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.
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 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.

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.2

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 to 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 costs, particularly if a consumer has accounts at different institutions that each use different terminology.

Accordingly, the Board is proposing to add a new comment 11(c)–2 to clarify that § 230.11(c) does not require an institution to disclose per-item overdraft fees in their account agreements. Under Regulation DD, comment 3(a)–2 provides that institutions should not use the generic term “insufficient funds fee” or “NSF fee” to describe both fees for paying overdraft fees and fees for returning checks or other 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).

2 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 overdraft fees 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 comments 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 brackets, while language that would be deleted is set off with [bold-type arrows].

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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§ 230.11 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.

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] [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.


Jennifer J. Johnson, Secretary of the Board.

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SMALL BUSINESS ADMINISTRATION

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

RIN 3245–AF65

Small Business, Small Disadvantaged Business, HUBZone, and Service-Disadvantaged 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.

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. 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.

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,