

***Transmittal***

***TR-405***

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**Number TR-405**

On November 9, 2007 the Federal Reserve Board issued the attached final rule amending Regulation DD, which implements the Truth in Savings Act, and the official staff commentary to the regulation, to withdraw portions of the interim final rules for the electronic delivery of disclosures issued March 30, 2001.

By order of the Board of Governors of the Federal Reserve System, October 31, 2007.

**Jennifer J. Johnson,**

*Secretary of the Board.*

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## FEDERAL RESERVE SYSTEM

### 12 CFR Part 230

[Regulation DD; Docket No. R-1285]

#### Truth in Savings

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Final rule; official staff interpretation.

**SUMMARY:** The Board is amending Regulation DD, which implements the Truth in Savings Act, and the official staff commentary to the regulation, to withdraw portions of the interim final rules for the electronic delivery of disclosures issued March 30, 2001. The interim final rules addressed the timing and delivery of electronic disclosures, consistent with the requirements of the Electronic Signatures in Global and National Commerce Act (E-Sign Act). Because compliance with the 2001 interim final rules has not been mandatory, withdrawal of these provisions from the *Code of Federal Regulations* reduces confusion about the status of the provisions and simplifies the regulation.

In addition, the Board is adopting final amendments to Regulation DD to provide guidance on the electronic delivery of disclosures. For example, the final rules provide that when a deposit account advertisement is accessed by a consumer in electronic form, disclosures may be provided to the consumer in electronic form in the advertisement without regard to the consumer consent and other provisions of the E-Sign Act. Similar final rules are being adopted under other consumer fair lending and financial services regulations administered by the Board.

**DATES:** The final rule is effective December 10, 2007. The mandatory compliance date is October 1, 2008.

**FOR FURTHER INFORMATION CONTACT:** John C. Wood, Counsel, Division of Consumer and Community Affairs, 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. Statutory Background

The purpose of the Truth in Savings Act (TISA), 12 U.S.C. 4301 *et seq.*, is to

enable consumers to make informed decisions about accounts at depository institutions. The act requires depository institutions to disclose yields, fees, and other terms concerning deposit accounts to consumers at account opening, upon request, when changes in terms occur, and in periodic statements. It also includes rules about advertising for deposit accounts. The Board's Regulation DD (12 CFR part 230) implements the act. Credit unions are governed by a substantially similar regulation issued by the National Credit Union Administration. TISA and Regulation DD require a number of disclosures to be provided in writing.

The Electronic Signatures in Global and National Commerce Act (the E-Sign Act), 15 U.S.C. 7001 *et seq.*, was enacted in 2000. The E-Sign Act provides that electronic documents and electronic signatures have the same validity as paper documents and handwritten signatures. The E-Sign Act contains special rules for the use of electronic disclosures in consumer transactions. Under the E-Sign Act, consumer disclosures required by other laws or regulations to be provided or made available in writing may be provided or made available, as applicable, in electronic form if the consumer affirmatively consents after receiving a notice that contains certain information specified in the statute, and if certain other conditions are met.

The E-Sign Act, including the special consumer notice and consent provisions, became effective October 1, 2000, and did not require implementing regulations. Thus, depository institutions are currently permitted to provide in electronic form any disclosures that are required to be provided or made available to the consumer in writing under Regulation DD if the consumer affirmatively consents to receipt of electronic disclosures in the manner required by section 101(c) of the E-Sign Act.

##### II. Board Proposals and Interim Rules Regarding Electronic Disclosures

On April 4, 2001, the Board published for comment interim final rules to establish uniform standards for the electronic delivery of disclosures required under Regulation DD (66 FR 17,795). Similar interim final rules for Regulations B, E, M, and Z, (implementing the Equal Credit Opportunity Act, the Electronic Fund Transfer Act, the Consumer Leasing Act, and the Truth in Lending Act, respectively) were published on March 30, 2001 (66 FR 17,322 and 66 FR 17,329) (Regulations M and Z, respectively) and April 4, 2001 (66 FR

17,779 and 66 FR 17,786) (Regulations B and E, respectively). Each of the interim final rules incorporated, but did not interpret, the requirements of the E-Sign Act. Depository institutions, creditors, and other persons, as applicable, generally were required to obtain consumers' affirmative consent to provide disclosures electronically, consistent with the requirements of the E-Sign Act. The interim final rules also incorporated many of the provisions that were part of earlier regulatory proposals issued by the Board regarding electronic disclosures.<sup>1</sup>

Under the 2001 interim final rules, disclosures could be sent to an e-mail address designated by the consumer, or could be made available at another location, such as an Internet Web site. If the disclosures were not sent by e-mail, institutions would have to provide a notice to consumers (typically by e-mail) alerting them to the availability of the disclosures. Disclosures posted on a Web site would have to be available for at least 90 days to allow consumers adequate time to access and retain the information. Institutions also would be required to make a good faith attempt to redeliver electronic disclosures that were returned undelivered, using the address information available in their files.

Commenters on the interim final rules identified significant operational and information security concerns with respect to the requirement to send the disclosure or an alert notice to an e-mail address designated by the consumer. For example, commenters stated that some consumers who choose to receive electronic disclosures do not have e-mail addresses or may not want personal financial information sent to them by e-mail. Commenters also noted that e-mail is not a secure medium for delivering confidential information and that consumers' e-mail addresses frequently change. The commenters also opposed the requirement for redelivery in the event a disclosure was returned undelivered. In addition, many commenters asserted that making the disclosures available for at least 90 days, as required by the interim final rule,

<sup>1</sup> On May 2, 1996, the Board proposed to amend Regulation E to permit financial institutions to provide disclosures by sending them electronically (61 FR 19696). Based on comments received, in 1998 the Board published an interim rule permitting the electronic delivery of disclosures under Regulation E (63 FR 14,528, March 25, 1998) and similar proposals under Regulations B, M, Z, and DD (63 FR 14,552, 14,538, 14,548, and 14,533, respectively, March 25, 1998). Based on comments received on the 1998 proposals, in 1999 the Board published revised proposals under Regulations B, E, M, Z, and DD (64 FR 49688, 49699, 49713, 49722 and 49740, respectively, September 14, 1999).

would increase costs and would not be necessary for consumer protection.

In August 2001, in response to comments received, the Board lifted the previously established October 1, 2001 mandatory compliance date for all of the interim final rules. (66 FR 41439, August 8, 2001.) Thus, institutions are not required to comply with the interim final rules. Since that time, the Board had not taken further action with respect to the interim final rules on electronic disclosures in order to allow electronic commerce, including electronic disclosure practices, to continue to develop without regulatory intervention and to allow the Board to gather further information about such practices.

In April 2007, the Board proposed to amend Regulation DD and the official staff commentary by (1) withdrawing portions of the 2001 interim final rule that restate or cross-reference provisions of the E-Sign Act and accordingly are unnecessary; (2) withdrawing other portions of the interim final rule that the Board now believes may impose undue burdens on electronic banking and commerce and may be unnecessary for consumer protection; and (3) retaining the substance of certain provisions of the interim final rule that provide regulatory relief or guidance regarding electronic disclosures. (72 FR 21155, April 30, 2007.) Similar amendments were also proposed by the Board under Regulations B, E, M, and Z (72 FR 21125, 72 FR 21131, 72 FR 21135, and 72 FR 21141, respectively).

### III. Summary of the Final Rule

The Board received about 20 comments on the April 2007 proposal, primarily from depository institutions and their representatives. Most of the financial industry commenters generally supported the proposal, although some provided suggestions for clarifications or changes to particular elements of the proposal. A comment letter was also submitted on behalf of four consumer groups. The consumer group commenters suggested a number of changes to strengthen consumer protections. The comments are discussed in more detail in the Section-by-Section Analysis below.

For the reasons discussed below, the Board is now adopting amendments to Regulation DD in final form, largely as proposed in April 2007. As stated in the proposal, because compliance with the 2001 interim final rules has not been mandatory, the final rule will reduce confusion about the status of the electronic disclosure provisions and simplify the regulation. The Board is also adopting certain provisions that are

identical or similar to provisions in the 2001 interim rules in order to enhance the ability of consumers to shop for deposit account products online, minimize the information-gathering burdens on consumers, and provide guidance or eliminate a substantial burden on the use of electronic disclosures, as discussed further below.

Since 2001, industry and consumers have gained considerable experience with electronic disclosures. During that period, the Board has received no indication that consumers have been harmed by the fact that compliance with the interim final rules is not mandatory. The Board also has reconsidered certain aspects of the interim final rules, such as sending disclosures by e-mail, in light of concerns about data security, identity theft, and "phishing" (i.e., prompting consumers to reveal confidential personal or financial information through fraudulent e-mail requests that appear to originate from a depository institution, government agency, or other trusted entity) that have become more pronounced since 2001. Finally, the Board is eliminating certain aspects of the 2001 interim final rule, such as provisions regarding the availability and retention of electronic disclosures, as unnecessary in light of current industry practices.

The 2001 interim final rule allowed depository institutions to provide certain disclosures to consumers electronically without regard to the consumer consent or other provisions of the E-Sign Act. These included disclosures in connection with advertisements and disclosures about deposit accounts that are provided upon a consumer's request. The Board reasoned that these disclosures, which would be available to the general public while shopping for deposit products, did not "relate to a transaction," which is a prerequisite for triggering the E-Sign consumer consent provisions, and thus were not subject to the consent provisions. Some commenters on the interim final rules agreed with the result but did not agree with the Board's rationale.

In the April 2007 proposal, the Board stated that, upon further consideration, it did not believe it was necessary to determine whether or not these disclosures are related to a transaction. Instead, pursuant to the Board's authority under section 269 of TISA, as well as under section 104(d) of the E-Sign Act,<sup>2</sup> the Board proposed to specify

<sup>2</sup> Section 269 of TISA provides that regulations prescribed by the Board under TISA "may provide for such adjustments and exceptions \* \* \* as, in the judgment of the Board, are necessary or proper

the circumstances under which certain disclosures may be provided to a consumer in electronic form, rather than in writing as generally required by Regulation DD, without obtaining the consumer's consent under section 101(c) of the E-Sign Act.

Commenters supported the Board's approach with regard to this issue. This final rule adopts the approach in the April 2007 proposal. The Board continues to believe that depository institutions should not be required to obtain the consumer's consent in order to provide advertising disclosures to the consumer in electronic form if the consumer accesses an advertisement containing those disclosures in electronic form, such as at an Internet Web site. Similarly, the Board continues to believe that institutions should not be required to follow the E-Sign consent requirements in order to respond to a consumer's request for account disclosures (although under the final rule, the institution could provide the disclosures in electronic form only if the consumer agrees).

The Board believes that when viewing online deposit product advertising, consumers would not be harmed if the E-Sign consent procedures do not apply and would obtain significant benefits by having timely access to advertising disclosures in electronic form. The Board also believes that consumers' ability to shop for deposit accounts online and compare the terms of various offers could be substantially diminished if consumers had to consent in accordance with the E-Sign Act in order to access advertisements that must be accompanied by disclosures, or in order to obtain account disclosures upon request. Applying the consumer consent provisions of the E-Sign Act to these disclosures could impose substantial burdens on electronic commerce and make it more difficult for consumers to gather information and shop for deposit accounts.

At the same time, the Board recognizes that consumers who shop or apply for deposit accounts online may

to carry out the purposes of [TISA], \* \* \* or to facilitate compliance with the requirements of [TISA]." Section 104(d) of the E-Sign Act authorizes federal agencies to adopt exemptions for specified categories of disclosures from the E-Sign notice and consent requirements, "if such exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers." For the reasons stated in this **Federal Register** notice, the Board believes that these criteria are met in the case of the advertising disclosures and the disclosures provided to a consumer upon request. In addition, the Board believes TISA section 269 authorizes the Board to permit institutions to provide disclosures electronically, rather than in paper form, independent of the E-Sign Act.

not want to receive other disclosures electronically. Therefore, with respect to account-opening disclosures, periodic statements, and change-in-terms notices, depository institutions are required to obtain the consumer's consent, in accordance with the E-Sign Act, to provide such disclosures in electronic form, or else provide written disclosures.

Finally, as proposed, certain provisions that restate or cross-reference the E-Sign Act's general rules regarding electronic disclosures (including the consumer consent provisions) are being deleted as unnecessary, because the E-Sign Act is a self-effectuating statute. The revisions to Regulation DD and the official staff commentary are described more fully below in the Section-by-Section Analysis.

#### IV. Section-by-Section Analysis

##### 12 CFR Part 230 (Regulation DD)

###### *Section 230.3 General Disclosure Requirements*

Section 230.3(a) prescribes the form of disclosures required for deposit accounts, and generally requires depository institutions to provide the disclosures in writing and in a form that the consumer may keep. As proposed, the Board is revising § 230.3(a) to clarify that institutions may provide disclosures to consumers in electronic form, subject to compliance with the consumer consent and other applicable provisions of the E-Sign Act. Some institutions may provide disclosures to consumers both in paper and electronic form and rely on the paper form of the disclosures to satisfy their compliance obligations. For those institutions, the duplicate electronic form of the disclosures may be provided to consumers without regard to the consumer consent or other provisions of the E-Sign Act because the electronic form of the disclosure is not used to satisfy the regulation's disclosure requirements.

Section 230.3(a) is also revised, as proposed, to provide that the disclosures required by §§ 230.4(a)(2) (disclosures provided upon request) and 230.8 (advertising) may be provided to the consumer in electronic form, under the circumstances set forth in those sections, without regard to the consumer consent or other provisions of the E-Sign Act. Commenters supported this aspect of the proposal.

Section 230.8 requires that if certain information is stated in a deposit account advertisement, or if an advertisement promotes the payment of overdrafts, the advertisement must also include specified disclosures. The

Board believes that, for a deposit account advertisement accessed by the consumer in electronic form, permitting institutions to provide the required disclosures in electronic form without regard to the consumer consent and other provisions of the E-Sign Act will eliminate a potential significant burden on electronic commerce without increasing the risk of harm to consumers. This approach will facilitate shopping for deposit products by enabling consumers to receive important disclosures at the same time they access an advertisement without first having to provide consent in accordance with the requirements of the E-Sign Act. Requiring consumers to follow the consent procedures set forth in the E-Sign Act in order to access an online advertisement is potentially burdensome and could discourage consumers from shopping for deposit products online. Moreover, because these consumers are viewing the advertisement online, there appears to be little, if any, risk that the consumer will be unable to view the disclosures online as well.

Similarly, § 230.4(a)(2) requires that depository institutions provide disclosures, setting forth account terms and conditions, to consumers upon request. If a consumer is not present at the depository institution and requests the account disclosures, it would appear unnecessary and burdensome to require the consumer to go through the E-Sign consent procedures before the request could be satisfied, as long as the consumer agrees that the disclosures can be provided electronically. Applying the E-Sign consent procedures in this context could discourage consumers from requesting account disclosures.

Section 230.3(g) in the 2001 interim final rule refers to § 230.10, the section of the interim final rule setting forth general rules for electronic disclosures. Because the Board is deleting § 230.10, as discussed further below, § 230.3(g) is also deleted, as proposed.

###### *Section 230.4 Account Disclosures*

Depository institutions generally must provide account-opening disclosures to consumers before an account is opened or a service is provided. Depository institutions may delay delivering the disclosures if the consumer is not present at the institution when the account is opened (or service is provided). Section 230.4(a)(1) provides that in such cases, account-opening disclosures must be mailed or delivered within ten business days. The rationale underlying the ten-day delay is that the institution cannot provide written

disclosures when, for example, an account is opened by telephone. The 2001 interim final rule provided that depository institutions opening accounts by electronic communication (for example, on the Internet) may not delay providing disclosures under § 230.4(a)(1). The difficulties in providing disclosures for accounts opened by mail or telephone do not exist for requests to open accounts received by electronic communication using visual text. Thus, the 2001 interim final rule required that disclosures must be provided before accounts are opened using electronic communication. New paragraph (ii) was added to § 230.4(a)(1) to effectuate this requirement. In the April 2007 proposal, the Board stated that it continued to believe that the rationale underlying § 230.4(a)(1)(ii) was valid, and accordingly proposed to retain the new provision.

Several commenters requested that the regulation allow delayed disclosures in a number of situations involving the use of electronic means to open an account. Commenters noted, for example, that small hand-held electronic devices, such as Internet-enabled cellphones or personal digital assistants, may not be well suited to displaying or retaining disclosures. Commenters argued, therefore, that institutions should be permitted to open an account electronically and mail paper disclosures to the consumer within ten business days, rather than providing electronic disclosures that the consumer might view using a small hand-held device. Some commenters suggested that the delayed disclosure provision should apply to other situations as well, such as "enhanced ATMs" and computers not owned by the consumer (e.g., a computer in an employer's office or a public library). However, it does not appear that at present, use of such devices for financial transactions has advanced to the point where the relief suggested by the commenters is necessary to avoid burdens on electronic commerce. Therefore, § 230.4(a)(1)(ii) is retained in the final rule with minor wording changes.

As noted above, depository institutions must also provide account disclosures to a consumer upon request. Section 230.4(a)(2)(i) provides that if a consumer is not present at the institution when a request for account disclosures is made, the institution must mail or deliver the disclosures within a reasonable time after the institution receives the request; ten days is deemed to be a reasonable time. The 2001 interim final rule revised § 230.4(a)(2)(i) to allow institutions to mail or deliver

disclosures either in paper form or electronically to consumers who are not present at the institution when they make their request. Under the 2001 interim final rule, to provide the requested disclosures electronically, the institution must send the disclosures to the consumer's e-mail address, or send a notice alerting the consumer to the location of the disclosures, such as on the institution's Internet Web site. The interim rule revised comment 4(a)(2)(i)-3 and added comment 4(a)(2)(i)-4 to provide guidance.

In the April 2007 proposal, the Board proposed to retain the changes made to § 230.4(a)(2)(i) and the accompanying commentary by the interim final rule, with some revisions for clarification and to provide greater flexibility for both institutions and consumers (in particular, by not requiring that e-mail be used to provide the disclosures electronically). The Board stated that it continued to believe that if the consumer is not present at the institution when requesting disclosures, it is appropriate to allow institutions to respond to requests by electronic means (without following the E-Sign consent provisions, as discussed above under § 230.3) provided the consumer agrees.

A few commenters suggested that the last sentence in proposed revised comment 4(a)(2)(i)-4, which states that the regulation "does not require an institution to provide, nor a consumer to agree to receive, disclosures in electronic form," should be eliminated as unnecessary. The Board believes, however, that the sentence is appropriate because it clarifies that institutions are required to provide account disclosures in paper form if a consumer requests that they be provided in paper form. However, in the final rule language has been added to the sentence to make clear that the sentence applies only to disclosures provided upon request under § 230.4(a)(2). An institution would not be prohibited from offering accounts online that use only electronic disclosures at account-opening and for periodic statements, provided the consumer consents in accordance with the E-Sign Act. Accordingly, the revisions made to § 230.4(a)(2)(i) and the accompanying commentary are adopted as proposed, with the minor wording changes noted.

#### *Section 230.8 Advertising*

Section 230.8 contains requirements for advertisements for deposit accounts, including the requirement that if an advertisement includes certain "trigger terms" (such as a bonus or the annual percentage yield), the advertisement must also include certain disclosures.

The Board proposed to add new comment 8(a)-11, to clarify that if a consumer accesses an advertisement for deposit accounts in electronic form, such as on a home computer, the disclosures required on or with the advertisement must be provided to the consumer in electronic form on or with the advertisement. The proposed comment also clarified that if a consumer receives a written advertisement in the mail, the required disclosures must be provided in paper form on or with the advertisement (and not, for example, by including a reference in the advertisement to the Web site where the disclosures are located). Commenters did not address this aspect of the proposal.

In the final regulation, new comment 8(a)-11 is not being adopted. Section 230.8 requires that if an advertisement includes trigger terms, the advertisement itself must "state" the required disclosures "clearly and conspicuously." Therefore, under the existing regulation, providing paper disclosures for an advertisement in electronic form, or vice versa, would not comply because the disclosures would not be stated in the advertisement itself.

Comment 8(a)-9, as added by the interim final rule, provides that in an electronic advertisement, the required disclosures need not be shown on each page where a "trigger term" appears, as long as each such page includes a cross-reference to the page where the required disclosures appear. For example, if a "trigger term" appears on a particular web page, the additional disclosures may appear on another web page if there is a clear reference to that page (which may be accomplished, for example, by including a link). In April 2007, the Board proposed to retain this comment. Commenters did not address this issue. The final rule retains the comment as proposed.

In April the Board also proposed to add new comment 8(a)-12 to clarify that the rules regarding advertising disclosures provided in electronic form also apply to the disclosures described in § 230.11(b), which are incorporated by reference in § 230.8(f). Commenters did not address this issue; the comment is adopted as proposed (and renumbered as comment 8(a)-11).

Section 230.8(b) permits institutions to state an interest rate in addition to the APY, as long as the rate is stated in conjunction with, but not more conspicuously than, the APY. In the 2001 interim final rule, comment 8(b)-4 was added to state that in an advertisement using electronic communication, the consumer must be able to view both rates simultaneously,

and that this requirement is not satisfied if the consumer can view the APY only by use of a link that takes the consumer to another web location. In the April 2007 proposal, the Board proposed to delete comment 8(b)-4 as unnecessary, because the requirement to state the simple annual rate or periodic rate in conjunction with, and not more conspicuously than, the APY, continues to apply to electronic advertisements no less than to advertisements in other media. In the supplementary information, the Board stated that requiring the consumer to scroll to another part of the page, or access a link, in order to view the APY would likely not satisfy this requirement.

Some commenters were concerned by the foregoing discussion in the April 2007 proposal, and contended that in the case of small hand-held electronic devices that a consumer might use to view a deposit account advertisement, the small size of the screen might necessitate scrolling or the use of links for viewing the APY. Commenters also said the proposal was confusing in that comment 8(b)-4, stating that the use of links would not comply, was proposed to be deleted, yet the supplementary information appeared to impose the same restriction.

Comment 8(b)-4 is being deleted as proposed. As stated in the proposal, the regulatory requirement is to state the interest rate in conjunction with, but not more conspicuously than, the APY, and this rule applies in the electronic context as well. However, the Board believes that the rule can be applied with some degree of flexibility, to account for variations in devices consumers may use to view electronic advertisements. Therefore, the use of scrolling or links would not necessarily fail to comply with the regulation in all cases; however, institutions should ensure that electronic advertisements comply with the equal conspicuousness requirement.

Section 230.8(e) exempts from some disclosure requirements advertisements made through broadcast or electronic media, such as television and radio or outdoor billboards. The interim final rule added comment 8(e)(1)(i)-1 to provide that this exemption would not apply to advertisements using electronic communication, such as Internet advertisements, which do not have the same time and space constraints as radio or television advertisements. In April, the Board proposed to retain comment 8(e)(1)(i)-1 with minor wording changes. Commenters did not address this issue. The Board continues to believe that space constraints for advertisements on Internet Web sites are

not significantly different from those for a print advertisement (a newspaper, for example). Accordingly, comment 8(e)(1)(i)-1 is adopted as proposed.

#### *Section 230.10 Electronic Communication*

Section 230.10 was added by the 2001 interim final rule to address the general requirements for electronic communications. In the April 2007 proposal, the Board proposed to delete § 230.10 from Regulation DD and the accompanying sections of the staff commentary. Depository institution commenters largely supported the proposed deletion, and § 230.10 and the accompanying commentary are deleted in the final rule.

In the interim rule, § 230.10(a) defines the term "electronic communication" to mean a message transmitted electronically that can be displayed on equipment as visual text, such as a message displayed on a personal computer monitor screen. The deletion of § 230.10(a) does not change applicable legal requirements under the E-Sign Act.

Sections 230.10 (b) and (c) incorporate by reference provisions of the E-Sign Act, such as the provision allowing disclosures to be provided in electronic form and the requirement to obtain the consumer's affirmative consent before providing disclosures in electronic form. The deletion of these provisions has no impact on the general applicability of the E-Sign Act to Regulation DD disclosures. Section 230.10(f) was added in the interim final rule to clarify that persons, other than depository institutions, that are required to comply with Regulation DD may use electronic disclosures. This provision is unnecessary because the E-Sign Act is a self-effectuating statute and permits any person to use electronic records subject to the conditions set forth in the Act.

Sections 230.10 (d) and (e) address specific timing and delivery requirements for electronic disclosures under Regulation DD, such as the requirement to send disclosures to a consumer's e-mail address (or post the disclosures on a Web site and send a notice alerting the consumer to the disclosures). The Board stated in the proposal that it no longer believed that these additional provisions were necessary or appropriate. The Board noted that electronic disclosures have evolved since 2001, as industry and consumers have gained experience with them, and also noted concerns about e-mail related to data security, identity theft, and phishing.

The consumer group commenters urged the Board to require the use of e-

mail to provide required disclosures in electronic form, arguing that e-mail is the only reliable way to ensure that consumers are able to actually access, receive, and retain disclosures. The consumer groups also disagreed with the statement that concerns relating to phishing, identity theft, and data security are a valid reason for not requiring the use of e-mail, noting that phishing involves gathering information from the consumer, while disclosures would be provided to the consumer, and need not include sensitive information.

While the consumer's receipt of an e-mail message that is actually from the consumer's depository institution would not in general pose a security risk, consumers might ignore or delete e-mails from depository institutions (real or purported), in order to avoid falling victim to fraud schemes. Thus, disclosures sent by consumers' depository institutions may not receive the attention they should. Consequently, some depository institutions may be reluctant to communicate by e-mail. To the extent consumers are instructed not to ignore electronic mail messages from their depository institutions, the risk of consumers being victimized by fraudulent e-mail might be increased. In any event, the Board believes it is preferable not to mandate the use of any particular means of electronic delivery of disclosures, but instead to allow flexibility for institutions to use whatever method may be best suited to particular types of disclosure (for example, account-opening, periodic statements, or change in terms).

With regard to the requirement to attempt to redeliver returned electronic disclosures, institutions would be required to search their files for an additional e-mail address to use, and might be required to use a postal mail address for redelivery if no additional e-mail address was available. As stated in the April 2007 proposal, the Board continues to believe that both requirements would likely be unduly burdensome.

Under the April 2007 proposed rule, the requirement in the 2001 interim final rule for institutions to maintain disclosures posted on a Web site for at least 90 days would be deleted. Depository institution commenters supported the proposed deletion; consumer group commenters expressed concern about its impact on consumers. As stated in the proposal, based on a review of industry practices, it appears that many institutions maintain disclosures posted on an Internet Web site for several months, and, in a number of cases, for more than a year. For example, it appears that institutions

that offer online periodic statements to consumers typically make those statements available without charge for six months or longer in electronic form. This practice has developed even though Regulation DD does not currently require institutions to maintain disclosures for any specific period of time. In addition, the Board continues to believe that an appropriate time period consumers may want electronic disclosures to be available may vary depending upon the type of disclosure, and is reluctant to establish specific time periods that would vary depending on the disclosures, which would increase the compliance burden. Therefore, the 90-day retention provision is deleted as proposed.

Nevertheless, while the Board is not requiring disclosures to be maintained on an Internet Web site for any specific time period, the general requirements of Regulation DD continue to apply to electronic disclosures, such as the requirement to provide disclosures to consumers at certain specified times and in a form that the consumer may keep. The Board expects institutions to maintain disclosures on Web sites for a reasonable period of time (which may vary depending upon the particular disclosure) so that consumers have an opportunity to access, view, and retain the disclosures. As stated in the April 2007 proposal, the Board will monitor institutions' electronic disclosure practices with regard to the ability of consumers to retain Regulation DD disclosures and would consider further revisions to the regulation to address this issue if necessary.

#### **V. Other Issues Raised by Commenters**

##### *Clear and Conspicuous Disclosures*

An issue raised in the comments on the April 2007 proposal related to small hand-held electronic devices through which consumers may conduct financial transactions using the Internet or other electronic means (for example, personal digital assistants, Internet-enabled cellphones, and similar devices). One commenter requested clarification on whether institutions would be deemed to comply with the requirement to provide disclosures in a clear and conspicuous form, even when the consumer views them on a small screen of a hand-held electronic device. The commenter noted that the institution has no control over what devices consumers choose to use, for example, to view disclosures on a Web page. The Board believes that disclosures comply with the "clear and conspicuous" requirement as long as they are provided in a manner such that they

would be clear and conspicuous when viewed on a typical home personal computer monitor.

#### *Retainable Form*

Several industry commenters requested guidance on how institutions can be sure of meeting the requirement to provide disclosures in a form that the consumer can keep. Commenters noted that some of the disclosures that are exempted from the E-Sign requirements regarding notice and consent are nevertheless required to be given in retainable form (for example, account disclosures provided upon request under § 230.4(a)(2)). Commenters pointed out that the E-Sign Act requires, with regard to consumer disclosures generally, that an institution disclose “the hardware and software requirements for access to and retention of the electronic records” and that the consumer consent to electronic disclosures “in a manner that reasonably demonstrates that the consumer can access” the disclosures electronically. A commenter noted that if the E-Sign procedures are followed, an institution has some degree of comfort that the retainability requirement has been met; however, with regard to disclosures that are exempted from the E-Sign notice and consent provisions (such as those under § 230.4(a)(2)), it is not clear how the institution can demonstrate compliance with the retainability requirement.

The consumer group commenters were concerned about retainability of disclosures in light of the deletion of the requirement to maintain disclosures on a Web site for at least 90 days. They urged that the final regulations require that disclosures be delivered in a format that is both downloadable and printable.

The Board believes that institutions satisfy the requirement for providing electronic disclosures in a form the consumer can retain if they are provided in a standard electronic format that can be downloaded and saved or printed on a typical home personal computer. Typically, any document that can be downloaded by the consumer can also be printed. The Board will, however, monitor institutions’ practices to evaluate whether further guidance is needed on this issue. In a situation where the consumer is provided electronic disclosures through equipment under the institution’s control—such as a terminal or kiosk in the institution’s offices—the institution could, for example, provide a printer that automatically prints the disclosures.

#### *Expansion of Exception From E-Sign Notice and Consent Requirements*

One commenter suggested that the Board adopt additional exemptions from the E-Sign notice and consent requirements. For example, if a consumer opened a deposit account online, the commenter suggested that the institution should be able to provide the account-opening disclosures online under § 230.4(a)(1) (in addition to the advertising-related disclosures, and disclosures provided upon request, already permitted under this final rule) without notice and consent under the E-Sign Act. The commenter argued that, since Internet commerce has expanded greatly over the past few years, when consumers choose to conduct financial transactions online, they presume that they will receive any related disclosures online as well. The Board believes that, at this time, there is insufficient evidence that the consent requirements are a burden on electronic commerce in this situation; and that consumers who shop for deposit products online may not necessarily want to receive account-opening disclosures online.

#### **VI. Use of “Plain Language”**

Section 722 of the Gramm-Leach-Bliley Act of 1999 requires the Board to use “plain language” in all proposed and final rules published after January 1, 2000. In the proposal, the Board invited comments on whether the proposed rules are clearly stated and effectively organized, and how the Board might make the proposed text easier to understand. No comments were received on “plain language” issues involving Regulation DD.

#### **VII. Final Regulatory Flexibility Analysis**

The Board prepared an initial regulatory flexibility analysis as required by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) in connection with the April 2007 proposal. The Board received no comments on its initial regulatory flexibility analysis.

The 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 certifies that the rule will not have a significant economic impact on a substantial number of small entities.

1. *Statement of the need for, and objectives of, the final rule.* The Board is adopting revisions to Regulation DD to withdraw the 2001 interim final rule on electronic communication and to allow depository institutions to provide certain disclosures to consumers in electronic form on or with an advertisement that is accessed by the consumer in electronic form, or if the consumer requests the disclosure, without regard to the consumer consent and other provisions of the E-Sign Act. The Board is also clarifying that other Regulation DD disclosures may be provided to consumers in electronic form in accordance with the consumer consent and other applicable provisions of the E-Sign Act.

TISA was enacted to enhance economic stabilization, improve competition between depository institutions, and strengthen the ability of consumers to make informed decisions regarding deposit accounts. 12 U.S.C. 4301. It is the purpose of TISA to require the clear and uniform disclosure of rates of interest payable on deposit accounts and the fees that are assessable against deposit accounts, so that consumers can make a meaningful comparison between the competing claims of institutions. TISA authorizes the Board to prescribe regulations to carry out the purposes of the statute. 12 U.S.C. 4308. The Act expressly states that the Board’s regulations may contain “such classifications, differentiations, or other provisions, \* \* \*, as in the judgment of the Board, are necessary or proper to carry out the purposes of [the Act], to prevent circumvention or evasion [of the Act], or to facilitate compliance with [the Act].” 12 U.S.C. 4308(a). The Board believes that the revisions to Regulation DD discussed above are within Congress’s broad grant of authority to the Board to adopt provisions that carry out the purposes of the statute. These revisions facilitate informed decisions about deposit accounts by consumers in circumstances where a consumer accesses a deposit account advertisement, or requests deposit account disclosures, in electronic form.

2. *Issues raised by comments in response to the initial regulatory flexibility analysis.* In accordance with section 603(a) of the RFA, the Board conducted an initial regulatory flexibility analysis in connection with the proposed rule. The Board did not receive any comments on its initial regulatory flexibility analysis.

3. *Small entities affected by the final rule.* The ability to provide advertising disclosures in electronic form on or with an advertisement that is accessed by the consumer in electronic form, or to provide disclosures in electronic form if requested to do so by the consumer, applies to all depository institutions, regardless of their size. Accordingly, the final rule would reduce burden and compliance costs for small entities by providing relief, to the extent the E-Sign Act applies in these circumstances. The number of small entities affected by this final rule is unknown.

4. *Other federal rules.* The Board believes no federal rules duplicate, overlap, or conflict with the final revisions to Regulation DD.

5. *Significant alternatives to the proposed revisions.* The Board solicited comment on any significant alternatives that could provide additional ways to reduce regulatory burden associated with the proposed rule. Commenters did not suggest any significant alternatives to the proposed rule.

#### VIII. Paperwork Reduction Act

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

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. This information collection is mandatory. Since the Federal Reserve does not collect any information, no issue of confidentiality arises.

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. The Federal Reserve accounts for the paperwork burden associated with Regulation DD only for Federal Reserve-supervised institutions. Federal Reserve supervised institutions are defined by Regulation DD as: State member banks, branches and agencies of foreign banks (other than federal branches, federal agencies, and insured state branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act. Other federal agencies account for the paperwork burden imposed on the depository institutions for which they have administrative enforcement authority.

The annual burden is estimated to be 232,443 hours for 1,172 Federal Reserve-supervised institutions that are deemed respondents for purposes of the PRA. As mentioned in the Preamble, on April 30, 2007, a notice of proposed rulemaking was published in the **Federal Register** (72 FR 21155). No comments specifically addressing the burden estimate were received.

The Federal Reserve has a continuing interest in the public's opinions of our collections of information. At any time, comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, may be sent to: Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551; and to the Office of Management and Budget, Paperwork Reduction Project (7100-0199), Washington, DC 20503.

#### List of Subjects in 12 CFR Part 230

Advertising, Banks, banking, Consumer protection, Federal Reserve System, Reporting and record keeping requirements, Truth in Savings.

■ For the reasons set forth in the preamble, the Board amends 12 CFR part 230 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 230.3 is amended by revising paragraph (a), to read as follows, and removing paragraph (g):

#### § 230.3 General disclosure requirements.

(a) *Form.* Depository institutions shall make the disclosures required by §§ 230.4 through 230.6 of this part, as applicable, clearly and conspicuously, in writing, and in a form the consumer may keep. The disclosures required by this part may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*). The disclosures required by §§ 230.4(a)(2) and 230.8 may be provided to the consumer in electronic form without regard to the consumer consent or other provisions of the E-Sign Act in the circumstances set forth in those sections. Disclosures for each account offered by an institution may be presented separately or combined with disclosures for the institution's other accounts, as long as it is clear which disclosures are applicable to the consumer's account.

\* \* \* \* \*

■ 3. Section 230.4 is amended by republishing paragraph (a)(1)(i) and revising paragraphs (a)(1)(ii) and (a)(2)(i), to read as follows:

#### § 230.4 Account disclosures.

(a) *Delivery of account disclosures—*  
(1) *Account opening.* (i) *General.* A depository institution shall provide account disclosures to a consumer before an account is opened or a service is provided, whichever is earlier. An institution is deemed to have provided a service when a fee required to be disclosed is assessed. Except as provided in paragraph (a)(1)(ii) of this section, if the consumer is not present at the institution when the account is opened or the service is provided and has not already received the disclosures, the institution shall mail or deliver the disclosures no later than 10 business days after the account is opened or the service is provided, whichever is earlier.

(ii) *Timing of electronic disclosures.* If a consumer who is not present at the institution uses electronic means (for example, an Internet Web site) to open an account or request a service, the disclosures required under paragraph (a)(1) of this section must be provided before the account is opened or the service is provided.

(2) *Requests.* (i) A depository institution shall provide account disclosures to a consumer upon request. If a consumer who is not present at the



institution makes a request, the institution shall mail or deliver the disclosures within a reasonable time after it receives the request and may provide the disclosures in paper form, or electronically if the consumer agrees.

\* \* \* \* \*

**§ 230.10 [Removed]**

- 4. Section 230.10 is removed and reserved.
- 5. In Supplement I to Part 230, the following amendments are made:
  - a. In *Section 230.4—Account disclosures*, under (a)(2)(i), paragraphs 3. and 4. are revised.
  - b. In *Section 230.8—Advertising*, under (a) *Misleading or inaccurate advertisements*, paragraph 9. is revised and new paragraph 11. is added.
  - c. In *Section 230.8—Advertising*, under (b) *Permissible rates*, paragraph 4. is removed.
  - d. In *Section 230.8—Advertising*, under (e)(1)(i), paragraph 1. is revised.
  - e. Section 230.10—Electronic Communication is removed and reserved.

The amendments read as follows:

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

\* \* \* \* \*

*Section 230.4—Account Disclosures*

(a) Delivery of Account Disclosures

\* \* \* \* \*

(a)(2) Requests  
(a)(2)(i)

\* \* \* \* \*

3. *Timing for response.* Ten business days is a reasonable time for responding to requests for account information that consumers do not make in person, including requests made by electronic means (such as by electronic mail).

4. *Use of electronic means.* If a consumer who is not present at the institution makes a request for account disclosures, including a request made by telephone, e-mail, or via the institution's Web site, the institution may send the disclosures in paper form or, if the consumer agrees, may provide the disclosures electronically, such as to an e-mail address that the consumer provides for that purpose, or on the institution's Web site, without regard to the consumer consent or other provisions of the E-Sign Act. The regulation does not require an institution to provide, nor a consumer to agree to receive, the disclosures required by § 230.4(a)(2) in electronic form.

\* \* \* \* \*

*Section 230.8—Advertising*

(a) *Misleading or Inaccurate Advertisements*

\* \* \* \* \*

9. *Electronic advertising.* If an electronic advertisement (such as an advertisement appearing on an Internet Web site) displays a triggering term (such as a bonus or annual

percentage yield) the advertisement must clearly refer the consumer to the location where the additional required information begins. For example, an advertisement that includes a bonus or annual percentage yield may be accompanied by a link that directly takes the consumer to the additional information.

\* \* \* \* \*

11. *Additional disclosures in connection with the payment of overdrafts.* The rule in § 230.3(a), providing that disclosures required by § 230.8 may be provided to the consumer in electronic form without regard to E-Sign Act requirements, applies to the disclosures described in § 230.11(b), which are incorporated by reference in § 230.8(f).

\* \* \* \* \*

(e) *Exemption for certain advertisements*  
(e)(1) *Certain media*  
(e)(1)(i)

1. *Internet advertisements.* The exemption for advertisements made through broadcast or electronic media does not extend to advertisements posted on the Internet or sent by e-mail.

\* \* \* \* \*

By order of the Board of Governors of the Federal Reserve System, October 31, 2007.

**Jennifer J. Johnson,**

*Secretary of the Board.*

[FR Doc. E7-21701 Filed 11-8-07; 8:45 am]

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**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Part 211**

[Release No. SAB 109]

**Staff Accounting Bulletin No. 109**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Publication of staff accounting bulletin.

**SUMMARY:** This staff accounting bulletin (“SAB”) expresses the views of the staff regarding written loan commitments that are accounted for at fair value through earnings under generally accepted accounting principles. SAB No. 105, *Application of Accounting Principles to Loan Commitments* (“SAB 105”), provided the views of the staff regarding derivative loan commitments that are accounted for at fair value through earnings pursuant to Statement of Financial Accounting Standards No. 133, *Accounting for Derivative Instruments and Hedging Activities*. SAB 105 stated that in measuring the fair value of a derivative loan commitment, the staff believed it would be inappropriate to incorporate the expected net future cash flows related to the associated servicing of the loan. This SAB supersedes SAB 105 and expresses

the current view of the staff that, consistent with the guidance in Statement of Financial Accounting Standards No. 156, *Accounting for Servicing of Financial Assets*, and Statement of Financial Accounting Standards No. 159, *The Fair Value Option for Financial Assets and Financial Liabilities*, the expected net future cash flows related to the associated servicing of the loan should be included in the measurement of all written loan commitments that are accounted for at fair value through earnings. SAB 105 also indicated that the staff believed that internally-developed intangible assets (such as customer relationship intangible assets) should not be recorded as part of the fair value of a derivative loan commitment. This SAB retains that staff view and broadens its application to all written loan commitments that are accounted for at fair value through earnings.

The staff expects registrants to apply the views in Question 1 of SAB 109 on a prospective basis to derivative loan commitments issued or modified in fiscal quarters beginning after December 15, 2007.

**DATES:** November 5, 2007.

**FOR FURTHER INFORMATION CONTACT:**

Ashley W. Carpenter, Office of the Chief Accountant (202) 551-5300 or Craig C. Olinger, Division of Corporation Finance (202) 551-3400, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:** The statements in staff accounting bulletins are not rules or interpretations of the Commission, nor are they published as bearing the Commission's official approval. They represent interpretations and practices followed by the Division of Corporation Finance and the Office of the Chief Accountant in administering the disclosure requirements of the Federal securities laws.

Dated: November 5, 2007.

**Florence E. Harmon,**  
*Deputy Secretary.*

**PART 211—[AMENDED]**

■ Accordingly, Part 211 of Title 17 of the Code of Federal Regulations is amended by adding Staff Accounting Bulletin No. 109 to the table found in Subpart B.

**Staff Accounting Bulletin No. 109**

■ The staff hereby amends and replaces Section DD of Topic 5, *Miscellaneous Accounting*, of the Staff Accounting Bulletin Series. Topic 5: DD (as amended) expresses the views of the staff regarding written loan