

correspondent that is not an eligible institution, a Reserve Bank shall pay interest only on the balances maintained to satisfy the reserve balance requirement of one or more respondents up to the top of the penalty-free band, and the correspondent shall pass back to its respondents interest paid on balances in the correspondent's account.

(d) * * *

(3) Balances maintained in an excess balance account will not satisfy any institution's reserve balance requirement.

* * * * *

(e) * * *

(2) A term deposit will not satisfy any institution's reserve balance requirement.

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By order of the Board of Governors of the Federal Reserve System, October 7, 2011.

Jennifer J. Johnson,
Secretary of the Board.

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FEDERAL RESERVE SYSTEM

12 CFR Part 210

[Regulation J; Docket No. R-1434]

RIN 7100 AD 84

Collection of Checks and Other Items by Federal Reserve Banks and Funds Transfers Through Fedwire: Elimination of "As-of Adjustments" and Other Clarifications

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice of proposed rulemaking; request for public comment.

SUMMARY: The Board is requesting public comment on proposed amendments to Regulation J (Collection of Checks and Other Items by Federal Reserve Banks and Funds Transfers through Fedwire). The proposed changes would eliminate references to "as-of adjustments" consistent with the Board's proposed amendments to Regulation D to simplify reserves administration. The proposed amendments would also clarify that an institution's Administrative Reserve Bank is deemed to have accepted deposit of a check or other item even if the institution sends the item directly to another Federal Reserve Bank. The proposed amendments would further clarify that Regulation J continues to apply to a Fedwire funds transfer even if the funds transfer also meets the definition of "remittance transfer" under the Electronic Fund Transfer Act.

DATES: Comments must be submitted by December 19, 2011.

ADDRESSES: You may submit comments, identified by Docket No. R-1434 and RIN 7100 AD 84, 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. 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 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: Kara Handzlik, Senior Attorney (202) 452-3852, Legal Division; Margaret Gillis DeBoer, Assistant Director (202) 452-3139, or Heather Wiggins, Senior Financial Analyst (202) 452-3674, Division of Monetary Affairs; or Joseph Baressi, Project Leader, Division of Reserve Bank Operations and Payment Systems (202) 452-3959; for users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263-4869; Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551.

SUPPLEMENTARY INFORMATION:

I. Background

Subpart A of Regulation J governs the collection of checks and other items by the Federal Reserve Banks (Reserve Banks), including the types of checks or other items that may be sent to Reserve Banks, the order in which they are deemed to be handled, and the related warranties and indemnities. Subpart B of Regulation J sets forth the terms and conditions under which Reserve Banks receive and deliver payment orders from and to depository institutions over the

Reserve Banks' Fedwire® Funds Service (Fedwire).

The Board is proposing amendments to Regulation J that would eliminate references throughout Regulation J to a Reserve Bank's use of "as-of adjustments."¹ These amendments are consistent with the Board's proposed amendments to Regulation D, published elsewhere in the **Federal Register**, which would simplify reserves administration.² The Board is also proposing amendments to subpart A of Regulation J to clarify where a check or other item is deemed to be accepted when it is sent to a Reserve Bank. Specifically, these amendments would clarify that when an institution sends a check or other item for collection to a Reserve Bank, the institution's Administrative Reserve Bank is deemed to have accepted deposit of the item even if the item was sent directly to another Reserve Bank.³ In addition, the Board is proposing amendments that would clarify the application of subpart B of Regulation J. Under these amendments, subpart B of Regulation J would continue to apply to a Fedwire funds transfer even if that funds transfer also meets the definition of "remittance transfer" under the recently revised Electronic Fund Transfer Act ("EFTA").

II. Overview of Proposed Amendments

Eliminate References to As-of Adjustments

Regulation J defines "as-of adjustment" for purposes of subpart B of the regulation as "a debit or credit, for reserve- or clearing-balance maintenance purposes only, applied to the reserve or clearing balance of a bank that either sends a payment order to a Federal Reserve Bank, or that receives a payment order from a Federal Reserve Bank, in lieu of an interest charge or

¹ If the Board eliminates references to as-of adjustments in its Regulations D and J, the Reserve Banks would make conforming changes to their operating circulars that set forth the terms of their services. The Reserve Banks' operating circulars are available at http://www.frbservices.org/regulations/operating_circulars.html.

² The proposed amendments to Regulation D, designed to reduce the administrative and operational costs associated with reserve requirements, would discontinue as-of adjustments for deposit revisions and replace all other as-of adjustments with direct compensation. The amendments would also create a common two-week maintenance period for all depository institutions, create a penalty-free band around reserve balance requirements in place of carryover and routine waivers, and eliminate the contractual clearing balance program.

³ An institution's Administrative Reserve Bank is the Reserve Bank in whose District the institution is located. 12 CFR 210.2(c), see section 204.3(g) of Regulation D, 12 CFR 204.3(g) (location of depository institutions).

payment.”⁴ Under Regulation J, a Reserve Bank may use either an as-of adjustment or direct compensation (at the federal funds rate) to compensate for an error in transaction processing or other damages owed in connection with a Fedwire funds transfer. An as-of adjustment corrects the average level of balances maintained by the depository institution to the level that would have resulted had the error not been made. As-of adjustments (and direct compensation) are based on the principle that a depository institution should not gain or lose in its reserve or clearing balance position as a result of a Reserve Bank accounting or administrative error or a Reserve Bank delay in processing transactions. Regulation J also provides in subpart A that a Reserve Bank’s operating circulars may include procedures for paying interest in the form of as-of adjustments in relation to the collection of checks and other items.

As noted above, the Board is proposing to amend Regulation D to simplify the rules governing the administration of reserve requirements. The proposed Regulation D amendments include discontinuing as-of adjustments related to deposit reporting revisions and replacing all other as-of adjustments with direct compensation. Direct compensation is either a debit or credit applied to an account to offset the effect of an error. Consistent with the Regulation D proposal, the Board is proposing to amend sections 210.3(a), 210.26(b), and 210.32(b) (along with the corresponding commentary) of Regulation J to eliminate references to as-of adjustments. Under the proposal, a Reserve Bank would continue to be able to pay direct compensation to a depository institution based on the federal funds rate in accordance with section 210.32(b) section 4A–506 of article 4A of the Uniform Commercial Code (UCC), as incorporated into Regulation J.⁵ The Board requests comment on whether use of the federal funds rate for the calculation of direct compensation is appropriate, and if not, the rate that the Board should use.⁶ The Board further requests comment on whether the Board should eliminate section 210.32(b)(1) of Regulation J

entirely, as the Reserve Banks could simply pay direct compensation based on the provisions of UCC section 4A–506, which is already incorporated into Regulation J.

Acceptance of Deposits of Items

Section 210.4 of Regulation J governs the sending and handling of checks and other items sent to Reserve Banks. Section 210.4 currently specifies the identity and order of the parties that are deemed to handle an item sent to a Reserve Bank for purposes of determining the rights and liabilities of the parties under Regulation J, Regulation CC (12 CFR part 229), and the UCC.

The Reserve Banks have long permitted institutions to send checks and other items for collection directly to a Reserve Bank other than the institution’s Administrative Reserve Bank. These “direct sends” have facilitated a more efficient and less costly check-processing infrastructure for depository institutions as well as for Reserve Banks. Approximately 99.9 percent of checks sent to the Reserve Banks for collection are sent as electronic items. In response to the continued nationwide decline in check usage and institutions’ pervasive use of electronic check-clearing methods, the Reserve Banks have eliminated all but one of their paper-check-processing offices and have consolidated electronic check processing in a single location. An institution must send checks to the applicable location (depending on whether the check is deposited in paper or electronic form) even if it is not an office of the institution’s Administrative Reserve Bank.

Regulation J currently sets forth the order in which Reserve Banks are deemed to have handled a check or other item, whether it is deposited electronically or in paper form. Specifically, section 210.4 provides that, for an item sent to a Reserve Bank for collection, the following parties are deemed to have handled the item in the following order: (1) The initial sender; (2) the initial sender’s Administrative Reserve Bank; (3) the Reserve Bank that receives the item from the initial sender (if different from the initial sender’s Administrative Reserve Bank); and (4) another Reserve Bank, if any, that receives the item from a Reserve Bank. The Board is proposing to amend section 210.4(b)(1)(ii) to clarify that the “handling” of an item by the initial sender’s Administrative Reserve Bank includes accepting the item for deposit. Thus, for purposes of determining the rights and liabilities of parties that send and handle checks and other items sent

to a Reserve Bank, the Administrative Reserve Bank is deemed to have accepted deposit of the item from the initial sender even if the sender sends the item directly to another Reserve Bank. Proposed 210.4(b)(3) would further clarify that, in addition to Regulation J, Regulation CC, and the UCC, the identity and order of the parties in section 210.4(b) also determines the relationships and the rights and liabilities of the parties for purposes of sections 13(1) and 16(13) of the Federal Reserve Act, which govern deposits to Reserve Banks.⁷

Application of Regulation J to “Remittance Transfers”

As noted above, Fedwire funds transfers are governed by subpart B of Regulation J. A funds transfer, which is made up of a series of payment orders, may originate outside of the Fedwire system and be carried out only partly over Fedwire.⁸ Subpart B of Regulation J currently “governs a funds transfer that is sent through Fedwire * * * even though a portion of the funds transfer is governed by the Electronic Fund Transfer Act [EFTA], but the portion of such funds transfer that is governed by the [EFTA] is not governed by” Regulation J.⁹ This provision is slightly different from (and supersedes) the scope of UCC Article 4A–108, which provides that Article 4A does not apply “to a funds transfer, any part of which is governed by the [EFTA].” Until recently, the exclusion from Regulation J and Article 4A of transactions governed by the EFTA did not create any gaps or overlap, because the EFTA excludes from the definition of “electronic fund transfer” wire transfers over systems that are not designed primarily for consumer transfers.¹⁰ The recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), however, added a new section 919 to the EFTA. The new section 919 of the EFTA creates new protections for consumers who send remittance transfers to designated recipients located in a foreign country. Section 919 defines “remittance transfer” to include an electronic transfer of funds requested by a U.S. consumer sender through a remittance transfer provider, whether or not the

⁷ 12 U.S.C. 342 and 360.

⁸ A payment order is an unconditional instruction of a sender to a receiving bank to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary. A funds transfer is a series of payment orders made for the purpose of making payment to the beneficiary of the order. See UCC Article 4A–103(a)(1) and 4A–104(a) as incorporated into Regulation J, Appendix B.

⁹ 12 CFR 210.25(b)(3).

¹⁰ 15 U.S.C. 1693a(6)(B).

⁴ 12 CFR 210.26(b).

⁵ The Board has incorporated Article 4A of the UCC, a uniform state law governing funds transfers, into Regulation J, appendix B. In the event of any inconsistency between subpart B of Regulation J and Article 4A, subpart B of Regulation J shall prevail. 12 CFR 210.25(b)(1).

⁶ Article 4A–506(b) states that if the amount of interest is not determined by an agreement or rule, the applicable federal funds rate would apply.

remittance transfer is also an electronic fund transfer as defined in the EFTA. Therefore, a Fedwire funds transfer could potentially be part of a remittance transfer under the new section 919 of the EFTA.¹¹

Consequently, under Regulation J's existing scope provision (section 210.25(b)(3)), Fedwire funds transfers that meet the EFTA's definition of "remittance transfer" could be viewed as "governed by" the EFTA and therefore not governed by Regulation J. The Board believes that this result would lead to legal uncertainty with respect to the rights and liabilities of the parties to a Fedwire funds transfer that is also a "remittance transfer." Specifically, the EFTA governs disclosures and other rights with respect to the consumer senders of remittance transfers, but does not address the interbank rights and obligations that are established in Regulation J. To avoid a gap in coverage for Fedwire funds transfers, the Board is proposing to amend section 210.25 of Regulation J to clarify that Regulation J continues to apply to "remittance transfers" as defined by the EFTA, to the extent there is not an inconsistency between Regulation J and section 919 of the EFTA (in which case section 919 would prevail). This proposed clarification would ensure that the provisions of Regulation J, and therefore Article 4A of the UCC, apply to all Fedwire funds transfers, except to the extent that section 919 of the EFTA and rules established thereunder apply. The proposal would include clarifications in the commentary to section 210.25 as well.

Effective Date

The Board proposes that the Regulation J amendments that would eliminate references to as-of adjustments be effective on the same date as the corresponding amendments to Regulation D. The Board proposes that these amendments take effect no earlier than the first quarter of 2012. The Board believes that the other proposed amendments to Regulation J would not require institutions to take any action or incur any cost. Therefore, the Board proposes that these amendments take effect 30 days after the Board adopts a final rule. The Board requests comment

¹¹ See the Board's proposed amendments to Regulation E (12 CFR part 205) to implement section 919 of the EFTA. (76 FR 29902 (May 23, 2011).) The Regulation E rulemaking will be completed by the Consumer Financial Protection Bureau in accordance with the provisions of the Dodd-Frank Act, which transferred rulemaking responsibility for most of the EFTA from the Board to the Bureau.

on whether the proposed effective dates are appropriate.

III. Competitive Impact Analysis

As a matter of policy, the Board subjects all operational and legal changes that could have a substantial effect on payment system participants to a competitive impact analysis.¹² Pursuant to this policy, the Board assesses whether such proposed changes "would have a direct and material adverse effect on the ability of other service providers to compete effectively with the Federal Reserve in providing similar services due to differing legal powers or constraints or because of a dominant market position of the Federal Reserve deriving from such legal differences." If as a result of this analysis the Board identifies an adverse effect on the ability to compete, the Board then assesses whether the associated benefits—such as improvements to payment system efficiency or integrity—can be achieved while minimizing the adverse effect on competition.

The proposed amendments that eliminate the use of as-of adjustments would require Reserve Banks to pay compensation in the form of explicit interest under UCC Article 4A–506, as is required of private-sector service providers. The proposed amendments to section 210.4, clarifying the status of the administrative Reserve Bank of a sender of a check, would not affect the competitive position of the Reserve Banks vis-à-vis private-sector service providers. The proposed amendments to section 210.25, clarifying the applicability of Regulation J to remittance transfers as defined in the Electronic Fund Transfer Act, do not rely on legal powers unique to the Federal Reserve; private-sector service providers of funds transfer service have the ability to similarly amend their rules. Therefore, the Board does not believe the proposed changes to Regulation J would have any direct and material adverse effect on the ability of other service providers to compete with the Reserve Banks.

IV. Initial Regulatory Flexibility Analysis

Congress enacted the Regulatory Flexibility Act (the "RFA") (5 U.S.C. 601 *et seq.*) to address concerns related to the effects of agency rules on small entities and the Board is sensitive to the impact its rules may impose on small entities. The RFA requires agencies

¹² See "The Federal Reserve in the Payments System," Fed. Res. Reg. Svc. ¶¶ 9–1550, 9–1558 (Apr. 2009).

either to provide an initial regulatory flexibility analysis with a proposed rule or to certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. In accordance with section 3(a) of the RFA, the Board has reviewed the proposed regulation. In this case, the proposed rule would apply to all depository institutions. Based on current information, the Board believes that the proposed rule would not have a significant economic impact on a substantial number of small entities (5 U.S.C. 605(b)). Nonetheless, an Initial Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603 in order for the Board to solicit comment. The Board will, if necessary, conduct a final regulatory flexibility analysis after consideration of comments received during the public comment period.

1. Statement of the Need for, Objectives of, and Legal Basis for, the Proposed Rule

The proposed amendments to Regulation J would eliminate references to "as-of adjustments" consistent with the Board's proposed amendments to Regulation D (12 CFR part 204), which simplify reserves administration. The proposed amendments would also clarify that an institution's Administrative Reserve Bank is deemed to have accepted deposit of a check or other item even if the institution sends the item directly to another Federal Reserve Bank. The proposed amendments would further clarify that Regulation J continues to apply to a Fedwire funds transfer even if the funds transfer also meets the definition of "remittance transfer" under the Electronic Fund Transfer Act.

2. Small Entities Affected by the Proposed Rule

The proposed rule would affect all institutions that use Federal Reserve Bank check or wire transfer services. Pursuant to regulations issued by the Small Business Administration (the "SBA") (13 CFR 121.201), a "small banking organization" includes a depository institution with \$175 million or less in total assets. Based on data reported as of March 31, 2011, the Board believes that there are approximately 10,723 small depository institutions, approximately 2,808 of which have a master account with the Federal Reserve.

3. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The proposed rule would eliminate references to as-of adjustments and

replace the use of as-of adjustments with direct compensation based on the federal funds rate. As noted above, a depository institution should not be harmed by this amendment because the depository institution would continue to be compensated for a transaction error; the payment for the error would simply be in the form of direct compensation instead of an as-of adjustment. The other proposed amendments to Regulation J are clarifications and do not impose new requirements on depository institutions. The Board seeks information and comment on any costs that would arise from the application of the proposed rule.

4. Identification of Duplicative, Overlapping, or Conflicting Federal Rules

The Board does not believe that any Federal rules duplicate, overlap, or conflict with the proposed rule. The proposed amendment to subpart B is intended to conform to proposed changes to Regulation D. The Board seeks comment regarding any statutes or regulations that would duplicate, overlap, or conflict with the proposed rule.

5. Significant Alternatives to the Proposed Rule

The Board is unaware of any significant alternatives to the proposed rule that accomplish the stated objectives of the Board. The Board welcomes comment on any significant alternatives that would minimize the impact of the proposal on small entities.

V. Paperwork Reduction Act Analysis

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 proposed rule under the authority delegated to the Board by the Office of Management and Budget (OMB). No collections of information pursuant to the PRA are contained in the proposed rule.

Comments related to PRA review of this rulemaking should be sent to Cynthia Ayouch, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 95-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 (Regulation J), Washington, DC 20503.

List of Subjects in 12 CFR Part 210

Banks, banking.

Authority and Issuance

For the reasons set forth in the preamble, the Board proposes to amend Regulation J, 12 CFR part 210, as follows:

PART 210—COLLECTION OF CHECKS AND OTHER ITEMS BY FEDERAL RESERVE BANKS AND FUNDS TRANSFERS THROUGH FEDWIRE (REGULATION J)

1. The authority citation for part 210 continues to read as follows:

Authority: 12 U.S.C. 248(i), (j), and (o), 342, 360, 464, 4001-4010, and 5001-5018.

2. In § 210.3, revise paragraph (a) to read as follows:

§ 210.3 General provisions.

(a) General. Each Reserve Bank shall receive and handle items in accordance with this subpart, and shall issue operating circulars governing the details of its handling of items and other matters deemed appropriate by the Reserve Bank. The circulars may, among other things, classify cash items and noncash items, require separate sorts and letters, provide different closing times for the receipt of different classes or types of items, provide for instructions by an administrative Reserve Bank to other Reserve Banks, set forth terms of services, and establish procedures for adjustments on a Reserve Bank's books, including amounts, waiver of expenses, and payment of compensation.

* * * * *

3. Section 210.4 is revised to read as follows:

§ 210.4 Sending items to Reserve Banks.

(a) Sending of items. A sender, other than a Reserve Bank, may send any item to any Reserve Bank, whether or not the item is payable within the Reserve Bank's District, unless the sender's administrative Reserve Bank directs the sender to send the item to a specific Reserve Bank.

(b) Handling of items.

(1) The following parties, in the following order, are deemed to have handled an item that is sent to a Reserve Bank for collection:

- (i) The initial sender;
(ii) The initial sender's administrative Reserve Bank (which is deemed to have accepted deposit of the item from the initial sender);
(iii) The Reserve Bank that receives the item from the initial sender (if different from the initial sender's administrative Reserve Bank); and
(iv) Another Reserve Bank, if any, that receives the item from a Reserve Bank.

(2) A Reserve Bank that is not described in paragraph (b)(1) of this section is not a person that handles an item and is not a collecting bank with respect to an item.

(3) The identity and order of the parties under paragraph (b)(1) of this section determine the relationships and the rights and liabilities of the parties under this subpart, part 229 of this chapter (Regulation CC), section 13(1) and section 16(13) of the Federal Reserve Act, and the Uniform Commercial Code. An initial sender's administrative Reserve Bank that is deemed to accept an item for deposit or handle an item is also deemed to be a sender with respect to that item. The Reserve Banks that are deemed to handle an item are deemed to be agents or subagents of the owner of the item, as provided in § 210.6(a) of this subpart.

(c) Checks received at par. The Reserve Banks shall receive cash items and other checks at par.

4. In § 210.25, revise paragraphs (b)(1) and (b)(3) to read as follows:

§ 210.25 Authority, purpose, and scope.

* * * * *

(b) * * *

(1) This subpart incorporates the provisions of article 4A set forth in appendix B to this subpart. In the event of an inconsistency between the provisions of the sections of this subpart and appendix B to this subpart, the provisions of the sections of this subpart shall prevail. In the event of an inconsistency between the provisions this subpart and section 919 of the Electronic Fund Transfer Act, section 919 of the Electronic Fund Transfer Act shall prevail.

* * * * *

(3) This subpart governs a funds transfer that is sent through Fedwire, as provided in paragraph (b)(2) of this section, even though a portion of the funds transfer is governed by the Electronic Fund Transfer Act, but the portion of such funds transfer that is governed by the Electronic Fund Transfer Act (other than section 919 governing remittance transfers) is not governed by this subpart.

* * * * *

§ 210.26 [Amended]

5. In § 210.26, paragraph (b) is removed and reserved.

6. In § 210.32, revise paragraphs (b)(1) and (b)(2), to read as follows:

§ 210.32 Federal Reserve Bank liability; payment of interest.

* * * * *

(b) * * *

(1) A Federal Reserve Bank shall satisfy its obligation, or that of another Federal Reserve Bank, to pay compensation in the form of interest under article 4A by paying compensation in the form of interest to its sender, its receiving bank, its beneficiary, or another party to the funds transfer that is entitled to such payment, in an amount that is calculated in accordance with section 4A-506 of article 4A.

(2) If the sender or receiving bank that is the recipient of an interest payment is not the party entitled to compensation under article 4A, the sender or receiving bank shall pass through the benefit of the interest payment by making an interest payment, as of the day the interest payment is effected, to the party entitled to compensation. The interest payment that is made to the party entitled to compensation shall not be less than the value of the interest payment that was provided by the Federal Reserve Bank to the sender or receiving bank. The party entitled to compensation may agree to accept compensation in a form other than a direct interest payment, provided that such an alternative form of compensation is not less than the value of the interest payment that otherwise would be made.

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7. In appendix A to subpart B:

a. In section 210.25, revise paragraph (b).

b. In section 210.26, revise paragraph (i).

c. In section 210.32, revise paragraph (b).

The revisions read as follows:

Appendix A to Subpart B of Part 210— Commentary

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Section 210.25—Authority, Purpose, and Scope

* * * * *

(b) *Scope.* (1) Subpart B of this part incorporates the provisions of article 4A set forth in appendix B of this part. The provisions set forth expressly in the sections of subpart B of this part supersede or preempt any inconsistent provisions of article 4A as set forth in appendix B of this part or as enacted in any state. The official comments to article 4A are not incorporated in subpart B of this part or this commentary to subpart B of this part, but the official comments may be useful in interpreting article 4A. Because section 4A-105 refers to other provisions of the Uniform Commercial Code, *e.g.*, definitions in article 1 of the UCC, these other provisions of the UCC, as approved by the National Conference of Commissioners on Uniform State Laws and the American Law Institute, from time to time, are also incorporated in subpart B of

this part. Subpart B of this part applies to any party to a Fedwire funds transfer that is in privity with a Federal Reserve Bank. These parties include a sender (bank or nonbank) that sends a payment order directly to a Federal Reserve Bank, a receiving bank that receives a payment order directly from a Federal Reserve Bank, and a beneficiary that receives credit to an account that it uses or maintains at a Federal Reserve Bank for a payment order sent to a Federal Reserve Bank. Other parties to a funds transfer are covered by this subpart to the same extent that this subpart would apply to them if this subpart were a “funds-transfer system rule” under article 4A that selected subpart B of this part as the governing law.

(2) The scope of the applicability of a funds-transfer system rule under article 4A is specified in section 4A-501(b), and the scope of the choice of law provision is specified in section 4A-507(c). Under section 4A-507(c), a choice of law provision is binding on the participants in a funds-transfer system and certain other parties having notice that the funds-transfer system might be used for the funds transfer and of the choice of law provision. The Uniform Commercial Code provides that a person has notice when the person has actual knowledge, receives notification, or has reason to know from all the facts and circumstances known to the person at the time in question. (See UCC § 1-201(25).) However, under sections 4A-507(b) and 4A-507(d), a choice of law by agreement of the parties takes precedence over a choice of law made by funds-transfer system rule.

(3) If originators, receiving banks, and beneficiaries that are not in privity with a Federal Reserve Bank have the notice contemplated by Section 4A-507(c) or if those parties agree to be bound by subpart B of this part, subpart B of this part generally would apply to payment orders between those remote parties, including participants in other funds-transfer systems. For example, a funds transfer may be sent from an originator’s bank through a funds-transfer system other than Fedwire to a receiving bank which, in turn, sends a payment order through Fedwire to execute the funds transfer. Similarly, a Federal Reserve Bank may execute a payment order through Fedwire to a receiving bank that sends it through a funds-transfer system other than Fedwire to a beneficiary’s bank. In the first example, if the originator’s bank has notice that Fedwire may be used to effect part of the funds transfer, the sending of the payment order through the other funds-transfer system to the receiving bank will be governed by subpart B of this part unless the parties to the payment order have agreed otherwise. In the second example, if the beneficiary’s bank has notice that Fedwire may be used to effect part of the funds transfer, the sending of the payment order to the beneficiary’s bank through the other funds-transfer system will be governed by subpart B of this part unless the parties have agreed otherwise. In both cases, the other funds-transfer system’s rules would also apply to, at a minimum, the portion of these funds transfers going through that funds transfer system. Because subpart B of this part is federal law, to the extent of any inconsistency, subpart B of this part will take

precedence over any funds-transfer system rule applicable to the remote sender or receiving bank or to a Federal Reserve Bank. If remote parties to a funds transfer, a portion of which is sent through Fedwire, have expressly selected by agreement a law other than subpart B of this part under section 4A-507(b), subpart B of this part would not take precedence over the choice of law made by the agreement even though the remote parties had notice that Fedwire may be used and of the governing law. (See 4A-507(d).) In addition, subpart B of this part would not apply to a funds transfer sent through another funds-transfer system where no Federal Reserve Bank handles the funds transfer, even though settlement for the funds transfer is made by means of a separate net settlement or funds transfer through Fedwire.

(4) Under section 4A-108, article 4A does not apply to a funds transfer, any part of which is governed by the Electronic Fund Transfer Act (EFTA) (15 U.S.C. 1693 *et seq.*). In general, Fedwire funds transfers to or from consumer accounts are exempt from the EFTA and Regulation E (12 CFR part 205). A funds transfer from a consumer originator or a funds transfer to a consumer beneficiary could be carried out in part through Fedwire and in part through an automated clearinghouse or other means that is subject to the EFTA or Regulation E. In these cases, subpart B would not govern the portion of the funds transfer that is governed by the EFTA or Regulation E. (See the commentary to section 210.26(i), “Payment Order”.)

(5) Section 919 of the EFTA, however, governs “remittance transfers,” which may include Fedwire funds transfers. Section 919 of the EFTA sets out the obligations of remittance transfer providers with respect to consumer senders of remittance transfers. Section 919 of the EFTA generally does not affect the rights and obligations of financial institutions involved in a remittance transfer. To the extent that a Fedwire funds transfer is a “remittance transfer” governed by section 919 of the EFTA, it continues to be governed by subpart B, except that, in the event of an inconsistency between the provisions of subpart B and section 919 of the EFTA, section 919 of the EFTA shall prevail. For example, a consumer may initiate a remittance transfer governed by EFTA section 919 from the consumer’s account at a depository institution, and the depository institution may initiate that transfer by sending a payment order to a Reserve Bank through the Fedwire funds system. If the consumer subsequently exercised the right to cancel the remittance transfer and obtain a refund under the terms of EFTA section 919, the depository institution would be required to comply with section 919 even if the institution does not have a right to reverse the payment order sent to the Reserve Bank under subpart B.

(6) Finally, section 4A-404(a) provides that a beneficiary’s bank is obliged to pay the amount of a payment order to the beneficiary on the payment date unless acceptance of the payment order occurs on the payment date after the close of the funds-transfer business day of the bank. The Expedited Funds Availability Act provides that funds received by a bank by wire transfer shall be available

for withdrawal not later than the banking day after the business day on which such funds are received (12 U.S.C. 4002(a)). That act also preempts any provision of state law that was not effective on September 1, 1989, that is inconsistent with that act or its implementing Regulation CC (12 CFR 229). Accordingly, the Expedited Funds Availability Act and Regulation CC may preempt section 4A–404(a) as enacted in any state. In order to ensure that section 4A–404(a), or other provisions of article 4A, as incorporated in subpart B of this part, do not take precedence over provisions of the Expedited Funds Availability Act, this section provides that where subpart B of this part establishes rights or obligations that are also governed by the Expedited Funds Availability Act or Regulation CC, the Expedited Funds Availability Act or Regulation CC provision shall apply and subpart B of this part shall not apply.

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Section 210.26—Definitions

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(i) *Payment Order.* (1) The definition of “payment order” in subpart B of this part differs from the section 4A–103(a)(1) definition. The subpart B definition clarifies that, for the purposes of Subpart B of this part, automated clearinghouse transfers and certain messages that are transmitted through Fedwire are not payment orders. Federal Reserve Banks and banks participating in Fedwire send various types of messages relating to payment orders or to other matters, through Fedwire, that are not intended to be payment orders. Under the subpart B definition, these messages, and messages involved with automated clearinghouse transfers, are not “payment orders” and therefore are not governed by this subpart. The operating circulars of the Federal Reserve Banks specify those messages that may be transmitted through Fedwire but that are not payment orders.

(2) In some cases, messages sent through Fedwire, such as certain requests for credit transfer, may be payment orders under article 4A, but are not treated as payment orders under subpart B because they are not an instruction to a Federal Reserve Bank to pay money.

(3) This subpart and article 4A govern a payment order even though the originator’s or beneficiary’s account may be a consumer account established primarily for personal, family, or household purposes. Under section 4A–108, article 4A does not apply to a funds transfer any part of which is governed by the Electronic Fund Transfer Act. That act, and Regulation E implementing it, do not apply to funds transfers through Fedwire (see 15 U.S.C. 1693a(6)(B) and 12 CFR 205.3(b)), except that section 919 of the Electronic Fund Transfer Act may govern a Fedwire funds transfer that is a “remittance transfer.” Such remittance transfers that are Fedwire funds transfers continue to be governed by this subpart. Thus, this subpart applies to all funds transfers through Fedwire even though some such transfers involve originators or beneficiaries that are consumers. (See also

section 210.25(b) and accompanying commentary.)

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Section 210.32—Federal Reserve Bank Liability; Payment of Interest

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(b) *Payment of interest.* (1) Under article 4A, a Federal Reserve Bank may be required to pay compensation in the form of interest to another party in connection with its handling of a funds transfer. For example, payment of compensation in the form of interest is required in certain situations pursuant to sections 4A–204 (relating to refund of payment and duty of customer to report with respect to unauthorized payment order), 4A–209 (relating to acceptance of payment order), 4A–210 (relating to rejection of payment order), 4A–304 (relating to duty of sender to report erroneously executed payment order), 4A–305 (relating to liability for late or improper execution or failure to execute a payment order), 4A–402 (relating to obligation of sender to pay receiving bank), and 4A–404 (relating to obligation of beneficiary’s bank to pay and give notice to beneficiary). Under section 4A–506(a), the amount of such interest may be determined by agreement between the sender and receiving bank or by funds-transfer system rule. If there is no such agreement, under section 4A–506(b), the amount of interest is based on the federal funds rate. Section 210.32(b) requires Federal Reserve Banks to provide compensation through an explicit interest payment.

(2) Interest would be calculated in accordance with the procedures specified in section 4A–506(b). Similarly, compensation in the form of explicit interest will be paid to government senders, receiving banks, or beneficiaries described in section 210.25(d) if they are entitled to interest under this subpart. A Federal Reserve Bank may also, in its discretion, pay explicit interest directly to a remote party to a Fedwire funds transfer that is entitled to interest, rather than providing compensation to its direct sender or receiving bank.

(3) If a bank that received an explicit interest payment is not the party entitled to interest compensation under article 4A, the bank must pass the benefit of the explicit interest payment made to it to the party that is entitled to compensation in the form of interest from a Federal Reserve Bank. The benefit may be passed on either in the form of a direct payment of interest or in the form of a compensating balance, if the party entitled to interest agrees to accept the other form of compensation, and the value of the compensating balance is at least equivalent to the value of the explicit interest that otherwise would have been provided.

By order of the Board of Governors of the Federal Reserve System, October 7, 2011.

Jennifer J. Johnson, Secretary of the Board.

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FINANCIAL STABILITY OVERSIGHT COUNCIL

12 CFR Part 1310

RIN 4030–AA00

Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies

AGENCY: Financial Stability Oversight Council.

ACTION: Second notice of proposed rulemaking and proposed interpretive guidance.

SUMMARY: Section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) authorizes the Financial Stability Oversight Council (the “Council”) to require a nonbank financial company to be supervised by the Board of Governors of the Federal Reserve System (the “Board of Governors”) and be subject to prudential standards in accordance with Title I of the Dodd-Frank Act if the Council determines that material financial distress at the nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the nonbank financial company, could pose a threat to the financial stability of the United States.

The proposed rule and attached guidance describe the manner in which the Council intends to apply the statutory standards and considerations, and the processes and procedures that the Council intends to follow, in making determinations under section 113 of the Dodd-Frank Act. The Council issued an advance notice of proposed rulemaking on October 6, 2010, and a notice of proposed rulemaking on January 26, 2011, regarding determinations under section 113.

DATES: Comment due date: December 19, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this notice of proposed rulemaking according to the instructions below. All submissions must refer to the document title. The Council encourages the early submission of comments.

Electronic Submission of Comments: Interested persons may submit comments electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt, and enables the Council to make them available to the public. Comments submitted electronically through the