institution may provide or that may be transferred from another account of the consumer to cover an item where there are insufficient or unavailable funds in the consumer's account. The rule is designed to ensure that consumers are not confused or misled about the available amount of funds in their account when they request their account balance. The final rule permits the institution to disclose an additional balance that includes funds provided pursuant to a discretionary overdraft service or a line of credit, or funds that could be transferred from a consumer's linked individual or joint account, so long as the institution prominently states that the balance includes these additional amounts.

Based on the Board's review of comments received and consumer testing results, the Board believes it is appropriate to place opt-out requirements under the Board's authority under the Electronic Fund Transfer Act and Regulation E.¹⁰ Thus, a revised substantive opt-out is set forth in a proposal under Regulation E. The Regulation E proposal also proposes, in the alternative, to require institutions to provide customers an opt-in to payment of overdrafts for ATM and debit transactions, and includes a proposed model opt-in notice. The Regulation E proposal would also incorporate the content and timing requirements for consumer opt-out (and opt-in) notices. The new proposed model forms have been modified to conform to the revised substantive opt-out right, and reflect consumer testing results and commenter suggestions.

⁹Comments that addressed the merits of the substantive opt-out right were provided in response to the May 2008 FTC Act Proposal. Many industry commenters argued that the substantive opt-out right should be addressed under Regulation E. These commenters argued that consumers prefer to have their checks paid and an overdraft fee assessed rather than face possible negative consequences resulting from a bounced check.

¹⁰These comments and the testing results are more fully discussed in the final FTC Act rule and the Board's Regulation E proposal published elsewhere in today's **Federal Register**, where appropriate.

V. Section-by-Section Analysis

Section 230.11 Additional Disclosure Requirements Regarding Overdraft Services

11(a) Disclosure of Total Fees on Periodic Statements

Applicability of Aggregate Fee Disclosures

Although periodic statements are not required under TISA, institutions that provide such statements are required to disclose fees or charges imposed on the account during the statement period. See 12 U.S.C. 4307(3) and 12 CFR 230.6(a)(3). Further, § 230.11(a) of Regulation DD requires institutions that promote the payment of overdrafts in an advertisement to provide on periodic statements the aggregate dollar amount totals for overdraft fees and for returned item fees, both for the statement period as well as for the calendar year-to-date. Pursuant to its authority under Sections 268 and 269 of TISA, the Board proposed to expand § 230.11(a) to require all institutions, regardless of whether they promote the payment of overdrafts, to disclose the aggregate fee information. The revision was intended to provide all consumers that use discretionary overdraft services, consistent with the purposes of TISA, with additional information about fees to help them better understand the costs associated with their accounts. The proposed rule also added format requirements to help make the aggregate fee disclosures more effective and noticeable to consumers. The final rule generally adopts the proposal, with certain clarifications to reflect the expanded scope of the rule. The final rule deletes as unnecessary certain of the examples in existing § 230.11(a)(2) of communications that would not trigger the aggregate fee disclosure requirement. As under the current rule, institutions must provide these totals for both the statement period and the calendar year-to-date. See § 230.11(a)(2). In addition, the Board is adopting, generally as proposed, commentary clarifying that the aggregate fee total 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 comment 11(a)(1)–2.

Consumers and consumer groups supported extending the aggregate overdraft fee disclosures on periodic statements to all financial institutions because, in their view, most institutions systematically cover overdrafts whether they promote the service or not.

These commenters asserted that consistent disclosures will ensure that consumers fully understand the consequences of overdrawing their account. These commenters stated that the aggregate fee disclosures would help consumers to better manage their bank accounts and to understand the total costs they have incurred over time. In addition, these commenters believed that the aggregate disclosures may encourage consumers to explore other potentially lower-cost alternatives that may be available to them.

In contrast, most industry commenters objected to extending the aggregate fee disclosures to all institutions. These commenters stated that revisions to periodic statements would be costly and would require extensive and time-consuming programming changes. Industry commenters also argued that the burden would outweigh the limited benefits of the disclosure; some argued that aggregate fee information would benefit only a limited number of consumers who incur substantial fees.

The final rule is intended to provide all consumers who use discretionary overdraft services with additional information to help them better understand the overdraft and NSF (returned item) costs associated with their accounts. The aggregate fee disclosures will benefit those consumers who overdraw their accounts with some frequency but who do not currently receive aggregate fee disclosures because their institution does not promote its overdraft service.

In addition, the Board believes the final rule will promote greater transparency about the terms and costs of overdraft services for all institutions. Under the current rule, institutions that do not promote their overdraft service may be reluctant to provide information about the service out of concern that such disclosures might trigger the aggregate fee disclosure requirements. The Board also believes the rule will create consistency in disclosures and will eliminate compliance challenges inherent in a regulatory scheme based on a “promoting” or “marketing” distinction.

Several industry commenters argued that overdraft fees are already disclosed in the deposit agreement or fee schedule, and questioned why these types of fees deserve special attention on the statement compared to other types of account fees. Others argued that consumers already receive itemized fees on their periodic statements. Some industry commenters argued that the emphasis on overdraft and returned

item fees would detract from other account charges.

The Board believes this requirement is appropriate because overdraft and returned item fees are not as predictable as many other types of account fees. Consumers cannot always know when settlement on any one item will occur (particularly relative to other transactions, where an institution processes items using different methods). Also, balance inquiries may not always contain real-time balance information; therefore, consumers may not realize that one overdrawn item could trigger overdrafts on other transactions, and thus may not be able to predict the total fees that will be charged for any one overdraft occurrence. When there are multiple overdrafts, fee amounts may be significant, even though each item may represent a relatively small dollar amount.¹¹ In addition, a small segment of consumers incur the majority of overdraft fees.¹² The aggregate fee disclosures will benefit these consumers by showing them the total expenditures on overdraft fees for the statement period and year, which may encourage them to explore alternatives that might be less costly.

A few industry commenters requested that, in lieu of a year-to-date fee total, the Board permit a rolling twelve-statement-cycle total, because the latter would be more useful for consumers. However, consumer testing on both credit card and overdraft disclosures indicated that consumers noticed year-to-date cost figures, and that they would find the numbers helpful in making financial decisions. The Board further

¹¹ Eric Halperin, Lisa James & Peter Smith, *Debit Card Danger*, Ctr. For Responsible Lending at 25 (consumers pay \$1.94 in fees for every one dollar borrowed to cover a debit card POS overdraft). The FDIC's Study of Bank Overdraft Programs found that the median overdraft amount for debit card overdrafts was \$20, and the median overdraft amount for ATM transactions was \$60. FDIC Study of Bank Overdraft Programs 79 (Nov. 2008), available at: http://www.fdic.gov/bank/analytical/overdraft/FDIC138_Report_FinalTOC.pdf. Overdraft fees have increased significantly over the last decade. See Federal Reserve Bulletin, *Retail Fees of Depository Institutions, 1997–2001*, 405, 409, available at: <http://www.federalreserve.gov/pubs/bulletin/2002/0902lead.pdf> (average overdraft fee in 1997: \$16.51); Bankrate, *2007 Courtesy Overdraft Study*, available at: http://www.bankrate.com/bnm/news/chk/20071219_overdraft_survey_main_a1.asp (average overdraft fee in 2007: \$29). See also Bank Fees: Federal Banking Regulators Could Better Ensure that Consumers Have Required Disclosure Documents Prior to Opening Checking or Savings Accounts, GAO Report 08–281 (January 2008) (11% increase from 2000 to 2007, according to one estimate).

¹² See, e.g., Jacqueline Duby, Eric Halperin & Lisa James, *High Cost and Hidden From View: The \$10 Billion Overdraft Loan Market*, Ctr. For Responsible Lending (May 26, 2005).

notes that some consumers are already receiving year-to-date totals from institutions currently subject to the rule; thus, requiring year-to-date disclosures for all institutions will promote consistency of disclosure across institutions. The Board is also adopting, elsewhere in today's **Federal Register**, requirements to disclose year-to-date interest charges and fees under Regulation Z. Consistency among the various consumer disclosure regulations should facilitate consumer understanding of disclosures. Thus, the final rule requires totals for both the statement period and the calendar year-to-date. *See* § 230.11(a)(2).

Several industry commenters asked whether an institution must provide an aggregate fee disclosure if the consumer has not been charged an overdraft or returned item fee for the year-to-date. Section 230.11(a)(1) states that a depository institution must separately make the fee disclosures on each periodic statement, *as applicable* (emphasis added). Thus, if a consumer has not incurred fees since the beginning of the year (or statement period), the institution is not required to provide a "\$0" aggregate total for the year-to-date (or statement period). However, institutions may, at their option, provide aggregate fee disclosures even if a consumer has not been charged fees since the beginning of the year or for a particular statement period.

Because the final rule expands the applicability of the aggregate fee disclosures to all financial institutions, certain existing staff comments addressing institutions that promote overdraft services require modification or are no longer applicable. Thus, comment 11(a)(3)–1 has been revised, and comment 11(a)(5)–1 has been deleted.

Format of Aggregate Fee Disclosures

Pursuant to the Board's authority under TISA Section 269, the final rule also adds proximity and format requirements which are intended to enhance the effectiveness of the disclosures and to make them more noticeable to consumers. Board staff reviewed current periodic statement disclosures for institutions that promote overdraft services. This review indicated that the aggregate fee totals are often disclosed in a manner that may not be effective in informing consumers of the totals.¹³ Accordingly, proposed § 230.11(a)(3) stated that aggregate fee

disclosures must be provided in close proximity to the fees identified under § 230.6(a)(3). For example, the aggregate fee totals could appear immediately after the transaction history on the periodic statement reflecting the fees that have been imposed on the account during the statement period. The proposed rule also provided that the information must be presented in a tabular format similar to the proposed interest charge and total fees disclosures under the Board's June 2007 proposal under Regulation Z. *See* 72 FR at 32996, 33052. The proposal requested comment on two alternatives of Sample Form B–11, which illustrates how institutions should provide the aggregate cost information on their periodic statements.

Consumer groups supported the proposed proximity and formatting requirements. These commenters maintained that the requirement to place the aggregate fee disclosures in close proximity to the transaction history would better enable consumers to understand how their current account activity may have contributed to a history of overdrafts. They also supported the proposed tabular format.

Industry commenters, however, objected to the proximity and fee table requirement. They argued that it would require extensive, costly systems changes to provide a fee table in close proximity to the transaction history. Some industry commenters also argued that a proximity requirement is subjective and subject to litigation risk.

As described above, Board staff's review of current periodic statement disclosures for institutions that promote overdraft services showed that in some cases, fee tables were not placed in a location noticeable to consumers. Thus, the Board believes that uniform proximity requirements are necessary to enable consumers to easily find fee information so that, consistent with the purposes of TISA, they better understand the costs of using the service. The proposed proximity and format requirements were informed by the Board's consumer testing undertaken in the context of credit card disclosure requirements under Regulation Z. In that testing, consumers reviewing transactions identified on their periodic statements consistently noticed totals for fees and interest charges when they were grouped together with transactions. *See* 72 FR at 32996. Additional consumer testing was conducted subsequent to the May 2008 proposal on overdraft fee disclosures and confirmed that aggregate cost disclosures for overdraft and returned item fees were more noticeable to

consumers when grouped together with the itemized fees.¹⁴ Further, the testing indicated that consumers tend to notice fee disclosures when expressed in tabular form. Consumer testing on the two proposed tabular format alternatives demonstrated that the first alternative, a clear graphic disclosure, was the preferred alternative. Consumers found it easiest to identify and digest the relevant fees in a column and row format. Thus, the Board is adopting the first proposed alternative, renumbered as Sample Form B–10, to illustrate how an institution should provide the aggregate cost data. Aggregate fee disclosures must be provided using a format substantially similar to Sample Form B–10. *See* § 230.11(a)(3).

Despite their general support of the aggregate fee disclosures, consumer groups nonetheless urged the Board to find that overdraft services are credit under Regulation Z so that consumers would be provided disclosures containing an effective APR figure. The Board believes that requiring an effective APR is not necessary to alert consumers to the costs of the service. Moreover, the Board believes the proposed aggregate fee table will be of more value than an effective APR in the overdraft context. Consumer testing in the credit card context showed that consumers preferred seeing costs reflected as amount totals rather than expressed as an effective APR.¹⁵

Several industry commenters requested that the Board permit some flexibility in the language used in the aggregate fee table for the total returned item fees, because their customers are more familiar with language such as "NSF fee" rather than "returned item fee." The Board has revised comment 11(a)(1)–3 to clarify that institutions may use terminology such as "returned item fee" or "NSF fee" to describe the fees for returning items unpaid.

Several industry commenters also requested clarification on how to display fees that have been refunded. Comment 11(a)(1)–6, which has been redesignated as comment 11(a)(1)–4 in the final rule, addresses this issue where an institution provides a statement for the current period reflecting that fees imposed during a previous period were waived and credited to the account. This comment provides that, in these circumstances, institutions may, but are not required to, reflect the adjustment in the total for the calendar year-to-date

¹⁴ *See Review and Testing of Overdraft Notices*, Macro International, December 8, 2008.

¹⁵ For this reason, the Board is revising Regulation Z to replace the disclosure of the effective APR with a tabular disclosure of the proposed interest charge and total fees.

¹³ For example, several statements contained inconsistent formatting, or fee totals were included at the end of the statement and not highlighted in a manner noticeable to consumers.

and in the applicable statement period. For example, if an institution assesses a fee in January and refunds the fee in February, the institution could disclose a year-to-date total reflecting the amount credited, but it should not affect the total disclosed for the February statement period, because the fee was not assessed in the February statement period. However, because some institutions may assess and then waive and credit a fee within the same statement cycle, the comment has been revised to clarify that, in such a case, the institution may reflect the adjustment in the total disclosed for fees imposed during the current statement period and for the total for the calendar year-to-date. In this case, if the institution assesses and waives the fee in February, the February fee total could reflect a total net of the waived fee.

11(b) Advertising Disclosures for Overdraft Services

Section 230.11(b)(2) lists the types of communications about the payment of overdrafts that are not subject to additional advertising disclosures under § 230.11(b)(1). The final rule expands the list in § 230.11(b)(2) to include an opt-out or opt-in notice regarding the institution's payment of overdrafts or provision of discretionary overdraft services. *See* § 230.11(b)(2)(xii).

11(c) Disclosure of Account Balances

Section 230.11(b)(1) currently requires institutions that promote the payment of overdrafts to include certain disclosures in their advertisements about the service to avoid confusion between overdraft services and traditional lines of credit. The May 2005 final rule provided examples of institutions promoting the payment of overdrafts in the staff commentary.¹⁶ In particular, the commentary stated that an institution must include the additional advertising disclosures if it "discloses an overdraft limit or includes the dollar amount of an overdraft limit in a balance disclosed on an automated system, such as a telephone response machine, ATM screen or the institution's Internet site."¹⁷ To facilitate responsible use of overdraft services and ensure that consumers receive accurate information about their account balances, the May 2008 Regulation DD Proposal would have prohibited institutions from including funds the institution may provide to cover an overdraft item in a consumer's account balance disclosed through any automated system in response to a

balance inquiry. The proposal would have permitted an institution to disclose a second balance that includes these additional funds, if the institution prominently indicates these funds are included. The rule as adopted has been revised to clarify that the balance disclosed may not include any funds the institution may provide to cover an overdraft, funds that will be paid by the institution under a service subject to the Board's Regulation Z (12 CFR part 226), or funds transferred from another account of the consumer. The final rule permits an institution to disclose another balance that includes these additional funds, so long as the institution prominently states that the balance includes such funds.

Industry response to the proposal was mixed. Some supported the rule as proposed; for example, one national community bank trade association stated that a common consumer complaint has been misunderstanding whether an account has sufficient funds to cover a transaction. This commenter believed that requiring the bank to disclose the available balance would help avoid customer confusion. Others argued for limiting the scope of coverage to balances provided at proprietary ATMs; some opposed the rule altogether as too burdensome. Some commenters requested that the rule be revised to clarify what funds must be excluded from the balance.

Consumer groups supported the proposed rule as a significant protection for consumers. These commenters argued that disclosing a balance without overdraft funds provided by the institution would equip consumers with the knowledge necessary to make informed financial decisions. However, these commenters urged the Board to apply the same requirement to balance information provided during communications with bank personnel. Some consumer groups also urged the Board to prohibit financial institutions from disclosing a second account balance.

The Board is adopting a revised rule, pursuant to its authority in TISA section 263(e) to prohibit misleading or inaccurate advertisements, announcements, or solicitations relating to a deposit account. Under § 230.11(c) of the final rule, if an institution discloses balance information through an automated system, it must disclose an account balance that excludes funds that the institution may provide to cover an overdraft in its discretion, funds that will be paid by the institution under a service subject to the Board's Regulation Z (12 CFR part 226), or funds transferred from another account of the consumer.

For example, although an institution may add a \$500 cushion to the consumer's account balance when determining whether to pay an overdrawn item, under the final rule, the additional \$500 could not be included in the balance provided to the consumer through an automated system.

The proposed rule covered account balances disclosed in response to a consumer's inquiry. However, balances may also be disclosed to the consumer even if the consumer has not specifically requested a balance. For example, if a consumer withdraws funds at an ATM from his or her checking account, the receipt for that transaction may also include the consumer's account balance. Or, a consumer may receive an account balance when requesting a transaction history online. The Board believes the requirement to provide a balance not supplemented by overdraft funds should apply equally in these circumstances to ensure consumers are given an accurate account balance. Thus, the final rule deletes the reference to the consumer's inquiry.

Funds Included In and Excluded From Balance

Several industry commenters argued that the reference in proposed § 230.11(c) to "funds that are available for the consumer's immediate use or withdrawal" is superfluous and adds unnecessary complexity to the rule. They contended that this language could lead to litigation over what is actually "available." Some commenters suggested that, to provide greater certainty, the rule should focus on the funds that must be excluded from the balance, rather than on the funds that should be included. The proposed language was intended to provide clarity that institutions should not provide a balance including overdraft funds, so that a consumer receives an accurate disclosure of his or her balance to help the consumer better manage his or her account. The rule was not intended to define what funds are available pursuant to Regulation CC. Accordingly, to avoid any ambiguity, § 230.11(c) has been revised to delete the language "funds that are available for the consumer's immediate use or withdrawal." As discussed below, the final rule does not require disclosures of real-time balances nor otherwise affect what funds an institution considers to be available.

Several other industry commenters requested clarification as to whether institutions may include in the balance disclosure amounts available under a consumer's overdraft line of credit with

¹⁶ *See* comment 11(b)-1.

¹⁷ Comment 11(b)-1.iii.

the institution, and how to treat funds from a linked account (such as a savings account). As described above, the rule was intended to give consumers an accurate idea of their balance. The Board is concerned that permitting a balance to include funds available under a consumer's overdraft line of credit or through a transfer from a consumer's savings or other linked account would cause consumer confusion—comparable to the inclusion of an overdraft cushion—as to the amount a consumer may withdraw or spend without incurring an overdraft. Thus, § 230.11(c) has been revised to clarify that an institution must disclose a balance that does not include additional amounts that the institution may provide in its discretion to cover an overdraft, funds that will be paid by the institution under a service subject to the Board's Regulation Z (12 CFR part 226), or funds transferred from another account of the consumer.

Proposed comment 11(c)–1 clarified that the institution may, but need not, include in the balance funds that are deposited in the consumer's account, such as from a check, but that are not yet made available for withdrawal in accordance with the funds availability rules under the Board's Regulation CC (12 CFR part 229). Similarly, the comment stated that the balance may, but need not, include any funds that are held by the bank to satisfy a prior obligation of the consumer (for example, to cover a hold for an ATM or debit card transaction that has been authorized but for which the bank has not settled). The comment is generally adopted as proposed.

Some consumer groups argued that the disclosed account balance should not be permitted to reflect deposits not yet available under the institution's funds availability policy, or debit card holds. They argued that inclusion of such funds misstates the balance and can cause consumers to incur overdraft fees. In contrast, industry commenters supported proposed comment 11(c)–1 based on operational concerns. These commenters agreed that the methods used by depository institutions for determining the balances that are available for the consumer's use or withdrawal may vary significantly by institution. Industry commenters also agreed that the disclosed balance should be able to include funds that have been deposited but not yet cleared.

Proposed comment 11(c)–1 reflected the Board's intent not to require institutions to reconfigure their internal systems to provide "real-time" balance disclosures in order to comply with the balance disclosure provision. For

example, some institutions may only be able to provide a balance to the ATM network that reflects the ledger balance for the consumer's account at the end of the previous day after the institution has completed its processing activities. Section 230.11(c) does not require institutions to provide a "real-time" balance, but only prohibits institutions from including additional overdraft funds such as a discretionary overdraft cushion in the disclosed balance.

Additional Balances

The February 2005 Joint Guidance stated that if more than one balance is provided, the institution should "separately (and prominently) identify the balance without the inclusion of overdraft protection." 70 FR at 9132. Proposed § 205.11(c) incorporated this portion of the Joint Guidance by providing that the institution may, at its option, disclose a second account balance that includes the additional overdraft funds, if the institution prominently indicates that this balance includes funds provided by the institution to cover overdrafts.¹⁸

Some consumer groups urged the Board to prohibit financial institutions from disclosing this second account balance. These commenters argued that disclosure of a second balance could be confusing to consumers, who may not realize they will incur fees by accessing the overdraft funds. One bank trade association also questioned whether permitting disclosure of a second balance would be particularly useful, although it supported including the option for banks to provide that information.

The final rule permits, but does not require, disclosure of an additional balance that includes these additional overdraft funds, which may be useful to some consumers. For example, consumers may wish to receive a balance disclosure that indicates how much overdraft coverage they have available, so that they can make an informed decision as to whether or not to go forward with a transaction. The final rule thus permits an additional balance to be disclosed, so long as the institution prominently states that the balance contains additional overdraft funds. To address commenter concerns

that consumers will be confused if multiple balances are disclosed to them on an automated system, new comment 11(c)–2 has been added to provide guidance on how institutions can appropriately identify that an additional balance includes overdraft funds. (Proposed comment 11(c)–2, described below, has been renumbered as comment 11(c)–3.) New comment 11(c)–2 explains that 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 overdraft amounts. For example, the institution may state that the balance includes "overdraft funds."

Further, the Board notes that § 230.11(c) does not affect the existing application of the advertising disclosure rules of § 230.11(b). Thus, to the extent an institution includes the dollar amount of a discretionary overdraft limit in a disclosed balance on an automated system, the disclosure will continue to be considered an advertisement promoting the payment of overdrafts. *See* comment 11(b)–1.iii. Therefore, the disclosures required by § 230.11(b)(1) (including the amount of overdraft fees) must be provided. The existing exemption in § 230.11(b)(2) from these disclosures for ATM receipts also continues to apply. However, under the final rule, any receipt containing a second balance including overdraft funds must prominently state that those funds are included and may not simply label the second balance as the consumer's "available balance" or "available funds." *See* comment 11(c)(2).

Many institutions currently provide consumers the ability to opt out of or opt into their overdraft service. Where a consumer has opted out of the institution's overdraft service (or, where an institution offers an opt-in and the consumer has not opted in), comment 11(c)–2 also clarifies that any additional balance disclosed may not include funds provided under their institution's service (because presumably the consumer would not have access to those funds). For example, if a consumer has \$200 in his or her account, and has opted out of the institution's overdraft service, a second balance may not reflect the additional \$100 that the institution might otherwise have provided under the service. (However, if the consumer is not enrolled in the institution's overdraft service but has a line of credit or other overdraft alternative, the

¹⁸ The FDIC Study found that of the 374 study population banks that extended their overdraft service to ATM withdrawals, most excluded the overdraft limit from ATM balances. Of the remaining banks, 16.1% displayed the overdraft limit separately from the account balance at proprietary ATMs (7.0% at non-proprietary ATMs), and 7.1% combined the overdraft limit with the account balance in the only balance displayed to customers at proprietary ATMs (5.6% at non-proprietary ATMs). *See* FDIC Study at 38–39.

additional balance may continue to include funds available pursuant to that other alternative.)

Similarly, some institutions may provide consumers the ability to opt out of overdraft services for ATM and debit card transactions. In this instance, the institution would continue to offer the overdraft service for other transactions, such as check transactions. Because the institution's overdraft service would be available for some, but not all transactions, comment 11(c)-2 states that if an institution discloses an additional balance where a consumer has opted out of some, but not all of the institution's overdraft services, the institution may choose whether or not to include the overdraft funds in the balance. However, if the institution chooses to include the overdraft funds in the additional balance, it must indicate that the additional overdraft funds are not available for all transactions.

Automated Systems

Proposed comment 11(c)-2 explained that the balance disclosure requirement applies to *any* automated system through which the consumer requests a balance, including, but not limited to, a telephone response machine (such as an interactive voice response system), at an ATM (both on the ATM screen and on receipts), or on an institution's Internet site (other than live chats with an account representative). Proposed comment 11(c)-2 also clarified that the reference to ATMs applies equally to ATMs owned or operated by a consumer's account-holding institution, as well as to "foreign" ATMs, including those operated by non-depository institutions. Some industry commenters supported the proposed comment, stating that it reflected the current practice at some institutions. However, other industry commenters argued that the account balance disclosure requirement should only apply to disclosures at proprietary ATMs. They stated that if the institution makes two balances available to the ATM network, one for balances and one for authorizations, it would have no control over what balances are displayed by a foreign ATM.

The comment, renumbered as comment 11(c)-3, is adopted with minor adjustments. The balance disclosure requirements apply to account balances an institution discloses through any ATM. Because account-holding institutions have discretion with respect to the balances they provide to an ATM network, they ultimately determine what additional funds (whether from the institution's

discretionary overdraft service, an overdraft line of credit, or a linked account) are included in those balances (*i.e.*, the institution has the discretion to provide to the network only balances that exclude overdraft funds). Thus, the Board believes that it is appropriate to include the information that account-holding institutions disclose through foreign ATMs within the scope of the rule.

Several industry commenters requested clarification that the rule applies only where a financial institution chooses to provide balance information, or when an ATM or other electronic terminal has the capability to provide a balance. The final rule applies only to the extent balance information is offered on an automated system; it does not require financial institutions or other automated systems owners to provide balance information on automated systems available to consumers.

Consumer groups commented that the Board should apply the balance disclosure requirement to information provided during discussions with bank personnel, whether in person, by telephone or e-mail, or over the Internet. They argued that many consumers obtain account balances directly from bank personnel, and that banks should be required to instruct employees to provide consumers with an account balance that does not include additional funds. Nonetheless, the Board continues to believe that the compliance burden and enforcement challenges associated with monitoring individual conversations and responses would outweigh the benefits provided by such a rule. Therefore, the final rule applies only to balance information disclosed through an automated system.

VI. Regulatory Flexibility Analysis

The Board has prepared a final regulatory flexibility analysis as required by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA). The RFA requires an agency to perform an assessment of the impact a rule is expected to have on small entities.

However, under section 605(b) of the RFA, 5 U.S.C. 605(b), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if an agency certifies, along with a statement providing the factual basis for such certification, that the rule will not have a significant economic impact on a substantial number of small entities. Based on its analysis and for the reasons stated below, the Board certifies that the rule will not have a significant economic impact on a substantial number of small entities.

1. *Statement of the need for, and objectives of, the proposed rule.* TISA was enacted, in part, for the purpose of requiring clear and uniform disclosures regarding deposit account terms and fees assessable against these accounts. Such disclosures allow consumers to make meaningful comparisons between different accounts and also allow consumers to make informed judgments about the use of their accounts. 12 U.S.C. 4301. TISA requires the Board to prescribe regulations to carry out the purpose and provisions of the statute. 12 U.S.C. 4308(a)(1).

The Board is revising Regulation DD to expand the current requirements for disclosing totals for overdraft and returned item fees on periodic statements. The requirement is expanded to all institutions and not solely to institutions that promote the payment of overdrafts. Thus, all consumers that use overdraft services will receive additional information about fees to help them better understand the costs associated with their accounts, regardless of whether the service is marketed to them. The Board is also revising Regulation DD to address balance disclosures provided to consumers through automated systems.

2. *Significant issues raised by comments in response to the initial regulatory flexibility analysis.* In accordance with section 3(a) of the RFA, the Board conducted an initial regulatory flexibility analysis in connection with the proposed rule. The Board did not receive any comments on its initial regulatory flexibility analysis.

3. *Description and estimate of classes of small entities affected by the final rule.* Approximately 12,356 depository institutions in the United States that must comply with TISA have assets of \$175 million or less and thus are considered small entities for purposes of the RFA, based on June 30, 2008, Call Report data. Approximately 5,075 are institutions that must comply with the Board's Regulation DD; approximately 7,281 are credit unions that must comply with NCUA's Truth in Savings regulations which must be substantially similar to the Board's Regulation DD.

The Board believes that many small depository institutions will not be significantly impacted by the final rule because many of these institutions already have required systems in place for compliance with the rule, either in conformity with the May 2005 Regulation DD amendments or the February 2005 Joint Guidance containing similar obligations. Under the rule, all small depository institutions that did not previously revise their periodic statement

disclosures to comply with the prior May 2005 Regulation DD amendments because they did not promote their overdraft service will need to do so to reflect aggregate overdraft and aggregate returned-item fees for the statement period and year-to-date. Those institutions that previously revised their periodic statements may also need to reprogram their automated systems to include the specified fee table format in the statement. Institutions may also have to reprogram their automated systems to disclose balances that exclude additional funds the institution may provide to cover an overdraft, if the institution has not done so as previously recommended by the February 2005 Joint Guidance, and to exclude funds paid by the institution under a service subject to Regulation Z, or funds transferred from another account held individually or jointly by a consumer. To the extent institutions disclose an additional balance that includes overdraft funds, institutions may also have to reprogram their systems to prominently state that the balance includes those additional overdraft funds, as described in the preamble.

4. *Recordkeeping, reporting, and other compliance requirements.* As discussed in more detail above, institutions that have not previously provided total dollar amounts of fees imposed on the account for paying overdrafts and total dollar amounts of fees for returning items unpaid will be required to do so for both the statement period and the calendar year-to-date. Institutions that disclose balances through any automated system must also, at a minimum, disclose balances that are not supplemented by additional funds that may be provided to cover an overdraft. For example, the balance must exclude funds that will be paid by the institution under a service subject to Regulation Z, and funds transferred from another account held individually or jointly by a consumer.

5. *Steps taken to minimize the economic impact on small entities.* The factual, policy, and legal reasons for selecting the alternatives adopted and why other significant alternatives were not adopted, are described above in the **SUPPLEMENTARY INFORMATION**. For example, the Board has provided more specific commentary on the balance disclosure rule in response to comments received in order to ease compliance burdens. In addition, based on the Board's review of comments received and consumer testing results, the Board is not adopting the proposed format, content and timing requirements regarding a consumer's right to opt out of overdraft coverage under Regulation

DD, and instead is proposing these requirements under Regulation E (as well as an alternative opt-in proposal), revised in response to commenter suggestions. An initial RFA analysis is included in that proposal.

The Board is also providing an implementation period that responds to commenters' concerns about the time needed to comply with the final rule. The Board believes the extended effective date will decrease costs for small entities by providing them with sufficient time to come into compliance with the final rule's requirements.

VII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR part 1320 Appendix A.1), the Board reviewed the final rule under the authority delegated to the Federal Reserve by the Office of Management and Budget (OMB). The collection of information that is subject to the PRA by this final rulemaking is found in 12 CFR part 230. The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, this information collection unless the information collection displays a currently valid OMB control number. The OMB control number is 7100-0271.

This information collection is required to provide benefits for consumers and is mandatory (15 U.S.C. 1601 *et seq.*). Since the Board does not collect any information, no issue of confidentiality arises. The respondents/recordkeepers are entities subject to Regulation DD, including for-profit small business depository institutions.

Section 269 of the Truth in Savings Act (TISA) (12 U.S.C. 4308) authorizes the Board to issue regulations to carry out the provisions of TISA. TISA and Regulation DD require depository institutions to disclose yields, fees, and other terms concerning deposit accounts to consumers at account opening, upon request, and when changes in terms occur. Depository institutions that provide periodic statements are required to include information about fees imposed, interest earned, and the annual percentage yield earned during those statement periods. The act and regulation mandate the methods by which institutions determine the account balance on which interest is calculated. They also contain rules about advertising deposit accounts. To ease the compliance cost (particularly for small entities), model clauses and sample forms are appended to the regulation. Depository institutions are required to retain evidence of compliance for twenty-four months, but

the regulation does not specify types of records that must be retained.

Regulation DD applies to all depository institutions except credit unions. Credit unions are covered by a substantially similar rule issued by the National Credit Union Administration. Under the PRA, the Federal Reserve accounts for the paperwork burden associated with Regulation DD only for Federal Reserve-supervised institutions. Regulation DD defines Federal Reserve-regulated institutions as: State member banks, branches and agencies of foreign banks (other than federal branches, federal agencies, and insured state branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act. Other federal agencies account for the paperwork burden imposed on the depository institutions for which they have administrative enforcement authority.

The rulemaking makes the current requirements for disclosing totals for overdraft and returned item fees on periodic statements applicable to all institutions and not solely to institutions that promote the payment of overdrafts. The rulemaking also requires that institutions that disclose balances through any automated system must, at a minimum, disclose a balance that is not supplemented by additional funds that may be provided to cover an overdraft. For example, the balance must exclude funds that will be paid by the institution in its discretion or under a service subject to Regulation Z, or funds transferred from another account held individually or jointly by a consumer.

On May 19, 2008, a notice of proposed rulemaking (NPR) was published in the **Federal Register** (73 FR 28739). The comment period for this notice expired July 18, 2008. No comments specifically addressing the burden estimate were received. As mentioned above, the proposed amendment regarding notice of a consumer's right to opt out of an institution's overdraft service has been withdrawn. Instead, the Federal Reserve is separately proposing to incorporate this notice requirement into its Regulation E (OMB No. 7100-0200).

The Federal Reserve has revised its burden estimate in this final rule to reflect the withdrawn proposed notice. In addition, the number of Federal Reserve-regulated institutions that are deemed to be respondents for the purposes of the PRA has been updated from 1,172 to 1,138.

The current total annual burden is estimated to be 170,984 hours. The final

rule will impose a one-time increase in the total annual burden under Regulation DD by 18,208 hours to 189,192 hours.

The Board estimates that 1,138 respondents regulated by the Federal Reserve would take, on average, 16 hours (two business days) to re-program and update their systems to comply with the disclosure requirements. These disclosure requirements include disclosure of total fees on periodic statements (§ 230.11(a)) and disclosure of account balances (§ 230.11(c)). The Federal Reserve estimates the total annual one-time burden to be 18,208 hours and believes that, on a continuing basis, there would be no increase in burden as the disclosures would be sufficiently accounted for once incorporated into the current periodic statement disclosure (§ 230.6). To ease the compliance burden, model clause B-10 (aggregate overdraft and returned item fees sample clause) (§ 230.11), is adopted in Appendix B.

The other federal financial agencies are responsible for estimating and reporting to OMB the total paperwork burden for the institutions for which they have administrative enforcement authority. They may, but are not required to, use the Board's burden estimation methodology. Using the Board's method, the total estimated annual burden for all financial institutions subject to Regulation DD, including Federal Reserve-regulated institutions, would be approximately 2,584,275 hours. The final rule would impose a one-time increase in the estimated annual burden for all institutions subject to Regulation DD by 275,200 hours to 2,859,475 hours. The above estimates represent an average across all respondents and reflect variations between institutions based on their size, complexity, and practices. All covered institutions, including depository institutions (of which there are approximately 17,200), potentially are affected by this collection of information, and thus are respondents for purposes of the PRA.

The Federal Reserve has a continuing interest in the public's opinions of our collections of information. At any time, comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, may be sent to: Secretary, Board of Governors of the Federal Reserve

System, 20th and C Streets, NW., Washington, DC 20551; and to the Office of Management and Budget, Paperwork Reduction Project (7100-0271), Washington, DC 20503.

List of Subjects in 12 CFR Part 230

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

■ For the reasons set forth in the preamble, the Board amends Regulation DD, 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 230.1 is amended by revising paragraph (a) to read as follows:

§ 230.1 Authority, purpose, coverage, and effect on state laws.

(a) *Authority.* This part, known as Regulation DD, is issued by the Board of Governors of the Federal Reserve System to implement the Truth in Savings Act of 1991 (the act), contained in the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 3201 *et seq.*, Pub. L. 102-242, 105 Stat. 2236). Information-collection requirements contained in this part have been approved by the Office of Management and Budget under the provisions of 44 U.S.C. 3501 *et seq.* and have been assigned OMB No. 7100-0271.

* * * * *

■ 3. Section 230.11 is amended by revising the heading, paragraphs (a), (b)(2)(x) and (b)(2)(xi), and adding paragraphs (b)(2)(xii) and (c) to read as follows:

§ 230.11 Additional disclosure requirements for overdraft services.

(a) *Disclosure of total fees on periodic statements*—(1) *General.* A depository institution must separately disclose on each periodic statement, as applicable:

- (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; and
- (ii) The total dollar amount for all fees or charges imposed on the account for returning items unpaid.

(2) *Totals required.* The disclosures required by paragraph (a)(1) of this section must be provided for the statement period and for the calendar year-to-date;

(3) *Format requirements.* The aggregate fee disclosures required by paragraph (a) of this section must be disclosed in close proximity to fees identified under § 230.6(a)(3), using a format substantially similar to Sample Form B-10 in Appendix B to this part.

(b) * * *

(2) * * *

(x) A notice provided to a consumer, such as at an ATM, that completing a requested transaction may trigger a fee for overdrawing an account, or a general notice that items overdrawing an account may trigger a fee;

(xi) Informational or educational materials concerning the payment of overdrafts if the materials do not specifically describe the institution's overdraft service; or

(xii) An opt-out or opt-in notice regarding the institution's payment of overdrafts or provision of discretionary overdraft services.

* * * * *

(c) *Disclosure of account balances.* If an institution discloses balance information to a consumer through an automated system, the balance may 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, whether under a service provided in its discretion, a service subject to the Board's Regulation Z (12 CFR part 226), or a service to transfer funds from another account of the consumer. The institution may, at its option, disclose additional account balances that include such additional amounts, if the institution prominently states that any such balance includes such additional amounts and, if applicable, that additional amounts are not available for all transactions.

■ 4. Amend Appendix B to part 230, by adding B-10 to read as follows:

Appendix B to Part 230—Model Clauses and Sample Forms

* * * * *

B-10 Aggregate Overdraft and Returned Item Fees Sample Form

	Total for this period	Total year-to-date
Total Overdraft Fees	\$60.00	\$150.00
Total Returned Item Fees	0.00	30.00

- 5. In Supplement I to part 230:
- a. In Section 230.11 and Section 230.11(a), the headings are revised and paragraphs (a)(1)–1. and (a)(1)–2. are removed.
- b. In Section 230.11, paragraphs (a)(1)–3. through (a)(1)–8. are redesignated as paragraphs (a)(1)–1. through (a)(1)–6, respectively.
- c. In Section 230.11, newly designated paragraphs (a)(1)–2. through (a)(1)–4. are revised.
- d. In Section 230.11, paragraph (a)(3)–1. is revised.
- e. In Section 230.11, paragraph (a)(5). is removed.
- f. In Section 230.11, new paragraphs (c)–1. through (c)–3. are added.

Supplement I to Part 230—Official Staff Interpretations

* * * * *

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 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 or by other means. 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).

3. *Fees for returning items unpaid.* The total dollar amount for all fees for returning items unpaid must include all fees charged to the account for dishonoring or returning checks or other items drawn on the account. The institution must disclose separate totals for the statement period and for the calendar year-to-date. Fees imposed when deposited items are returned are not included. Institutions may use terminology such as "returned item fee" or "NSF fee" to describe fees for returning items unpaid.

4. *Waived fees.* In some cases, an institution may provide a statement for the

current period reflecting that fees imposed during a previous period were waived and credited to the account. Institutions may, but are not required to, reflect the adjustment in the total for the calendar year-to-date and in the applicable statement period. For example, if an institution assesses a fee in January and refunds the fee in February, the institution could disclose a year-to-date total reflecting the amount credited, but it should not affect the total disclosed for the February statement period, because the fee was not assessed in the February statement period. If an institution assesses and then waives and credits a fee within the same cycle, the institution may, at its option, reflect the adjustment in the total disclosed for fees imposed during the current statement period and for the total for the calendar year-to-date. Thus, if the institution assesses and waives the fee in the February statement period, the February fee total could reflect a total net of the waived fee.

* * * * *

(a)(3) *Time period covered by disclosures*

1. *Periodic statement disclosures.* The disclosures under section 230.11(a) must be included on periodic statements provided by an institution starting the first statement period that begins after January 1, 2010. For example, if a consumer's statement period typically closes on the 15th of each month, an institution must provide the disclosures required by § 230.11(a)(1) on subsequent periodic statements for that consumer beginning with the statement reflecting the period from January 16, 2010 to February 15, 2010.

* * * * *

(c) *Disclosure of account balances*

1. *Balance that does not include additional amounts.* For purposes of the balance disclosure requirement in § 230.11(c), if an institution discloses balance information to a consumer through an automated system, it must disclose a balance that excludes any funds that the institution may provide to cover an overdraft pursuant to a discretionary overdraft service, that will be paid by the institution under a service subject to the Board's Regulation Z (12 CFR part 226), or that will be transferred from another account held individually or jointly by a consumer. The balance may, but need not, include funds that are deposited in the consumer's account, such as from a check, that are not yet made available for withdrawal in accordance with the funds availability rules under the Board's Regulation CC (12 CFR part 229). In addition, the balance may, but need not, include funds that are held by the institution to satisfy a prior obligation of the consumer (for example, to cover a hold for an ATM or debit card transaction that has

been authorized but for which the bank has not settled).

2. *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 opted out of the institution's discretionary overdraft service, any additional balance disclosed should not include funds institutions provide under that service. Where a consumer has opted out of the institution's discretionary overdraft service for some, but not all transactions (e.g., the consumer has opted out overdraft services for ATM and debit card transactions), an institution that includes funds from its discretionary overdraft service in the 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 debit card transactions.

3. *Automated systems.* The balance disclosure requirement in § 230.11(c) applies to any automated system through which the consumer requests a balance, including, but not limited to, a telephone response system, the institution's Internet site, or an ATM. The requirement applies whether the institution discloses a balance through an ATM owned or operated by the institution or through an ATM not owned or operated by the institution (including an ATM operated by a non-depository institution). If the balance is obtained at an ATM, the requirement also applies whether the balance is disclosed on the ATM screen or on a paper receipt.

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By order of the Board of Governors of the Federal Reserve System, December 18, 2008.

Jennifer J. Johnson,

Secretary of the Board.

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