

# RESCINDED

Office of Thrift Supervision  
Department of the Treasury

March 9, 2010

*Transmittal*

**TR-447**

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**Number TR-447**

On March 1, 2010 the Board of Governors of the Federal Reserve System issued a proposed rule and request for comment regarding amending Regulation DD and the official staff commentary to clarify the application of the final rule published on January 29, 2009.

**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:** Proposed rule; request for public comment.

**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 proposes to amend Regulation DD and the official staff commentary to clarify 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:** Comments must be received on or before March 31, 2010.**ADDRESSES:** You may submit comments, identified by Docket No. R-1315, by any of the following methods:

- *Agency Web Site:* <http://www.federalreserve.gov>. Follow the instructions for submitting comments at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *E-mail:* [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov).

Include the docket number in the subject line of the message.

- *Fax:* (202) 452-3819 or (202) 452-3102.

- *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm> as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room MP-500 of the Board's Martin Building (20th and C Streets, NW) between 9 a.m. and 5 p.m. on weekdays.

**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>

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 is proposing to amend Regulation DD and the official staff commentary, as discussed in Section III of this **SUPPLEMENTARY INFORMATION**. Similarly, elsewhere in today's **Federal Register**, the Board has proposed to amend certain aspects of the Regulation E final rule.

<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).

**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 statements are provided, including certain fees or charges. The Board is proposing two technical amendments to § 230.6(a) and the related staff commentary. First, the Board is proposing to add a new § 230.6(a)(5) to clarify that the periodic statement aggregate fee disclosures required by § 230.11(a), discussed below, are among the disclosures that are required to be provided on periodic statements for purposes of § 230.6(a). Second, the Board is proposing to revise comment 6(a)(3)-2, which contains a cross-reference to § 230.11(a) that references institutions that promote the payment of overdrafts. Because the Regulation DD final rule extended the aggregate fee disclosure requirement to all institutions, and not just those institutions that promote the payment of overdrafts, the proposed revision eliminates the promotion reference.

*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. Sample Form B-10 displays this total as "Total Overdraft Fees." Some institutions may use terms other than "overdraft fee," such as "NSF

items-paid” to describe per-item overdraft fees in their account agreements. Under Regulation DD, comment 3(a)–2 requires institutions to 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.<sup>2</sup>

Under § 230.11(a)(1), institutions are required 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 the discretionary 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 other terminology 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.

Accordingly, the Board is proposing to revise § 230.11(a)(1)(i) to clarify that the periodic statement aggregate fee disclosure must disclose 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)–2 would explain that this provision supersedes comment 3(a)–2. As explained in comment 11(a)(1)–3, institutions may use terminology such as “returned item fee” or “NSF fee” to describe the fees for returning items unpaid.

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

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

Under the Regulation DD final rule, § 230.11(c) requires institutions that disclose balance information to a consumer through an automated system

to 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.

Questions have been 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 established under the Board’s Regulation D, 12 CFR 204.2(d)(2).

Retail sweep programs are distinguishable from overdraft protection plans that transfer funds from a consumer’s linked accounts in several respects. 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 for the consumer 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 account statements that consumers receive under such a program 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 to, 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, retail sweep programs typically do not impose fees on transfers between the savings subaccount and the transaction subaccount, while institutions typically charge fees for transfers from linked accounts to cover an overdraft.

Based on the foregoing, 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 displayed 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). In recognition of the distinct characteristics of retail sweep programs, the Board is proposing to add a new comment 11(c)–2 to clarify 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 when disclosing a transaction account balance under such a program.

#### 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. Subsequent to the adoption of the Regulation DD final rule, however, the Board adopted the 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 fee for paying ATM and one-time debit card transactions. In light of the final Regulation E opt-in requirement, the Board is proposing to renumber current comment 11(c)–2 as comment 11(c)–3 and amend it to include references to the opt-in requirement. References to opt-outs have been retained in some instances because some institutions may provide an opt-out choice with respect to checks, ACH, and other types of

<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).

transactions not subject to the Regulation E final rule restrictions.

The Board is also proposing to extend the requirement to indicate, when applicable, that funds in the additional balance may not be available for all transactions to circumstances under which funds from overdraft services subject to the Board's Regulation Z or from services that transfer funds from another account are not 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 would state that any additional balance displayed through an automated system should indicate that the overdraft funds are not available for all transactions.

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 is proposing 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 solicits comment on whether this time frame would be an appropriate time period for implementation. The Board is proposing to make the remaining revisions effective approximately 30 days after publication of the final rule in the Federal Register.

IV. Regulatory Analysis

Sections VI and VII of the SUPPLEMENTARY INFORMATION to the 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 proposed amendments are clarifications and would not, if adopted, 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.

Text of Proposed Revisions

Certain conventions have been used to highlight the proposed revisions. New language is shown inside ►bold-type arrows ◀ while language that would be deleted is set off with [bold-type brackets].

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 discussed in the preamble, the Board proposes to amend 12 CFR part 230 and the Official Staff Commentary, as set forth below:

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:

(a) General rule. \* \* \*

►(5) Aggregate fee disclosure. The disclosure of total overdraft and returned item fees required by § 230.11(a). ◀

\* \* \* \* \*

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

(a) Disclosure of total fees on periodic statements—(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."◀[.]

\* \* \* \* \*

4. In Supplement I to part 230, a. In Section 230.6(a)(3), paragraph 2. is 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 redesignated paragraph 3. is revised.

Supplement I to Part 230—Official Staff Interpretations

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§ 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 [when an institution promotes the payment of overdrafts].) \* \* \*

\* \* \* \* \*

§ 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).

►Under § 230.11(a)(1)(i), the disclosure must describe the total dollar amount for all fees or charges imposed on the account for paying overdrafts using the term "Total Overdraft Fees." This requirement supersedes 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 established 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 for the consumer 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

are established for such purposes and that have the following characteristics:

(1) The classification of the accounts involved complies with the Board's Regulation D, 12 CFR 204.2(d)(2), (2) the consumer does not have direct access to the non-transaction subaccount that is part of the retail sweep program, and (3) the consumer's monthly statement shows the account balance as the combined balance in the subaccounts.

3◀[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 not opted into, or as applicable, ◀ has opted out of the institution's discretionary overdraft service, any additional balance disclosed should not include funds [institutions] provided under that service. Where a consumer ▶ has not opted into ◀ [has opted out of ] the institution's discretionary overdraft service for some, but not all transactions (e.g., the consumer has ▶ not opted into ◀ [opted out] overdraft services for ATM and ▶ one-time ◀ debit card transactions), an institution that includes ▶ these additional overdraft ◀ funds [from its discretionary overdraft service] 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, February 18, 2010.

**Jennifer J. Johnson,**

*Secretary of the Board.*

[FR Doc. 2010-3719 Filed 2-26-10; 8:45 am]

**BILLING CODE 6210-01-P**

## SMALL BUSINESS ADMINISTRATION

**13 CFR Parts 121, 124, 125, 126, and 134**

**RIN 3245-AF65**

### Small Business, Small Disadvantaged Business, HUBZone, and Service-Disabled Veteran-Owned Protest and Appeal Regulations

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Small Business Administration (SBA or Agency) proposes to amend its regulations to clarify the effect, across all small business programs, of initial and appeal eligibility decisions on the procurement in question; increase the amount of time that SBA has to render formal size determinations; require that SBA's Office of Hearings and Appeals (OHA) issue a size appeal decision within 60 calendar days of the close of the record, if possible; increase the amount of time that SBA has to file North American Industry Classification System (NAICS) code appeals; alter the NAICS code appeal procedures to comply with a Federal Court decision; clarify that contracting officers must reflect final agency eligibility decisions in federal procurement databases and goaling statistics; clarify how a contracting officer assigns a NAICS code and size standard to a multiple award procurement; and make other changes to size status protest and appeal rules.

**DATES:** Comments must be received on or before March 31, 2010.

**ADDRESSES:** You may submit comments, identified by RIN: 3245-AF65, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Mail, for paper, disk, or CD-ROM submissions:* Khem Sharma, Chief, Office of Size Standards, U.S. Small Business Administration, Office of Government Contracting, 409 Third Street, SW., Washington, DC 20416.

- *Hand Delivery/Courier:* Khem Sharma, Chief, Office of Size Standards, U.S. Small Business Administration, Office of Government Contracting, 409 Third Street, SW., Washington, DC 20416.

SBA will post all comments on <http://www.regulations.gov>. If you wish to submit confidential business information (CBI) as defined in the User Notice at <http://www.Regulations.gov>, please submit the information to Khem Sharma, Chief, Size Standards Division, U.S. Small Business Administration, Office of Government Contracting, 409 Third Street, SW., Washington, DC 20416, or send an e-mail to [khem.sharma@sba.gov](mailto:khem.sharma@sba.gov). Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination on whether it will publish the information or not.

**FOR FURTHER INFORMATION CONTACT:** Carl Jordan, Program Analyst, Size Standards Division, Office of Government Contracting, (202) 205-7189 or at [carl.jordan@sba.gov](mailto:carl.jordan@sba.gov).

**SUPPLEMENTARY INFORMATION:** SBA is proposing to delete the reference to other factors to be considered when assigning a NAICS code to a procurement in 13 CFR 121.402. SBA's regulations currently provide that a contracting officer should consider the principal purpose of the product or service to be acquired, and that a procurement is usually classified according to the component which accounts for the greatest percentage of contact value. SBA's regulations further provide that contracting officers may consider previous Government procurement classifications of the same or similar products or services and which classification would best serve the purposes of the Small Business Act. SBA believes these additional factors are unnecessary. A repeated error is not persuasive evidence, especially since such classifications are almost never reviewed or challenged. As discussed above, SBA receives very few NAICS code appeals because of the short appeal timelines. Further, it is unclear how a contracting officer can determine which NAICS code and size standard can best serve the purposes of the Small Business Act. Thus, we are proposing to delete reference to prior government classifications and the purpose of the Small Business Act. Each solicitation should be classified based on the principal purpose of that particular solicitation, and the contracting officer only needs to make a reasonable choice.

SBA is proposing to delete a provision in § 121.404 that requires a concern to recertify its size where a solicitation is modified so that initial offers are no longer responsive. Generally, a firm must be small at the time of initial offer,