

# Proposed Rules

Federal Register

Vol. 73, No. 97

Monday, May 19, 2008

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## 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:** The Federal Reserve Board (Board) proposes to amend Regulation DD, which implements the Truth in Savings Act, and the staff commentary to the regulation, to provide additional disclosures about account terms and costs associated with overdrafts. The proposed amendments would set forth content and timing requirements for a notice to consumers about any right to opt out of an institution's overdraft service. Requirements for disclosing overdraft fees on periodic statements would be expanded to apply to all institutions and not solely to institutions that promote the payment of overdrafts. The proposed amendments also address balance disclosures provided in response to balance inquiries from consumers.

**DATES:** Comments must be received on or before July 18, 2008.

**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:

Benjamin K. Olson, Attorney, or Vivian W. Wong, Senior 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) 452-2412 or (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 (APY), 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).

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. Notice also must be provided to accountholders before an adverse change in account terms occurs and prior to the renewal of certificates of deposit (time accounts).

TISA and Regulation DD contain rules for advertising deposit accounts. Under TISA, there is a prohibition against advertisements, announcements, or

solicitations that are inaccurate or misleading, or that misrepresent the deposit contract. Institutions also are prohibited from describing 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. In addition, the act and regulation impose substantive restrictions on institutions' practices regarding the payment of interest on accounts and the calculation of account balances.

##### II. Background on Overdraft Services and Regulatory Action to Date

Historically, if a consumer engaged in a transaction that overdrew his or her account, the consumer's depository institution used its discretion on an ad hoc basis to determine whether to pay the overdraft, usually imposing a fee for paying the overdraft. 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 consumers' transactions on an ad hoc basis.

Over the years, most institutions have largely automated the overdraft payment process, including setting specific criteria for determining whether to honor overdrafts and limits on the amount of the coverage provided. From the industry's perspective, the benefits of overdraft, or bounced check, services include a reduction in the costs of manually reviewing individual items, as well as the consistent treatment for all customers with respect to overdraft payment decisions. Moreover, industry representatives assert that overdraft services are valued by consumers, particularly for check transactions, as they allow consumers to avoid additional fees that would be charged by the payee if the item was returned unpaid, and other adverse consequences, such as the furnishing of

negative information to a consumer reporting agency.<sup>1</sup>

In contrast, consumer advocates believe overdraft transactions are a high-cost form of lending that traps low- and moderate-income consumers (particularly students and the elderly) into paying high fees. Moreover, consumer advocates note that consumers are enrolled in overdraft services automatically, often with no chance to opt out. In addition, consumer advocates believe that by honoring check and other types of overdrafts, institutions encourage consumers to rely on this service and thereby consumers incur greater costs in the long run than they would if the transactions were not honored. Consumer advocates also express concerns about debit card overdrafts where the dollar amount of the fee may far exceed the dollar amount of the overdraft, and multiple fees may be assessed in a single day for a series of small-dollar transactions.<sup>2</sup>

According to a recent report from the Government Accountability Office (GAO), the average cost of overdraft and insufficient funds fees has increased roughly 11 percent between 2000 and 2007 to just over \$26 per item, according to one estimate.<sup>3</sup> The GAO also reported that large institutions on average charged between \$4 and \$5 more for overdraft and insufficient fund fees compared to smaller institutions.<sup>4</sup> In addition, the GAO Bank Fees Report noted that a small number of institutions (primarily large banks) apply tiered fees to overdrafts, charging higher fees as the number of overdrafts in the account increases.<sup>5</sup>

Overdraft services vary among institutions but typically share certain characteristics. Coverage is “automatic” for consumers who meet the institution’s criteria (e.g., the account has been open a certain number of days, the account is in “good standing”, deposits are made regularly). While institutions generally do not underwrite on an individual account basis in determining whether to enroll the consumer in the service initially, 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 overdraft program disclosures state that payment of an overdraft is discretionary on the part of the institution, and disclaim any legal obligation of the institution to pay any overdraft. Typically, the service is extended to also cover non-check transactions, including withdrawals at automated teller machines (ATMs), automated clearinghouse (ACH) transactions, debit card transactions at point-of-sale, pre-authorized automatic debits from a consumer’s account, telephone-initiated funds transfers, and on-line banking transactions. A flat fee is charged each time an overdraft is paid, and commonly, institutions 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.

Where institutions vary most in their provision of overdraft services is the extent to which institutions inform consumers about the existence of the service or otherwise promote the use of the service. For those institutions that choose to promote the existence and availability of the service, they may also disclose to consumers, typically in a brochure or welcome letter, the aggregate dollar limit of overdrafts that may be paid under the service.

As the availability and customer use of these overdraft services has increased, the federal banking agencies (Board, Federal Deposit Insurance Corporation (FDIC), NCUA, Office of the Comptroller of the Currency (OCC) and Office of Thrift Supervision (OTS)) have become concerned about aspects of the marketing, disclosure, and implementation of some of these services. In response to some of these concerns, the agencies published guidance on overdraft protection programs in February 2005.<sup>6</sup> The Joint

Guidance addresses three primary areas—safety and soundness considerations, legal risks, and best practices, while the OTS Guidance focuses on safety and soundness considerations and best practices. The best practices focus on the marketing and communications that accompany the offering of overdraft services, as well as the disclosure and operation of program features, including the provision of a consumer election or opt-out of the overdraft service. The agencies have also published a consumer brochure on overdraft services.<sup>7</sup>

In May 2005, the Board separately issued revisions to Regulation DD and the staff commentary pursuant to its authority under the Truth in Savings Act (TISA) to address concerns about the uniformity and adequacy of institutions’ disclosure of overdraft fees generally, and to address concerns about advertised overdraft services in particular. 70 FR 29582 (May 24, 2005).<sup>8</sup> The goal of the final rule was to improve the uniformity and adequacy of disclosures provided to consumers about overdraft and returned-item fees to assist consumers in better understanding the costs associated with the payment of overdrafts. In addition, the final rule addressed some of the Board’s concerns about institutions’ marketing practices with respect to overdraft services.

Under the May 2005 final rule, which became effective July 1, 2006, all depository institutions are required to specify in their account disclosures the categories of transactions for which an overdraft fee may be imposed, and to include in their advertisements about overdraft services, certain information about the costs associated with the service and the circumstances under which the institution would not pay an overdraft. The Board’s final rule also requires institutions that promote the payment of overdrafts in an advertisement 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 must be provided for the statement period and for the calendar

Protection Programs (OTS Guidance), 70 FR 8428 (Feb. 18, 2005).

<sup>7</sup> The brochure entitled “Protecting Yourself from Overdraft and Bounced-Check Fees,” can be found at: <http://www.federalreserve.gov/pubs/bounce/default.htm>.

<sup>8</sup> A substantively similar rule applying to credit unions was issued separately by the NCUA. 71 FR 24568 (Apr. 26, 2006). The NCUA previously issued an interim final rule in 2005. 70 FR 72895 (Dec. 8, 2005).

<sup>1</sup> See, e.g., *Overdraft Protection: Fair Practices for Consumers: Hearing before the House Subcomm. on Financial Institutions and Consumer Credit, House Comm. on Financial Services*, 110th Cong. (2007) *Overdraft Protection Hearing*, (available at [http://www.house.gov/apps/list/hearing/financialsvcs\\_dem/hr0705072.shtml](http://www.house.gov/apps/list/hearing/financialsvcs_dem/hr0705072.shtml)).

<sup>2</sup> See, e.g., *Overdraft Protection Hearing* n.1; Jacqueline Duby, Eric Halperin & Lisa James, *High Cost and Hidden From View: The \$10 Billion Overdraft Loan Market*, Ctr. Responsible Lending (May 26, 2005) (noting that the bulk of overdraft fees are incurred by repeat users) (available at [http://www.responsiblelending.org/pdfs/ip009-High\\_Cost\\_Overdraft-0505.pdf](http://www.responsiblelending.org/pdfs/ip009-High_Cost_Overdraft-0505.pdf)).

<sup>3</sup> See *Bank Fees: Federal Banking Regulators Could Better Insure That Consumers Have Required Disclosure Documents Prior to Opening Checking or Savings Accounts*, GAO Report 08–281 (January 2008) (hereinafter, *GAO Bank Fees Report*). See also *Bankrate 2007 Checking Account Study*, posted September 26, 2007 (available at: [http://www.bankrate.com/brm/news/chk/chkstudy/20070924\\_bounced\\_check\\_fee\\_al.asp?caret=2e](http://www.bankrate.com/brm/news/chk/chkstudy/20070924_bounced_check_fee_al.asp?caret=2e)) (reporting an average overdraft fee of over \$28.00 per item).

<sup>4</sup> See *GAO Bank Fees Report* at 16.

<sup>5</sup> According to the GAO, of the financial institutions that applied up to 3 tiers of fees in 2006, the average overdraft fees were \$26.74, \$32.53 and \$34.74, respectively. See *GAO Bank Fees Report* at 14.

<sup>6</sup> See *Interagency Guidance on Overdraft Protection Programs (Joint Guidance)*, 70 FR 9127 (Feb. 24, 2005) and *OTS Guidance on Overdraft*

year to date. The final rule for the aggregate fee disclosures was narrower than the proposal, which would have applied the periodic statement requirements to all institutions, regardless of whether they market the payment of overdrafts.

Notwithstanding the issuance of the February 2005 Joint Guidance and the Board's May 2005 final rule under Regulation DD, the Board remains concerned that consumers may not adequately understand the costs of overdraft services nor how overdraft services operate generally. The Board is thus proposing additional disclosure requirements pursuant to its authority under Sections 263, 264, 268 and 269(a) of TISA to facilitate consumers' ability to make informed judgments about the use of their accounts. 12 U.S.C. 4302(e), 4303(b) & (d), 4307, 4308(a). The proposed requirements address disclosures to consumers about the costs associated with overdraft services on periodic statements and disclosures to consumers about account balances in response to consumer inquiries.

In addition, as discussed elsewhere in this **Federal Register**, the Board, along with the OTS and the NCUA, are proposing to adopt substantive protections using their authority under the Federal Trade Commission Act (FTC Act) to address certain unfair or abusive protections associated with overdraft services.<sup>9</sup> The Board's proposal would add a new Subpart D on overdraft services to the Board's Regulation AA, Unfair or Deceptive Acts or Practices (2008 Regulation AA Proposal) (12 CFR part 227). Among other things, the proposal would require institutions to provide consumers the ability to opt out of their institutions' payment of overdrafts. The Board is proposing to amend Regulation DD to ensure that consumers receive effective disclosures about their right to opt out of overdraft services, by setting forth certain content, format and timing requirements for the notice.<sup>10</sup>

During this rulemaking process, Board staff has held discussions with representatives from banks, core systems providers, consumer groups, vendors of overdraft services, payment card associations, and industry trade associations. Board staff has also reviewed current account disclosures,

and solicited input from members of the Board's Consumer Advisory Council regarding overdraft services.

### III. Summary of Proposal

#### *Disclosure of Consumer Opt-Out of Overdraft Services*

The Board is proposing amendments under Regulation DD to set forth content and format requirements for the notices that would be given to consumers informing them about their right to decline, or opt out of, their institution's overdraft service. The substantive opt-out requirement is proposed separately in today's **Federal Register** under the Board's authority under the FTC Act. Under the proposal, the notice must be provided to the consumer before the institution assesses any fees in connection with paying an overdraft, and subsequently during or for each statement period in which a fee is imposed (for example, on a notice sent promptly after an overdraft informing the consumer of that fact, or on each periodic statement reflecting an overdraft fee or charge). The notice following assessment of an overdraft fee would help to ensure that consumers are apprised of their opt-out rights at a time when the information may be most relevant, that is, after the consumer has overdrawn his or her account and received information about the costs of using the service. The content of the notice is discussed in more detail in the Section-by-Section Analysis below. The Board intends to conduct consumer testing on the proposed notice following the issuance of this proposal and review of comments received.

#### *Disclosure of the Aggregate Costs of Overdraft Services on Periodic Statements*

As discussed above, the Board's May 2005 final rule under Regulation DD requires, among other things, institutions that promote the payment of overdrafts to provide consumers information about the aggregate costs of the overdraft service for the statement period and the calendar year to date. The Board is proposing to expand this provision to require all institutions, regardless of whether they promote the payment of overdrafts, to disclose aggregate cost information. The amendment is intended to provide all consumers that use overdraft services with additional information about fees to help them better understand the costs associated with their accounts. Under the current rule, institutions that do not promote their overdraft service may be reluctant to provide information about their service, including other

alternatives to overdraft services, out of concern that such disclosures might trigger the aggregate fee disclosure requirements. Thus, the proposal would promote greater transparency about the costs and terms of overdraft services for all institutions. The proposed rule would also add format requirements to help make the aggregate fee disclosures are more effective and noticeable to consumers.

#### *Balance Inquiries*

To ensure that consumers are not confused or misled about the amount of funds in their account when they request their balance, the Board proposes to require that institutions generally disclose only the amount of funds available for the consumer's immediate use or withdrawal, without incurring an overdraft. This rule would apply to balance inquiries made through any automated system, including, but not limited to, an ATM, Internet web site, and telephone response system. Institutions would be permitted to provide a second balance that includes any additional funds that an institution may advance to cover an overdraft if this fact is also prominently disclosed to the consumer, along with that balance information.

### IV. Section-by-Section Analysis

#### *Section 230.10 Opt-Out Disclosure Requirements for Overdraft Services*

The February 2005 Joint Guidance recommended as a best practice that where overdraft protection is provided automatically, institutions should offer consumers the option of "opting out" of the overdraft service with a clear consumer disclosure of this option. See 70 FR at 9132. As discussed separately in this **Federal Register**, the Board is proposing to exercise its authority under the FTC Act to require institutions to provide consumers with a right to opt out of an institution's overdraft service before assessing a fee or charge for the service. Proposed § 230.10 sets forth content and timing requirements for the notice to ensure that the opt-out right is disclosed effectively to consumers. The Board anticipates that any final actions taken under the FTC Act and TISA will be issued simultaneously after the Board has reviewed comments received on the proposals.

To facilitate compliance, Sample Form B-10 provides a model form institutions may use to satisfy their disclosure obligations under the proposed rule. Following issuance of the proposal, the Board intends to conduct consumer testing to determine

<sup>9</sup>For simplicity, this notice will refer only to the Board's proposal.

<sup>10</sup>While NCUA is not proposing amendments to its 12 CFR part 707 in today's **Federal Register**, TISA requires NCUA to promulgate regulations substantially similar to Regulation DD. Accordingly, NCUA will issue amendments to part 707 following the Board's adoption of final rules under Regulation DD.

how well consumers understand and can use the proposed opt-out notice.

#### 10(a) General Rule

Proposed § 230.10(a) states the general rule that if a depository institution provides a consumer the right to opt out of the institution's payment of overdrafts pursuant to the institution's payment of overdrafts on the consumer's account pursuant to the institution's overdraft service, the institution must provide notice of that right in writing. As noted above, the Board is separately proposing, pursuant to its authority under the FTC Act, to require institutions to provide consumers with a right to opt out of the institution's overdraft service before assessing a fee or charge for the service. Section 230.10 generally sets forth requirements regarding the content and timing requirements for providing this opt-out. *See* proposed comment 10–1.

#### 10(b) Format and Content

Under proposed § 230.10(b), institutions are required to include in their opt-out notice specified information about the institution's overdraft service. The new disclosures are proposed pursuant to the Board's authority under TISA Sections 264, 268, and 269. 12 U.S.C. 4303(b) & (d), 4308. Consistent with TISA's purpose, the proposal would require institutions to provide disclosures about the terms of deposit accounts to assist consumers in comparing accounts. Specifically, the proposed disclosures relate to the fees that are assessed against consumer accounts for the payment of overdrafts, the conditions under which the fees are imposed, how consumers can avoid such fees by opting out, and the availability of potentially less costly alternatives.

Under proposed § 230.10(b)(1), the notice must state the categories of transactions for which an overdraft fee may be imposed. For example, if the institution pays overdrafts created by check, ATM withdrawals and point-of-sale debit card transactions, it must indicate this fact. *See* comment 4(b)(4)–5.

Under the proposal, the notice must also include information about the costs of the institution's overdraft service. *See* proposed § 230.10(b)(2). In addition to stating the dollar amount of any fees or charges imposed on the account for paying overdraft items, including daily fees, institutions would also be required to inform consumers in the notice that overdraft fees could be charged in connection with an overdraft as low as \$1, or the lowest dollar amount for which the institution could charge a fee.

This latter disclosure is intended to make consumers aware, in some cases, that the per item overdraft fee may far exceed the amount of the overdraft. *See* proposed § 230.10(b)(3).

In the February 2005 Joint Guidance, the federal banking agencies recommended that institutions consider imposing a cap on consumers' potential daily costs from the overdraft program, such as a limit on the number of overdraft transactions subject to a fee per day, or a dollar limit on the total fees that will be imposed per day. *See* 70 FR at 9132. The Board is proposing to require additional disclosures about the maximum costs that could be incurred in connection with an institution's overdraft service. Under the proposal, institutions must disclose any daily dollar limits on the amount of overdraft fees or charges that may be assessed in addition to any limits for the statement period. If the institution does not limit the amount of fees that can be imposed either for a single day or for a statement period, it must disclose that fact. *See* proposed § 230.10(b)(4). The Board intends that both this disclosure about fee limits as well as the notice that overdraft fees in some cases will exceed the amount of the overdraft would alert consumers to the potentially high costs of overdraft services, so that they may more effectively determine whether the service's terms and features are suited to their needs, or whether other alternatives would be more appropriate.

Proposed § 230.10(b)(5) requires institutions to inform a consumer of the right to opt out of the institution's payment of overdrafts, including the method(s) that the consumer may use to exercise the opt-out right.<sup>11</sup> Such methods may include providing a toll-free telephone number that the consumer may call to opt out or allowing the consumer to mail in the opt-out request. *See* proposed comment 10(b)–2. Comment is requested as to whether institutions should be required to provide a form with a check-off box that consumers may mail in to opt out. Comment is also requested regarding whether consumers should also be allowed to opt out electronically, provided that the consumer has agreed to the electronic delivery of information.

<sup>11</sup> Under the Board's Regulation AA proposal in today's *Federal Register*, an institution would be required to allow consumers to opt out of the institution's overdraft service for all transaction types. In addition, the proposal would require the institution to allow consumers to opt out of the payment of overdrafts resulting only from ATM withdrawals and point-of-sale debit card transactions.

Proposed § 230.10(b)(6) incorporates the February 2005 Joint Guidance recommendation that when describing an overdraft protection program, institutions should inform consumers generally of other overdraft services and credit products, if any, that are available. These alternatives may include transfers from other accounts held at the institution, overdraft lines of credit, or transfers from a credit card issued by the institution. In some cases, these alternatives may be less costly than the overdraft service offered by the institution. Under the proposed rule, institutions must state whether it offers any alternatives for the payment of overdrafts. If one of the alternatives that the institution offers is an overdraft line of credit, it must state this fact. Institutions may also, but are not required to, list any additional alternatives they may offer to overdraft services.

In some cases, institutions may wish to explain to consumers the consequences of opting out of overdraft services. For example, the institution may explain that if a consumer opts out and writes a check that overdraws an account, the institution may still charge a fee if the check is returned, and that the merchant may also assess a fee. Proposed comment 10(b)–3 permits institutions to briefly describe the consequences of opting out. Of course, institutions should not represent that the payment of overdrafts is guaranteed or assured if they are not. *See* comment 8(a)–10.ii.

Comment is requested regarding whether the proposed content requirements provide sufficient information for consumers to evaluate effectively whether an institution's overdraft service meets their needs. In addition, the Board's proposal would require that all opt-out notices contain the same content, regardless of when the notice is provided. As further discussed below, the Board is requesting comment whether the content requirements should differ when the opt-out notice is provided after an overdraft fee has been charged to the consumer's account.

Proposed § 230.10(b) also requires institutions to provide the opt-out notice in a format substantially similar to Sample Form B–10 to ensure that the opt-out content is segregated from other disclosures provided by the institution and noticeable by the consumer. The Board recognizes, however, that institutions may need flexibility in formatting disclosures, depending on where and when the disclosure is provided. For example, if the opt-out notice is included in disclosures provided at account opening,

segregating the required content from other disclosures may overemphasize the importance of the disclosure to the consumer in comparison to other information about the account that the consumer is given at that time. In contrast, consumers may benefit from a more conspicuous opt-out notice when the notice is provided on the periodic statement once the consumer has incurred fees. As noted above, the Board expects to conduct consumer testing of the proposed sample form following issuance of this proposal, which may include exploring how the opt-out notice may be presented in a manner that complies with the regulation's general clear and conspicuous requirements under § 230.3, including formatting methods.

#### 10(c) Timing

Proposed § 230.10(c) sets forth timing requirements for providing an opt-out notice. The opt-out notice must initially be provided before the overdraft service is provided and overdraft fees are imposed on the consumer's account. For example, notice may be given at the time of account opening, either as part of the deposit account agreement or in a stand-alone document. Some institutions, however, do not enroll consumers in their overdraft service until some time after account opening, after the consumer has maintained his or her account in good standing for a certain period of time. Thus, institutions may provide the opt-out notice closer to the time in which overdraft services would be added to the consumer's account. The proposed rule would allow this later notice so long as it is provided, and the consumer has a reasonable opportunity to exercise the opt-out right, before the institution imposes any fees in connection with paying an overdraft.

The Board believes that providing an opt-out notice only at account opening may have limited effectiveness. For example, consumers may not focus on the significance of the information at account opening because they may assume they will not overdraw the account.<sup>12</sup> Thus, under both the Board's

2008 Regulation AA proposal and this proposed rule, institutions must also provide consumers notice of the right to opt-out of their institution's payment of overdrafts at a time when the consumer is more likely to be focused on the cost impact of the service, specifically after the consumer has overdrawn the account and fees have been assessed on the account. Proposed § 230.10(c)(2)(i) generally requires institutions to provide a notice meeting the content requirements of § 230.10(b) on each periodic statement reflecting the assessment of any overdraft fee or charge. In addition, pursuant to authority under section 269 of TISA, the proposed rule requires that if the notice is included on the periodic statement, it must be provided in close proximity to the aggregate fee disclosures required under § 230.11(a) to ensure that these related disclosures are presented together.

Alternatively, many institutions notify consumers promptly after paying an overdraft of the fact of the overdraft and the amount the consumer's account is overdrawn. While this separate notice is not required by Regulation DD (it is considered a best practice under the February 2005 Joint Guidance), institutions providing an opt-out notice at this time would also be deemed to comply with the timing requirements of this proposed rule. See proposed § 230.10(c)(2)(ii). Institutions that elect to provide the opt-out disclosure on a separate notice sent following the institution's payment of an overdraft need only provide the opt-out notice once per statement period. For example, assume a statement cycle is for a calendar month. If a consumer overdraws on the account at the beginning of the month and receives an opt-out notice shortly after the overdraft is paid, the institution is not required to provide another opt-out notice for any additional overdrafts that occur during that statement period.

As noted above, the Board's proposal would require that institutions provide the same content in proposed § 230.10(b) for all opt-out notices to ensure uniform notices and because consumers may not see the initial opt-out notice. However, the Board is cognizant of the compliance burden imposed on institutions from the proposed content requirements. In addition, the Board recognizes that consumers may not require all of the information in proposed § 230.10(b) in

the notices following an individual overdraft. For example, the consumer may not need to be reminded that he or she may incur an overdraft fee for a small dollar overdraft if the periodic statement reflects both the fee and the amount of the transaction that caused the consumer to overdraw the account. Similarly, the amount of the fee may not need to be included in the opt-out notice if the transaction history on the statement reflects fees charged to the account, including for paying an overdraft.

Comment is requested on the content requirements of the opt-out notice, and the burden to institutions and benefits to consumers of providing all of the proposed content in each notice, including the information about alternatives to overdraft services. Comment is also requested regarding whether consumers should receive the same content for all opt-out notices, regardless of when a notice is provided, or whether the rule should permit institutions to exclude some of the required content in subsequent notices. For example, if the information about alternatives to overdraft services is retained generally, should this information be excluded from periodic statements. In addition, comment is requested on the burden to institutions of requiring that the opt-out disclosures appear in close proximity to the fees. The Board also intends to explore these issues through its consumer testing of the opt-out notice following the issuance of this proposal.

The Board anticipates that the requirement to provide notice before overdraft fees are assessed would apply only to accounts opened after the effective date of the final rule. Thus, depository institutions would not be required to provide initial opt-out notices to existing customers. Nonetheless, the requirement to provide subsequent notice of the opt-out after the consumer has overdrawn the account and fees have been assessed on the account would apply to all accounts after the effective date of the final rule, including those existing as of the effective date of the rule.

#### 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 do provide such statements are required to disclose fees or charges imposed on

<sup>12</sup> This behavior is referred to as "hyperbolic discounting." See Angela Littwin, *Beyond Usury: A Study of Credit-Card Use and Preference Among Low-Income Consumers*, 80 Tex. L. Rev. 451, 467-478 (2008) (discussing consumers' tendency to underestimate their future credit card usage when they apply for a card and thereby failing to adequately anticipate the costs of the product, and citing Shane Frederick, George Loewenstein & Ted O'Donoghue, *Time Discounting and Time Preference: A Critical Review*, 40 J. Econ. Literature 351, 366-67 (2002); Ted O'Donoghue & Matthew Rabin, *Doing It Now or Later*, 89 Am. Econ. Rev. 103, 103, 111 (1999) (explaining people's preference

for delaying unpleasant activities and accepting immediate rewards despite their knowledge that the delay may lessen potential future rewards or increase potential adverse consequences).

the account during the statement period. *See* 12 U.S.C. 4307(3) and 12 CFR 230.6(a)(3). Section 230.11(a) further requires institutions that promote the payment of overdrafts in an advertisement to provide 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. Under the proposed rule, § 230.11(a) is amended to require all institutions to provide these fee disclosures, whether or not they promote the payment of overdrafts.

As originally proposed in May 2004, all institutions would have been required to separately disclose the total dollar amount of overdraft fees and the total dollar amount of returned-item fees for the statement period and for the calendar year to date. Most industry commenters opposed the proposal, stating that it would be costly and provide little benefit to consumers. The majority of industry commenters stated that if the Board adopted such a requirement, it should apply to all institutions and not just institutions that market overdraft services. Some of these commenters stated that a rule based on “marketing” would be too vague, while others asserted that if the Board believed the cost disclosures are useful, they would be just as beneficial to consumers regardless of whether the overdraft service is marketed. *See* 70 FR at 29,588.

In limiting the aggregate fee disclosures to institutions that market overdraft services in the May 2005 final rule, the Board stated its intention to avoid imposing compliance burdens on institutions that pay overdrafts infrequently, such as institutions that only pay overdrafts on an ad hoc basis. *See* 70 FR at 29,589. To address industry concerns that a rule based on marketing would be too vague to administer, the final rule also specified certain types of communications and practices that would not trigger the requirement for disclosing aggregate fees on periodic statements, including responding to consumer-initiated inquiries about deposit accounts or overdrafts or making disclosures that are required by federal or other applicable law. *See* § 230.10(a)(2).

Since issuance of the May 2005 final rule, Board staff and staff of other federal banking agencies have received a number of questions and requests for more guidance about when an institution is deemed to be promoting the payment of overdrafts in an advertisement to trigger the aggregate fee disclosure requirements. Compliance issues have most often been raised by financial institutions that are

concerned that implementing the best practices recommended by the February 2005 Joint Guidance may lead to a determination that they are promoting their overdraft service. For example, Board staff has received a number of inquiries about how institutions may provide notices informing consumers about their ability to opt out of an institution’s overdraft service without being considered to be promoting the service. Similarly, an institution may want to inform consumers of less costly alternatives to the institution’s overdraft service as recommended by the February 2005 Joint Guidance, but refrain from doing so because they may inadvertently trigger the aggregate fee disclosure requirements under § 230.11(a). Based on further analysis, the Board is concerned that limiting the scope of the rule to institutions that market the service may have led to the unintended consequence of discouraging transparency by depository institutions regarding their overdraft payment practices.

In addition, although the rule’s application only to institutions that market overdraft services was intended to avoid imposing compliance burdens on institutions that pay overdrafts infrequently, the Board is concerned that the vast majority of institutions may no longer pay overdrafts on an entirely “ad hoc” basis, but rather automate most of their overdraft payment decision process, leading to more frequent payment of overdrafts. Available data reviewed by Board staff indicates that the percentage of accountholders with one or more overdrafts paid during a calendar year appears to be consistent across institutions, whether or not an institution promotes its overdraft service. Thus, a significant number of consumers who use overdraft services on a regular basis do not receive the benefit of the aggregate fee disclosures which might otherwise help them in evaluating their approach to account management and determine whether other types of accounts or services would be more appropriate for their needs. Moreover, the Board notes that the ability of consumers to compare effectively the terms of accounts is potentially undercut by a rule that distinguishes between institutions that promote overdraft services and those that do not.

In light of the concerns noted above, the Board is proposing to require all institutions to provide aggregate dollar amount totals of fees for paying overdrafts and for fees for returning items unpaid on periodic statements provided to consumers, pursuant to its

authority under Sections 268 and 269 of TISA. *See* § 230.11(a)(1). 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). Comment is requested on the potential benefits to consumers and compliance burden for institutions for the proposed approach.

#### **Format of Aggregate Fee Disclosures**

Board staff’s review of current periodic statement disclosures for institutions that promote overdraft services indicates the aggregate fee totals are often disclosed in a manner that may not be effective in informing consumers of the totals. Accordingly, pursuant to its authority under Section 269 of TISA, the Board is proposing to require that these disclosures be provided in close proximity to fees identified under § 230.6(a)(3). *See* proposed § 230.11(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 format requirement has been informed to a significant degree by the Board’s consumer testing in the context of credit card disclosures. In that testing, consumers consistently reviewed transactions identified on their periodic statements and noticed totals for fees and interest charges when they were grouped together with transactions. *See* 72 FR at 32996. Similarly, the Board believes that the requirement to provide the aggregate cost disclosures for overdraft and returned item fees will be more noticeable to consumers when grouped together with the itemized fees, thus enabling them to act as appropriate to manage their accounts effectively. In addition, the proposed rule requires the information to be presented in a tabular format similar to the proposed interest charge and fees total disclosures under the Board’s June 2007 proposal under Regulation Z. *See* 72 FR at 32996, 33052; proposed 12 CFR 226.7(b)(6). The proposal includes two alternatives for Sample Form B–11 to illustrate how institutions may provide the aggregate cost information on their periodic statements. Following issuance of this proposal, the Board intends to conduct additional consumer testing to test the format, placement, and content of this periodic statement disclosure.

The proposal contains additional revisions to the provisions in § 230.11(a) and accompanying staff commentary to reflect the revised scope of institutions subject to the disclosure requirement, including deletion as unnecessary of the

examples in § 230.11(a)(2) of communications that would not trigger the aggregate fee disclosure requirement.

#### 11(b) Advertising Disclosures for Overdraft Services

Section 230.11(b) contains a list of communications about the payment of overdrafts that are not subject to additional advertising disclosures. The Board proposes to add a new example under § 230.11(b) to include the proposed opt-out notice under § 230.10 of this rule. *See* proposed § 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 additional guidance in the staff commentary in the form of examples of institutions promoting the payment of overdrafts and 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.” *See* comment 11(b)–1.iii; *see also* § 230.11(b)(1); 70 FR at 29,590. To facilitate responsible use of overdraft services and ensure that consumers receive accurate information about their account balances, the Board is proposing additional restrictions on account balances that may be disclosed in response to a consumer inquiry. Specifically, to avoid consumer confusion with respect to account balances disclosed in response to an inquiry, proposed § 230.11(c) would prohibit institutions from including in the consumer’s disclosed balance any funds the institution may provide to cover an overdraft item. The proposed provision would apply to any automated system used by an institution to provide balance information. The proposed rule would not apply to in-person discussions or telephone discussions or Internet chats with live personnel due to concerns about the compliance burden associated with monitoring individual conversations and responses. Of course, such discussions may not be deceptive.

The proposed provision implements the prohibition in TISA § 263(e) (12 U.S.C. 4303(e)) on misleading or inaccurate advertisements, announcement, or solicitations relating

to a deposit account. Thus, under proposed § 230.11(c), institutions must disclose an account balance that solely includes funds that are available for the consumer’s immediate use or withdrawal, and may not include any additional amount that the institution may provide to cover an overdraft. For example, as part of its overdraft service, an institution may add a \$500 cushion or overdraft limit to the consumer’s account balance when determining whether to pay an overdrawn item; the additional \$500 could not be included in this balance disclosed to the consumer in response to an inquiry. The proposed provision incorporates a best practice recommended by the February 2005 Joint Guidance. Similarly, as provided in the February 2005 Joint Guidance, institutions may, at their option, disclose a second balance that includes funds that may be advanced through the institution’s overdraft service, provided that the institution prominently discloses at the same time that the second balance includes funds provided by the institution to cover overdrafts.

Proposed comment 11(c)–1 clarifies that for purposes of this provision, the institution may, but need not, include 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 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 proposed comment recognizes 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. For example, smaller institutions may only consider a balance 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. Other institutions may update the balance on a near-or real-time basis to reflect recent transactions that have been authorized, but have not been presented for settlement. The proposed comment is intended to make clear that institutions are not expected to reconfigure their internal systems to provide “real-time” balance disclosures. Regardless of the transactions that are reflected in the account balance disclosed to consumers, the proposed

rule is intended only to require that the balance must not include any additional amounts that the institution may provide to pay an overdraft.

Proposed comment 11(c)–2 provides 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). The proposed comment further clarifies that the reference to ATM inquiries applies equally to inquiries at ATMs owned or operated by a consumer’s account-holding institution, as well as to inquiries at foreign ATMs, including those operated by non-depository institutions.

While the Board considered addressing concerns about potentially deceptive balances under its separate rulemaking authority under Section 5(a) of the FTC Act (15 U.S.C. 45(n)), the Board is proposing to address this issue under its TISA authority because such rules (if similarly adopted under the NCUA’s separate authority under TISA, *see* 12 CFR part 707) would also extend to state-chartered credit unions.<sup>13</sup> Nevertheless, the Board believes that adoption of this rule under TISA would not preclude a separate determination by a federal banking agency that it is a deceptive practice under the FTC Act to disclose a single balance that includes funds that an institution may provide to cover an overdraft, if the institution does not state that fact.

#### V. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) generally 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 believes that this proposed rule will not

<sup>13</sup> The Board notes that rules promulgated by the NCUA under the FTC Act do not apply to state-chartered credit unions. As noted above, following the Board’s adoption of final rules under Regulation DD, NCUA intends to issue substantially similar amendments to 12 CFR part 707.

have a significant economic impact on a substantial number of small entities. A final regulatory flexibility analysis will be conducted after consideration of comments received during the public comment period.

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 set forth content, timing and format requirements for a notice provided to consumers about their right to opt out of an institution's overdraft service. The proposed requirements are intended to ensure that consumers receive effective disclosures about the opt-out right. In addition, current requirements for disclosing totals for overdraft and returned item fees on periodic statements would be expanded to apply 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. Lastly, the proposed rule would ensure that consumers are not misled about the funds they have available for a transaction by requiring institutions that provide balance information through an automated system in response to a consumer inquiry, to only include funds available for the consumer's immediate use or withdrawal pursuant to the terms of the account agreement, and not any funds that may be advanced through the institution's overdraft service.

2. *Small entities affected by the proposed rule.* Approximately 12,117 depository institutions in the United States that must comply with TISA have assets of \$150 million or less and thus are considered small entities for purposes of the RFA, based on 2007 call report data. Approximately 4,774 are institutions that must comply with the Board's Regulation DD; approximately 7,343 are credit unions that must comply with NCUA's Truth in Savings regulations which must be substantially similar to the Board's Regulation DD.

Under the proposed rule, all small depository institutions that pay overdrafts will have to revise their disclosures both at account opening (or before the overdraft service is provided) and on periodic statements, to reflect the proposed consumer right to opt out. (The rule provides alternative means for complying with the periodic statement opt-out disclosure requirement, such as by providing the opt-out disclosure on a notice sent promptly after an overdraft. To the extent a depository institution elects to comply with this alternative means, it will have to revise those disclosures, as appropriate.) The Board notes, however, that some depository institutions likely already provide some form of consumer opt-out based on their implementation of best practices under the February 2005 Joint Guidance.

In addition, 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. Lastly, institutions will have to reprogram their automated systems to provide balances that exclude additional funds the institution may provide to cover an overdraft in response to consumer balance inquiries, if the institution has not done so as previously recommended by the February 2005 Joint Guidance.

3. *Recordkeeping, reporting, and compliance requirements.* The proposed revisions to Regulation DD require all depository institutions to provide consumers notice of their right to opt out of the institution's overdraft service before the service is provided, and on each periodic statement reflecting an overdraft fee or charge (or alternatively, on a notice sent promptly after an overdraft informing the consumer of that fact). In addition, 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. Disclosures of account balances that include funds that the institution may provide to cover an overdraft will be prohibited, unless the institution specifically discloses that fact.

4. *Other federal rules.* The Board has not identified any federal rules that duplicate, overlap, or conflict with the proposed revisions to Regulation DD.

5. *Significant alternatives to the proposed revisions.* The Board solicits comment about additional ways to reduce regulatory burden associated with this proposed rule.

## VI. 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 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 proposed 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 creditors and other entities subject to Regulation DD, including for-profit financial institutions and small businesses.

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



Board-supervised institutions. Regulation DD defines Board-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.

As mentioned in the preamble, the proposed rulemaking sets forth content, timing and format requirements for a notice provided to consumers about their right to opt out of an institution's overdraft service. Current requirements for disclosing totals for overdraft and returned item fees on periodic statements would be extended to apply to all institutions and not solely to institutions that promote the payment of overdrafts. The proposed rule would also require institutions that provide balance information in response to a balance inquiry by the consumer, to only include funds available for the consumer's immediate use or withdrawal without incurring an overdraft, and not any funds added through the institution's overdraft service.

The Board estimates that 1,172 respondents regulated by the Board would take, on average, 40 hours (one business week) to re-program and update their systems to comply with the proposed disclosure requirements. These disclosure requirements include opt-out disclosures for overdraft services (§ 230.10), disclosure of total fees on periodic statements (§ 230.11(a)), and disclosure of account balances (§ 230.11(c)). The Board estimates the total annual one-time burden to be 46,880 hours and believes that, on a continuing basis, there would be no increase in burden as the proposed disclosures would be sufficiently accounted for once incorporated into the current account disclosures (§ 230.4) and periodic statement disclosure (§ 230.6). To ease the compliance cost model clauses, B-10 consumer opt-out from overdraft services sample form (§ 230.10) and B-11 aggregate overdraft and returned item fees sample form (§ 230.11), are proposed in Appendix B.

The current total annual burden is estimated to be 176,177 hours for 1,172 Board-covered institutions. The proposed total annual burden is estimated to be 223,057 hours, an increase of 46,880 hours.

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 estimates. Using the Board's method, the total estimated annual burden for all financial institutions subject to Regulation DD, including Board-supervised institutions, would be approximately 2,898,548 hours. The proposed amendments would impose a one-time increase in the estimated annual burden for all institutions subject to Regulation DD by 772,000 hours to 3,670,548 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 19,300), potentially are affected by this collection of information, and thus are respondents for purposes of the PRA.

*Comments are invited on:* (1) Whether the proposed collection of information is necessary for the proper performance of the Board's functions; including whether the information has practical utility; (2) the accuracy of the Board's estimate of the burden of the proposed information collection, including the cost of compliance; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology. Comments on the collection of information should be sent to Michelle Shore, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 151-A, Board of Governors of the Federal Reserve System, Washington, DC 20551, with copies of such comments sent to the Office of Management and Budget, Paperwork Reduction Project (7100-0271), Washington, DC 20503.

#### Text of Proposed Revisions

Certain conventions have been used to highlight the proposed changes to the text of the regulation and staff commentary. New language is shown inside bold-faced arrows, while language that would be deleted is set off with bold-faced 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 set forth in the preamble, the Board proposes to amend 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 regulation, 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 regulation 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. [7100-0255] ▶ 7100-0271 ◀.

\* \* \* \* \*

3. Section 230.10 is added to read as follows:

#### § 230.10 ▶ Opt-out disclosure requirements for overdraft services.

(a) *General rule.* If a depository institution provides a consumer the right to opt out of the institution's payment of overdrafts pursuant to the institution's overdraft service, as defined in 12 CFR 227.31(c), the institution must provide written notice of that right in accordance with the requirements of this section.

(b) *Format and content.* The notice described in paragraph (a) of this section must use a format substantially similar to Sample Form B-10, and include the following information:

(1) *Overdraft policy.* The categories of transactions for which a fee for paying an overdraft may be imposed;

(2) *Fees imposed.* The dollar amount of any fees or charges imposed for paying checks or other items when there are insufficient or unavailable funds and the account becomes overdrawn;

(3) *Potential impact of fee in relation to overdraft amount.* A statement that a fee may be charged for overdrafts as low as \$1, or the lowest dollar amount for which the institution may charge an overdraft fee;

(4) *Limits on fees charged.* The maximum amount of overdraft fees or

charges that may be assessed per day and per statement period, or, if applicable, that there is no limit to the fees that can be imposed;

(5) *Disclosure of opt-out right.* An explanation of the consumer's right to opt out of the institution's payment of overdrafts, including the method(s) by which the consumer may exercise that right; and

(6) *Alternative payment options.* As applicable, a statement that the institution offers other alternatives for the payment of overdrafts. In addition, if the institution offers a line of credit subject to the Board's Regulation Z (12 CFR part 226) for the payment of overdrafts, the institution must also state that fact. An institution may, but is not required to, list additional alternatives for the payment of overdrafts.

(c) *Timing.* As applicable, the notice described in paragraph (a) of this section must be provided:

(1) Prior to the institution's imposition of any fee for paying a check or other item when there are insufficient or unavailable funds in the consumer's account, provided that the consumer has a reasonable opportunity to exercise the opt-out right prior to the assessment of any fee for paying an overdraft; and

(2)(i) On each periodic statement reflecting any fee(s) or charge(s) for paying an overdraft, in close proximity to the disclosures required by § 230.11(a); or

(ii) At least once per statement period on any notice sent promptly after the institution's payment of an overdraft.

4. 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 institutions advertising the payment of overdrafts] ▶for overdraft services.**

(a) [Periodic statement disclosures] ▶*Disclosure of total fees on periodic statements*◀—(1) *Disclosure of total fees* ▶*General*◀. [(i) Except as provided in paragraph (a)(2) of this section, if a depository institution promotes the payment of overdrafts in an advertisement, the] ▶A depository◀ institution must separately disclose on each periodic statement▶, as applicable◀:

[(A)] ▶(i)◀ The total dollar amount for all fees or charges imposed on the account for paying checks or other items when there are insufficient funds and the account becomes overdrawn; and

[(B)] ▶(ii)◀ The total dollar amount for all fees imposed on the account for returning items unpaid.

[(ii)] ▶(2) *Totals required.*◀ The disclosures required by [this] paragraph ▶(a)(1) of this section◀ must be provided for the statement period and for the calendar year to date [for any account to which the advertisement applies];

▶(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-11 in appendix B.◀

[(2) *Communications not triggering disclosure of total fees.* The following communications by a depository institution do not trigger the disclosures required by paragraph (a)(1) of this section:

(i) Promoting in an advertisement a service for paying overdrafts where the institution's payment of overdrafts will be agreed upon in writing and subject to the Board's Regulation Z (12 CFR part 226);

(ii) Communicating (whether by telephone, electronically, or otherwise) about the payment of overdrafts in response to a consumer-initiated inquiry about deposit accounts or overdrafts. Providing information about the payment of overdrafts in response to a balance inquiry made through an automated system, such as a telephone response machine, an ATM, or an institution's Internet site, is not a response to a consumer-initiated inquiry for purposes of this paragraph;

(iii) Engaging in an in-person discussion with a consumer;

(iv) Making disclosures that are required by federal or other applicable law;

(v) Providing a notice or including information on a periodic statement informing a consumer about a specific overdrawn item or the amount the account is overdrawn;

(vi) Including in a deposit account agreement a discussion of the institution's right to pay overdrafts;

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

(viii) Providing informational or educational materials concerning the payment of overdrafts if the materials do not specifically describe the institution's overdraft service.

(3) *Time period covered by disclosures.* An institution must make the disclosures required by paragraph (a)(1) of this section for the first statement period that begins after an

institution advertises the payment of overdrafts. An institution may disclose total fees imposed for the calendar year by aggregating fees imposed since the beginning of the calendar year, or since the beginning of the first statement period that year for which such disclosures are required.

(4) *Termination of promotions.* Paragraph (a)(1) of this section shall cease to apply with respect to a deposit account two years after the date of an institution's last advertisement promoting the payment of overdrafts applicable to that account.

(5) *Acquired accounts.* An institution that acquires an account must thereafter provide the disclosures required by paragraph (a)(1) of this section for the first statement period that begins after the institution promotes the payment of overdrafts in an advertisement that applies to the acquired account. If disclosures under paragraph (a)(1) of this section are required for the acquired account, the institution may, but is not required to, include fees imposed prior to acquisition of the account.]

(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; [or]

(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 notice regarding the institution's payment of overdrafts under § 230.10 of this part.◀

\* \* \* \* \*

▶(c) *Disclosure of account balances.* In response to an account balance inquiry by a consumer through an automated system, an institution must provide a balance that solely includes funds that are available for the consumer's immediate use or withdrawal, and 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. The institution may, at its option, disclose a second account balance that includes such an additional amount, if the institution prominently indicates that this balance includes funds provided by the institution to cover overdrafts.◀

5. In Appendix B to Part 230, and new forms B-10 Overdraft Services Opt-Out Notice Sample Form and B-11 Aggregate Overdraft And Returned Item Fees Sample Form to read as follows:

Appendix B to Part 230—Model Clauses  
and Sample Forms

\* \* \* \* \*

**B-10 Overdraft Services Opt-Out Notice Sample Form**

We provide overdraft services for your account. This means that if there is a debit to your account when your account does not have sufficient funds, we may pay your overdraft.

There are fees associated with our overdraft services:

- We will charge you a fee of \$\_\_ for each overdraft item that we pay, including ATM withdrawals, debit card purchases, checks, and in-person transactions.
- We may charge you this fee even if your overdraft amount is as low as \$\_\_.
- [We may also charge you additional daily fees of \$\_\_ for each day your account remains overdrawn.]
- [We can charge you a maximum of \$\_\_ in fees per day and \$ \_\_ per statement period for overdrawing your account.] [There is no limit to the amount of fees we can charge you for overdrawing your account per day/per statement period.]

You have the right to opt out of this service and tell us not to pay any overdrafts. If you do, however, you may have to pay a fee if you make transactions that are returned unpaid. You also have the right to tell us not to pay overdrafts for ATM withdrawals and debit card purchases, but to continue to pay overdrafts for other types of transactions.

We also offer less costly overdraft payment services that you may qualify for, including a line of credit. To opt out of our overdraft service, or to obtain information about other alternatives, call us at 1-800-XXX-XXXX or write us at [insert address].

**B-11 Aggregate Overdraft and Returned Items Fee Sample Form**

**Alternative 1:**

Summary of Overdraft and Returned Item Fees		
	Total For This Period	Total Year-to-Date
Total Overdraft Fees	\$50.00	\$75.00
Total Returned Item Fees	\$0.00	\$33.00

**Alternative 2:**

Summary of Overdraft and Returned Item Fees	
Total overdraft fees charged this period	\$50.00
Total overdraft fees charged year-to-date	\$75.00
Total returned item fees charged this period	\$0.00
Total returned item fees charged year-to-date	\$33.00

- 6. In Supplement I to part 230:
  - a. In Section 230.10, the heading is revised and new paragraphs 1. through 3. are added.
  - b. In Section 230.11 and Section 230.11(a), the headings are revised and paragraphs (a)(1)1. and (a)(1)2. are removed.
  - c. In Section 230.11, paragraphs (a)(1)3. through (a)(1)8. are redesignated as paragraphs (a)(1)1. through (a)(1)6., respectively.
  - d. In Section 230.11, new paragraphs (a)(1)2. and (a)(1)3. are revised.
  - e. In Section 230.11, new paragraphs (c)1. and (c)2. are added.

**Supplement I to Part 230—Official Staff Interpretations**

\* \* \* \* \*

**Section 230.10 Opt-out Disclosure Requirements for the Payment of Overdrafts**

►1. *Disclosure of opt-out right.* Section 230.10 sets forth the disclosures that must be provided if a depository institution provides a consumer the right to opt out of the institution's payment of overdrafts. Institutions may be required to provide consumers with the right to opt out in accordance with federal or other applicable law. See, e.g., § 227.31(a) of the Board's Regulation AA (12 CFR part 227).

2. *Methods of opting out.* Reasonable methods that a consumer may use to opt out of an institution's payment of overdrafts include mailing a form and calling a toll-free telephone number.

3. *Additional opt-out notice content.* In the opt-out notice provided under § 230.10(a) of this part, an institution may briefly describe the consequences of the consumer's election to opt out of the institution's payment of

overdrafts. For example, the institution may state that if a consumer opts out, the consumer's payment may be denied, or returned unpaid, and that the consumer may incur returned item fees from both the institution as well as the payee. ◀

\* \* \* \* \*

**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.* [An institution that advertises the payment of overdrafts] ►Institutions◀ must disclose on periodic statements a total dollar amount for all fees charged to 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 to avoid an overdraft, or fees charged when the institution has previously agreed in writing to pay items that overdraw the account and the service is subject to the Board's Regulation Z, 12 CFR part 226.

3. *Fees for returning items unpaid.* [An institution that advertises the payment of overdrafts must disclose a] ►The◀ total dollar amount ►of◀ [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.

\* \* \* \* \*

►(c) *Disclosure of account balances.*

1. *Funds available for consumer's immediate use or withdrawal.* For purposes of the balance disclosure requirement in § 230.11(c), an institution must generally disclose a balance that solely reflects the funds that are available for the consumer's immediate use or withdrawal, without the consumer incurring an overdraft. The balance disclosed 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 disclosed may, but need not, include any 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. *Balance inquiry channels.* The balance disclosure requirement in § 230.11 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 automated teller machine (ATM) (whether or not the ATM is owned or operated by the institution). If the balance is obtained at an

ATM, the disclosure requirement applies whether the balance is disclosed on the ATM screen or on a paper receipt. ◀

\* \* \* \* \*

By order of the Board of Governors of the Federal Reserve System, May 2, 2008.

**Jennifer J. Johnson,**

*Secretary of the Board.*

[FR Doc. E8-10243 Filed 5-16-08; 8:45 am]

BILLING CODE 6210-01-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2008-0556; Directorate Identifier 2007-NM-028-AD]

RIN 2120-AA64

#### **Airworthiness Directives; Various Aircraft Equipped With Honeywell Primus II RNZ-850( )/-851(-) Integrated Navigation Units**

**AGENCY:** Federal Aviation Administration (FAA), Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to supersede an existing airworthiness directive (AD) that applies to various aircraft equipped with certain Honeywell Primus II RNZ-850( )/-851( ) integrated navigation units (INUs). The existing AD, as one alternative for compliance, provides for a one-time inspection to determine whether a certain modification has been installed on the Honeywell Primus II NV-850 navigation receiver module (NRM), which is part of the INU. In lieu of accomplishing this inspection, and for aircraft found to have an affected NRM, that AD provides for revising the aircraft flight manual to include new limitations for instrument landing system approaches. That AD also requires an inspection to determine whether certain other modifications have been done on the NRM; and doing related investigative, corrective, and other specified actions, as applicable; as well as further modifications to address additional anomalies. This proposed AD would extend the compliance time for a certain inspection and associated actions. This proposed AD would also revise the applicability to include additional affected INUs. This proposed AD results from reports indicating that erroneous localizer and glideslope indications have occurred on certain aircraft equipped with the subject INUs. We are proposing this AD to ensure that

the flight crew has accurate localizer and glideslope deviation indications. An erroneous localizer or glideslope deviation indication could lead to the aircraft making an approach off the localizer, which could result in impact with an obstacle or terrain.

**DATES:** We must receive comments on this proposed AD by July 3, 2008.

**ADDRESSES:** You may send comments by any of the following methods:

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

- *Fax:* 202-493-2251.

- *Mail:* U.S. Department of

Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact <https://pubs.cas.honeywell.com> or contact Honeywell International, Inc., Commercial Electronic Systems, 21111 North 19th Avenue, Phoenix, Arizona 85027-2708.

#### **Examining the AD Docket**

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800-647-5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** J. Kirk Baker, Aerospace Engineer, Systems and Equipment Branch, ANM-130L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712-4137; telephone (562) 627-5345; fax (562) 627-5210.

#### **SUPPLEMENTARY INFORMATION:**

##### **Comments Invited**

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA-2008-0556; Directorate Identifier 2007-NM-028-AD" at the beginning of

your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

#### **Discussion**

On October 13, 2006, we issued AD 2006-22-05, amendment 39-14802 (71 FR 62907, October 27, 2006), for various aircraft equipped with certain Honeywell Primus II RNZ-850( )/-851( ) integrated navigation units (INUs). That AD, as one alternative for compliance, provides for a one-time inspection to determine whether a certain modification has been installed on the Honeywell Primus II NV-850 navigation receiver module (NRM), which is part of the INU. In lieu of accomplishing this inspection, and for aircraft found to have an affected NRM, that AD provides for revising the aircraft flight manual to include new limitations for instrument landing system approaches. That AD also requires an inspection to determine whether certain other modifications have been done on the NRM; and doing related investigative, corrective, and other specified actions, as applicable; as well as further modifications to address additional anomalies. That AD resulted from reports indicating that erroneous glideslope indications have occurred on certain aircraft equipped with the subject INUs. We issued that AD to ensure that the flightcrew has an accurate glideslope deviation indication. An erroneous glideslope deviation indication could lead to the aircraft making an approach off the glideslope, which could result in impact with an obstacle or terrain.

#### **Actions Since Existing AD Was Issued**

Since we issued AD 2006-22-05, we have become aware of the need to change three aspects of the existing AD:

1. Additional INU part numbers need to be added to the applicability.
2. Paragraph (j) of the existing AD requires related investigative, corrective, and other specified actions for certain NRMs before further flight. Our intention was to allow the full compliance time for both the inspection for the discrepant NRMs and the other associated actions for those NRMs.