

Transmittal

TR-365

Federal Register, Vol. 70 No. 99, pp. 29582 - 29596



Number TR-365

The Federal Reserve Board (FRB) issued the attached amendment to Regulation DD to improve the information that depositors receive about overdraft protection. FRB published the rule on May 24 and it becomes effective July 1, 2006.

insufficient funds in the account. These services are typically automated services provided to transaction account consumers as an alternative to a traditional overdraft line of credit. Among other things, the final rule creates a new section to the regulation that requires institutions that promote the payment of overdrafts in an advertisement to disclose on periodic statements, total fees imposed for paying overdrafts and total fees imposed for returning items unpaid on periodic statements, both for the statement period and the calendar year to date, and to include certain other disclosures in advertisements of overdraft services.

DATES: The rule is effective July 1, 2006.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. The Truth in Savings Act

The Truth in Savings Act (TISA), 12 U.S.C. 4301 *et seq.*, is implemented by the Board's Regulation DD (12 CFR part 230). The purpose of the act and regulation is to assist consumers in comparing deposit accounts offered by depository institutions, principally through the disclosure of fees, the annual percentage yield (APY), the interest rate, and other account terms. An official staff commentary interprets the requirements of Regulation DD (12 CFR part 230 (Supp. I)). Credit unions are governed by a substantially similar regulation issued by the National Credit Union Administration.

Under TISA and Regulation DD, disclosures must be given upon a consumer's request and before an account is opened. Institutions are not required to provide periodic statements, but if they do, the act requires that fees, yields, and other information be provided on the statements. Notice must be given to accountholders before an adverse change in account terms occurs and prior to the renewal of certificates of deposit (time accounts).

TISA and Regulation DD contain rules for advertising deposit accounts. Under TISA, there is a prohibition against advertisements, announcements, or solicitations that are inaccurate or misleading, or that misrepresent the deposit contract. Institutions also are prohibited from describing an account as free (or using words of similar meaning) if a regular service or

transaction fee is imposed, if a minimum balance must be maintained, or if a fee is imposed when a customer exceeds a specified number of transactions. In addition, the act and regulation impose substantive restrictions on institutions' practices regarding the payment of interest on accounts and the calculation of account balances.

II. Concerns About Overdraft Services

Historically, depository institutions have used their discretion on an ad hoc basis to pay overdrafts for consumers on transaction accounts, usually imposing a fee. Over the years, some institutions automated the process for considering whether to honor overdrafts to reduce the costs of reviewing individual items, but generally institutions did not inform customers of their internal policies for determining whether an item would be paid or returned. More recently, third-party vendors have developed and sold overdraft programs to institutions, particularly to smaller institutions. These programs generally build upon or add to the institution's existing internal reporting systems to enable the institution to automate its payment of overdrafts.¹ What generally distinguishes the vendor programs from institutions' in-house automated processes is the addition of marketing plans that appear designed to promote the generation of fee income by disclosing to account-holders the dollar amount that the consumer typically will be allowed to overdraw their accounts. Some institutions also encourage consumers to use the service to meet short-term borrowing needs.

Paying consumers' occasional or inadvertent overdrafts is a long-established customer service provided by depository institutions. The Board recognized this longstanding practice when it initially adopted Regulation Z in 1969, to implement the Truth in Lending Act (TILA); the regulation provided that these transactions are generally exempt from coverage under Regulation Z where there is no written agreement between the consumer and institution to pay an overdraft and impose a fee. *See* § 226.4(c)(3). The exemption from Regulation Z was designed to facilitate depository institutions' ability to accommodate consumers on an ad-hoc basis.

¹ The Board's proposal referred to "bounced-check protection" services. These services also are sometimes referred to as "courtesy overdraft protection." Because some institutions' overdraft services apply to non-check transactions, for clarity the services are referred to generically as "overdraft services."

FEDERAL RESERVE SYSTEM

12 CFR Part 230

[Regulation DD; Docket No. R-1197]

Truth in Savings

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board is amending Regulation DD, which implements the Truth in Savings Act, and the staff commentary to the regulation, to address concerns about the uniformity and adequacy of information provided to consumers when they overdraw their deposit accounts. The amendments, in part, address certain types of services—sometimes referred to as “bounced-check protection” or—courtesy overdraft protection”—which are offered by many depository institutions to pay consumers' checks, and which allow other overdrafts when there are

Although overdraft services vary among institutions, many institutions provide the coverage automatically for consumers who meet the institution's criteria (e.g., the account has been open for a certain number of days, and the consumer makes deposits regularly). Consumers are not required to apply for the coverage and the institution performs no credit underwriting. Many institutions clearly inform consumers that payment of an overdraft is discretionary on the part of the institution; deposit account agreements typically disclaim any legal obligation to pay any overdraft. Some institutions extend the overdraft service to non-check transactions, for example, withdrawal requests made at automated teller machines ("ATMs"), purchases made using a debit card, pre-authorized automatic debits from a consumer's account, telephone-initiated funds transfers, or on-line banking transactions. A flat fee is charged each time the service is triggered and an overdraft item is paid; often the fee for paying an overdraft is the same amount that the institution would charge when a check drawn on insufficient funds is returned unpaid. In some cases, a daily fee may be imposed for each day the account remains overdrawn.

In November 2002, the Board solicited comment and information from the public about institutions' current overdraft services, to assist the Board in determining the need for guidance to depository institutions under Regulation Z (Truth in Lending) and other laws. 67 FR 72618 (December 6, 2002). In response to the Board's request for comment, consumer advocates, state agency representatives, and others stated that certain overdraft services should be subject to the TILA and Regulation Z. They noted that in addition to warning consumers about the high cost of the services, TILA disclosures would apprise consumers about the true nature of these services as a credit transaction. Industry commenters opposed coverage under Regulation Z, stating that institutions currently provide adequate disclosures pursuant to TISA and Regulation DD, and that coverage under Regulation Z would be burdensome.

The Board's study of overdraft services identified a number of other concerns about some programs. One major concern relates to the adequacy of information provided to consumers whose accounts are eligible for the service. For example, some institutions do not clearly inform consumers that ATM withdrawals, debit card transactions, or other electronic transfers may routinely be authorized

under these overdraft services and that fees will be imposed in such cases.

Other concerns center on institutions' marketing practices. Although the service may be designed to protect consumers against occasional inadvertent overdrafts, some institutions' promotional materials make the service appear to be a line of credit, apparently to promote a consumer's repeated use of the service. Many institutions inform consumers of the availability of the overdraft service, and also of the maximum aggregate dollar amount of overdrafts the institution will pay. Some marketing plans encourage consumers to use the service to meet short-term credit needs, and not just as protection against inadvertent overdrafts. Some institutions have encouraged consumers specifically to use an overdraft as an advance on their next paycheck. Notwithstanding the marketing promises, however, qualifying language disclaims any legal obligation by the institution to pay any overdraft. In some cases, deposit accounts that are promoted as being "free" also promote overdraft services that involve substantial fees.

III. Concerns About Uniform Disclosure of Overdraft Fees

The Board also has concerns about the uniformity and adequacy of cost disclosures provided to consumers regarding overdraft and returned-item fees under Regulation DD. Many institutions already provide timely information to consumers about particular overdrafts and the fees imposed by sending a notice at the time an overdraft occurs. Institutions' practices and disclosures are not uniform, however, and some consumers may not receive adequate information on a timely basis.

Fees for paying overdrafts and for returning items unpaid are typically flat fees unrelated to the amount of the item. These amounts may be significant when there are multiple overdrafts even though the items may represent relatively small dollar amounts. Even when consumers are aware that an account is or may become overdrawn, they do not necessarily know the number of overdraft items that will result or the total fees that will be imposed, both of which are determined by the order in which items drawn on the account are presented and the institution's policies concerning the order in which items are paid. Consumers may not be aware of the total fees imposed until the next periodic statement, and when the periodic statement is provided, it may

intersperse fees for overdrafts and fees for returned items among other transactions rather than provide a total. As a result, the overall cost associated with overdrawing the account may not be clearly presented to consumers.

IV. The Board's Proposed Revisions to Regulation DD

In May 2004, the Board proposed revisions to Regulation DD and the staff commentary to address concerns about the uniformity and adequacy of institutions' disclosure of overdraft fees generally, and to address concerns about advertised overdraft services in particular. 69 FR 31760 (June 7, 2004). Specifically, the Board proposed to revise Regulation DD to expand the prohibition against misleading advertisements to cover communications with current consumers about existing accounts; the staff commentary provided examples of advertisements that would ordinarily be misleading. The proposed revisions also required additional fee and other disclosures about overdraft services, including disclosures on periodic statements of the total dollar amounts for all overdraft fees and for all returned-item fees, for the statement period and for the calendar year to date; however, the Board solicited comment on whether the periodic statement requirement to disclose calendar year-to-date totals should be limited to institutions that market overdraft services. Further, the Board proposed to require institutions that market automated overdraft services that are not covered by TILA to include certain disclosures about the service in their advertisements, including the fee for the payment of each overdraft item and the circumstances under which the institution would not pay an overdraft.

Overview of Public Comments

Approximately 300 comments were received; the majority of comments were received from depository institutions or their trade associations. About 100 of these comment letters were received from consumer advocates and individual consumers, including about 60 nearly identical form letters sent by consumers through the same Internet site.

Almost all the comments from consumers and consumer advocates oppose the proposed amendments to Regulation DD, and instead urge the Board to cover certain overdraft services under Regulation Z. Few of these comment letters contained substantive suggestions on the proposed revisions to Regulation DD. One Member of Congress submitted a letter also

requesting the Board to cover certain overdraft services under Regulation Z.

Industry commenters were uniform in agreeing that overdraft protection is a deposit service that should be covered under Regulation DD rather than Regulation Z. Industry representatives that commented generally oppose covering overdraft services under Regulation Z. Industry representatives stated that disclosing an annual percentage rate (APR) for overdraft services would impose substantial compliance burdens without leaving consumers better-informed about the cost of credit or better able to compare the costs of different credit products.

Although generally agreeing that coverage of overdraft services was more appropriate under Regulation DD, virtually all industry commenters have concerns about specific aspects of the proposal. The most frequent objection to the proposal concerns the requirements for disclosing aggregate totals for overdraft fees and returned item fees on periodic statements. In particular, most industry commenters cite the costs of implementing the new disclosures and assert that consumers are already provided sufficient information about these fees. Industry commenters also asked for clarification about the types of overdraft services that would be covered under the rule, focusing on the Board's use of the term "automated overdraft service" to describe the overdraft service that would be subject to the additional advertising disclosures. Finally, many industry commenters oppose the requirement to disclose in advertisements the circumstances under which an overdraft would not be paid, because it could suggest an agreement to pay overdrafts in other circumstances contrary to the "discretionary" nature of the product. Additional comments are discussed in the section-by-section analysis.

V. The Final Rule

Pursuant to the Board's authority under Section 269(a) of TISA (12 U.S.C. 4308(a)), the Board is adopting final revisions to Regulation DD and the staff commentary generally as proposed. Some clarifications and modifications to the proposal have been made to respond to commenters' concerns; in particular, the requirement to disclose aggregate overdraft and returned item fees on periodic statements has been limited to institutions that promote the payment of overdrafts in an advertisement. The final rule consolidates the guidance for institutions that promote the payment of overdrafts in a new § 205.11 of the regulation to facilitate compliance. To give institutions sufficient time to

implement the necessary system changes to comply with the regulation, compliance with the final rule will not become mandatory until July 1, 2006.

Summary of Revisions to the Regulation

The following is a summary of the final revisions to the regulation and the staff commentary. These revisions are discussed in detail below in the section-by-section analysis.

Disclosures Concerning Overdraft Fees

Periodic Statements

- Institutions that promote the payment of overdrafts in an advertisement must separately disclose on their periodic statements, the total amount of fees or charges imposed on the deposit account for paying overdrafts and the total amount of fees charged for returning items unpaid. These disclosures must be provided for the statement period and for the calendar year to date for any account to which the advertisement applies. The final rule is narrower than the proposal, which would have applied to all institutions, regardless of whether they market the payment of overdrafts. Thus, institutions that do not promote the payment of overdrafts would not be required to provide the new periodic statement disclosures under the final rule.

- To facilitate compliance, the staff commentary provides specific examples of when an institution is promoting the payment of overdrafts in an advertisement. For example, stating the overdraft limit for an account on a periodic statement or stating an account balance that includes available overdraft funds on an ATM receipt would be considered an advertisement triggering the required disclosures.

- An institution that does not otherwise promote the payment of overdrafts would not trigger the requirement to provide aggregate fee disclosures on periodic statements solely by:

- (1) Communicating information about the payment of overdrafts in response to a consumer-initiated inquiry about overdrafts or deposit accounts generally. Providing information about the payment of overdrafts in response to a balance inquiry made through an automated system, such as a telephone response machine, an ATM, or an institution's Internet site, is not a response to a consumer-initiated inquiry for purposes of this provision, and would trigger the periodic statement disclosure requirements;

- (2) Providing educational materials that do not specifically describe the institution's overdraft service;

- (3) Promoting in an advertisement a traditional line of credit that is subject to the Board's Regulation Z (Truth in Lending);

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

- (5) Making a disclosure required by Federal or other applicable law;

- (6) Including information on a periodic statement or providing a notice informing a consumer about a specific overdrawn item or the amount the account is overdrawn;

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

- (8) Notifying a consumer that completing a requested transaction, such as an ATM withdrawal, may trigger an overdraft fee, or providing a general notice that items overdrawing an account may trigger an overdraft fee.

Account-Opening Disclosures

- Institutions must specify in TISA's account-opening disclosures the categories of transactions for which an overdraft fee may be imposed. An exhaustive list of transactions is not required; it is sufficient to state that the fee is imposed for overdrafts created by checks, in-person withdrawals, ATM withdrawals, or by other electronic means, as applicable. This requirement applies to all institutions, including institutions that do not promote the payment of overdrafts in an advertisement.

Advertising Rules

- To avoid confusion with traditional lines of credit, institutions that promote the payment of overdrafts are required to include certain disclosures in their advertisements about the service: the applicable fees or charges, the categories of transactions covered, the time period consumers have to repay or cover any overdraft, and the circumstances under which the institution would not pay an overdraft. Stating the available overdraft limit or the amount of funds available on a periodic statement would be considered an advertisement triggering the required disclosures.

- The final rule provides safe harbors from the advertising requirements similar to those described above for the periodic statement disclosure requirements. Thus, for example, the advertising disclosure requirements would not apply to institutions when they provide educational materials, respond to a consumer-initiated inquiry about overdrafts or deposit accounts, or notify a consumer about a specific overdraft in their account.

- Advertising disclosures are not required on ATM receipts, due to space

limitations. Similarly, advertising disclosures are not required for advertisements using broadcast media, billboards, or telephone response systems. This parallels an exemption in Regulation DD which applies to other types of advertising disclosures. Limited advertising disclosures are required on ATM screens, telephone response machines and indoor signs.

Prohibiting Misleading Advertisements

- TISA's prohibition against advertisements, announcements, or solicitations that are misleading or that misrepresent the deposit contract is extended to communications with consumers about the terms of their existing accounts.

Examples of Misleading Advertisements

- The staff commentary is revised to provide five examples of advertisements that would ordinarily be deemed misleading:

- (1) Representing an overdraft service as a "line of credit;"

- (2) Representing that the institution will honor all checks or transactions, when the institution retains discretion at any time not to honor any transaction;

- (3) Representing that consumers with an overdrawn account are allowed to maintain a negative balance when the terms of the account's overdraft service require consumers to promptly return the deposit account to a positive balance;

- (4) Describing an overdraft service solely as protection against bounced checks, when the institution also permits overdrafts for a fee in connection with ATM withdrawals and other electronic fund transfers that permit consumers to overdraw their account; and

- (5) Describing an account as "free" or "no cost" in an advertisement that also promotes a service for which there is a fee (including an overdraft service), unless the advertisement clearly and conspicuously indicates there is a cost associated with the service.

Possible Coverage Under the Truth in Lending Act

The amendments to Regulation DD recognize that an overdraft service is provided as a feature and term of a deposit account, and that the fees associated with the service are assessed against the deposit account. As noted above, consumer advocates and some others who commented on the proposed revisions to Regulation DD believe that certain overdraft services should be covered by Regulation Z. These commenters state that overdraft services compete with traditional credit

products—open-end lines of credit, credit cards, and short-term closed-end loans—all of which are covered under TILA and Regulation Z and provide consumers with the cost of credit expressed as a dollar finance charge and an APR. They believe that TILA disclosures would enhance consumers' understanding of the cost of overdraft services and their ability to compare costs of competing financial services.

At its October 2004 meeting, the Board's Consumer Advisory Council also discussed this issue, including ways to distinguish between an institution's infrequent, ad hoc accommodation of a customer, and an overdraft service that operates more like a line of credit. Some Council members believed that overdraft services that are the functional equivalent of a traditional overdraft line of credit should be subject to Regulation Z, but that institutions' historical practice of paying occasional overdrafts on an ad hoc basis should not be covered by Regulation Z.

The Board's adoption of final rules under Regulation DD does not preclude a future determination that TILA disclosures would also benefit consumers. The Board expressly stated in its proposal that further consideration of the need for coverage under Regulation Z may be appropriate in the future.

VI. Section-by-Section Analysis

Section 230.2 Definitions

2(b) Advertisement

TISA prohibits institutions from making any advertisement, announcement, or solicitation relating to a deposit account that is inaccurate or misleading or that misrepresents its deposit contract. 12 U.S.C. 4302(e). Regulation DD currently defines "advertisement" to include "a commercial message appearing in any medium, that promotes directly or indirectly the availability of, or a deposit in, an account." See § 230.2(b). Under the existing staff commentary, institutions' communications with consumers about existing accounts are not considered "advertisements" under Regulation DD. See comment 2(b)-2.iii.

The Board proposed to revise the definition of "advertisement" to include an institution's communications with existing customers for purposes of TISA's prohibition against advertisements that are misleading or inaccurate or that misrepresent the deposit contract. The Board also proposed to expand the definition to cover communications with existing customers that promote the institutions' overdraft services, which would trigger

additional disclosures about the costs and terms of the service.

The final rule adopts the revised definition of "advertisement" as proposed under § 230.2(b)(1). Section 230.2(b)(2) of the final rule provides that for purposes of the prohibition on misleading advertisements in § 230.8(a) and the new disclosure requirements in § 230.11, the definition of "advertisement" includes the terms of, or a deposit in, a new or existing account. The staff commentary has been modified to address commenters' concerns about the need to clarify the scope of the revised definition.

Most commenters who addressed this aspect of the proposal did not oppose applying the prohibition on misleading or inaccurate advertisements to communications about existing accounts. Many commenters believe, however, that modifications are necessary to clarify the scope of the proposed definition. In particular, several commenters expressed concern that, without clarification, the definition would be interpreted to apply to routine communications, such as notices commonly sent to inform accountholders that their account has become overdrawn. Other commenters asked the Board to provide additional guidance on types of communications that would constitute promoting an overdraft service and thus satisfy the definition of "advertisement."

Comment 2(b)-2 currently provides examples of messages that are not considered advertisements. The Board proposed to re-designate comment 2(b)-2 as comment 2(b)-3. The re-designation is not necessary in the final rule. In response to commenters' concerns, comment 2(b)-2 has been revised to provide additional examples of messages that are not advertisements. Paragraph 2(b)-2.iii is revised for conformity with the final rule. Paragraph 2(b)-2.iv. clarifies that an institution is not promoting a deposit or service solely by providing information about a particular transaction in an account, such as in a notice or a periodic statement advising a consumer about a specific overdrawn item.

Paragraph 2(b)-2.v. provides that an institution is not promoting a deposit or service solely by providing legally required disclosures. Similar guidance had been included in proposed comment 2(b)-2. The guidance in the final rule has been revised by deleting the specific reference to disclosures provided at account-opening, on periodic statements, and on electronic terminal receipts, to address commenters' concerns that other required disclosures should also be

excluded from the definition of "advertisement." If an institution combines promotional material with the required disclosures, however, this additional information would be considered an advertisement. An institution that includes promotional materials about its overdraft service with required disclosures generally would be required to provide the new disclosures in § 230.11 (discussed below). Paragraph 2(b)–2.vi. clarifies that an account agreement is not an advertisement.

The revised definition of advertisement does not affect rules for triggering additional disclosures when an advertisement states an APY or bonus. The previous definition of "advertisement" continues to apply for this purpose and has been redesignated as § 230.2(b)(1). Modifications have been made only for stylistic consistency; no substantive change is intended.

Section 230.4 Account Disclosures

4(b) Content of Account Disclosures

4(b)(4) Fees

Under TISA and Regulation DD, before an account is opened, institutions must provide a schedule describing all fees that may be charged in connection with the account. The schedule must also disclose the amount of the fee and the conditions under which the fee will be imposed. 12 U.S.C. 4303; § 230.4(b)(4). When terms required to be disclosed in the schedule change and adversely affect accountholders, notice of the change must be provided 30 days in advance. 12 U.S.C. 4305; § 230.5(a).

Currently, the guidance for describing fees is quite general, and provides that "naming and describing the fee will typically satisfy these requirements." See comment 4(b)(4)–3. The Board proposed comment 4(b)(4)–5 to require institutions to state in their account-opening disclosures the types of transactions for which an overdraft fee may be imposed. As proposed, describing the fee solely as a "fee for overdrafts" or fee for "overdraft items" would not provide sufficient notice to consumers as to whether the fee applies to overdrafts by check only, or whether it also applies to overdrafts by other means, such as by ATM withdrawal or other electronic transactions. The revisions are being adopted substantially as proposed, with some modifications to address commenters' concerns, and would apply to all institutions, regardless of whether they promote the payment of overdrafts.

A few commenters that support the proposed comment affirm that they already provide such disclosures. Most

commenters do not oppose the proposed change, but encourage the Board to clarify that an exhaustive list of transactions for which an overdraft fee may be imposed, is not required. These commenters express concern that requiring disclosure of an exhaustive list of transactions could necessitate a change-in-terms notice as new technologies are implemented. For example, several commenters believe that an institution solely disclosing that overdraft fees may be imposed for transfers initiated using the Internet might have to provide a change-in-terms notice if telephone transfers are subsequently allowed. These commenters assert that an illustrative list of transactions would sufficiently notify the consumer that overdraft fees will apply in multiple circumstances, while allowing institutions to avoid the need to provide a change-in-terms notice if, subsequently, overdrafts are permitted through another channel. A few commenters asked the Board to provide model language to ease compliance.

To address commenters' concerns, comment 4(b)(4)–5 has been revised to clarify that an exhaustive list of transactions is not required. As revised, the comment provides that institutions may specify categories of transactions for which an overdraft fee may be imposed. The final comment also includes model language. Institutions may satisfy the requirements by stating that the fee applies to overdrafts "created by check, in-person withdrawal, ATM withdrawal, or other electronic means," as applicable. The model language is sufficiently broad to cover most situations in which overdrafts can occur, but institutions are free to add additional categories. For example, an institution using the model language would not be required to change its disclosures when implementing a system for making electronic transfers by telephone. But if an institution only discloses that overdraft fees are imposed in connection with the payment of checks, new disclosures would be required if the institution subsequently imposes the fees for overdrafts created by ATM withdrawals or other electronic means.

Institutions are not required to provide new account-opening disclosures or change-in-terms notices to consumers who previously received overdraft fee disclosures under existing guidance currently in the staff commentary. However, to the extent that an institution's prior disclosures suggested the overdraft service only covers checks, institutions should consider informing their customers that

the service is broader and applies to overdrafts by in-person withdrawals, ATM withdrawals, and by other electronic means, as applicable.

Section 230.6 Periodic Statement Disclosures

6(a) General Rule

6(a)(3) Fees Imposed

The Board proposed to revise Regulation DD, by adding § 230.6(a)(3)(ii), to require all institutions to disclose separately, the total dollar amount of overdraft fees and the total dollar amount of returned-item fees, for the statement period and the calendar year to date. As further discussed below, this provision has been moved to new § 230.11(a), and the requirements are limited to institutions that promote the payment of overdrafts in an advertisement. Proposed comment 6(a)(3)–2 has been adopted, with some modifications, to clarify that fees for paying overdrafts and fees for returning items unpaid may not be grouped together as fees for insufficient funds.

Section 230.8 Advertising

As discussed above, the Board is revising Regulation DD to apply the prohibition in § 230.8(a) on misleading advertisements to communications with consumers about the terms of their existing accounts. The Board also proposed to revise the staff commentary to provide examples of advertisements that would ordinarily be misleading. In addition, to reduce consumer confusion about how overdraft services differ from a traditional line of credit, the proposed rule required institutions that promote automated overdraft services to include certain disclosures in their advertisements about the service. In the final rule, the prohibition on guidance regarding misleading and inaccurate advertisements in § 230.8(a) is being revised. The proposed examples in the commentary of advertisements that would ordinarily be misleading are being adopted largely as proposed under § 230.8(a), with some modifications for clarity. The additional disclosure requirements for advertisements that promote the payment of overdrafts in proposed § 230.8(f) are contained in new § 230.11(b), discussed below.

8(a) Misleading or Inaccurate Advertisements

In the final rule, § 230.8(a) has been reorganized, as proposed. To provide guidance on the types of advertisements that may violate the rule, the Board proposed to add comment 8(a)–10. The proposed comment provided five examples of advertisements that would

ordinarily be misleading, inaccurate, or misrepresent the deposit contract. The examples of misleading advertisements in proposed comment 8(a)–10 are adopted as proposed, with some revisions for clarity.

The first example is an advertisement that represents an overdraft service as a “line of credit” unless the service is subject to the Board’s Regulation Z. The second example is an advertisement that misleads consumers by representing that the institution will honor all checks or authorize all transactions that overdraw an account, with or without a specified dollar limit, when the institution retains discretion at any time not to honor checks or authorize transactions.

A third example states that an advertisement could mislead consumers by representing that consumers with overdrawn accounts are allowed to maintain a negative balance when the terms of the account’s overdraft service require consumers to promptly return the deposit account to a positive balance. The fourth example provides that promotional materials describing a service solely as protection against bounced checks could mislead consumers if the service also applies to ATM withdrawals, and other debit card transactions, and electronic fund transfers.

The fifth example of misleading advertisements relates to the advertisement of free accounts. Under Regulation DD, an institution may not describe an account as “free” (or use a similar term) if any maintenance or activity fee may be imposed on the account. As the Board noted in the proposal, fees for overdraft services are not considered maintenance or activity fees, because the fees do not relate to the use of the consumer’s own funds in the account. Thus, institutions may impose overdraft fees in connection with “free” accounts. The example addresses concerns about institutions that advertise overdraft services (or other services) as a feature of their free checking accounts in a manner that could mislead consumers to believe that the service is without cost. Accordingly, an advertisement would be deemed misleading if the account is described as “free” and the advertisement also promotes account-related services for which there is a fee, unless the advertisement clearly and conspicuously indicates there is a cost associated with the advertised service.

Most commenters agree that the misleading advertising practices identified by the Board should be prohibited, and support the proposed examples. One consumer group,

however, believes that the proposed examples are not sufficient because they do not prohibit institutions from encouraging consumers to use the service for intentional overdrafts. The final rule does not contain such an example. Although advertisements that encourage intentional overdrafts may under some circumstances mislead consumers about the terms of the service, such a determination must be made on a case-by-case basis.

A few industry commenters objected to the scope of the fifth example which pertains to advertisements that promote “free” accounts as well as services for which a fee is charged. These commenters believe the example should be limited to advertisements promoting overdraft services in connection with free accounts. Although comment 8(a)–10.v. addresses concerns that consumers may be misled into thinking that overdraft protection is without cost when the service is advertised as a feature of free checking accounts, the same possibility of misleading consumers exists when other account-related services are advertised in connection with free accounts. Thus, the scope of the final comment is not limited to the promotion of overdraft services.

TISA’s limitation on advertising an account as free is currently implemented in § 230.8(a). This provision has been redesignated as § 230.8(a)(2), without any substantive change.

8(f) Additional Disclosures in Connection With Overdraft Services

Proposed § 230.8(f) would have required advertisements promoting an automated overdraft service to include certain fee and other information about the service. This requirement is in § 230.11(b) in the final rule. Section 230.8(f) of the final rule contains a cross-reference to the new advertising disclosures in § 230.11(b).

Section 230.11 Additional Disclosure Requirements for Institutions Advertising the Payment of Overdrafts

New § 230.11 consolidates the disclosure requirements previously set forth in §§ 230.6(a)(3) and 230.8(f) of the proposed rule. Section 230.11(a) contains the disclosure requirements for periodic statements. The final rule is narrower than the proposal and only applies to institutions that promote the payment of overdrafts in advertisements. Section 230.11(a) requires these institutions to separately disclose the total fees for paying overdrafts and the total fees for returning items unpaid on periodic

statements. The disclosures must be made for the statement period and for the calendar year to date for each account to which the advertisement applies. Section 230.11(b) requires institutions that promote the payment of overdrafts in advertisements to provide certain additional disclosures about the nature of the overdraft service. The Board believes that consolidating these rules in a new section will help facilitate compliance with the regulation for institutions that choose to promote the payment of overdrafts.

11(a) Periodic Statement Disclosures of Fees for Overdrafts and for Returned Items Unpaid

To assist consumers in better understanding the costs associated with overdrawing their accounts, the Board proposed to revise the requirements for providing cost disclosures on periodic statements. Although periodic statements are not required by TISA, an institution that provides such statements must disclose any fees or charges imposed on the account during the statement period. Under Regulation DD, fees must be itemized on a periodic statement by type, for example, by separately listing the monthly service charge, ATM fees, and returned check fees. When multiple fees of the same type are charged in a single period, comment 6(a)(3)–2 in the current staff commentary states that institutions have the option of showing each fee as a separate charge or, alternatively, aggregating all fees of the same type and disclosing a single dollar amount for that category. The Board proposed to add § 230.6(a)(3)(ii) to require *all* institutions to disclose separately the total dollar amount of overdraft fees and the total dollar amount of returned-item fees on an aggregate basis for the statement period and for the calendar year to date. As discussed above, under § 230.11(a)(1) of the final rule, only institutions that promote the payment of overdrafts in an advertisement are required to provide the aggregate fee disclosures on periodic statements. Institutions must provide the disclosures for all accounts to which the institution’s advertisement applies.

Section 230.11(a)(2) describes certain communications that institutions may make concerning the payment of overdrafts that would not trigger the new periodic statement disclosures. Sections 230.11(a)(3) through (5) provide guidance on how an institution can comply with the rule after it commences advertising the payment of overdrafts, and after an institution acquires accounts through a merger or acquisition. Additional comments have

been added for clarity in response to concerns raised by commenters.

Consumer representatives that commented believe that consumers need better information about the cost of using certain overdraft services, but they assert that disclosing aggregate fees for the statement cycle and year to date would be insufficient to provide consumers with the information necessary to compare the cost of overdraft services with the costs of alternative forms of short-term credit such as payday loans, tax refund anticipation loans, and traditional overdraft lines of credit. They recommend that instead of adopting the proposed revisions to Regulation DD, the Board should cover certain overdraft services under Regulation Z so that periodic statements would provide consumers with an APR.

Where the institution has not agreed in writing to pay overdrafts, a charge assessed against a deposit account for paying an overdraft has not been considered a finance charge and disclosures under Regulation Z are not required. This exception was established in Regulation Z from its inception in 1969. As noted above, the Board's adoption of final rules under Regulation DD does not preclude a future determination that TILA disclosures would also benefit consumers.

Industry commenters generally oppose the proposed requirement to disclose aggregate totals for overdraft fees and returned-item fees because they believe it would be costly and would provide little benefit to consumers. Several commenters disagree with the view that consumers do not receive sufficient information about the costs associated with overdrawing their account, observing that consumers receive a schedule of fees at account-opening, notice of fees imposed upon each overdraft, and an itemization of fees on periodic statements. Many of these commenters also assert that the itemization of fees on periodic statements provides a sufficient basis for consumers to determine an aggregate total for fees imposed during the statement cycle and calendar year to date. Most industry commenters stated that the typical industry practice of providing a notice after each overdraft is a more effective and timely means of alerting consumers about the cost of overdrafts. Some financial institutions oppose additional disclosures about overdraft fees on periodic statements because, in their view, it would detract from information on the periodic statement about other types of fees, such as ATM withdrawal fees. A few industry

commenters question how an institution can provide year-to-date totals that would be reset to zero each January when a statement period is not tied to a calendar month.

Most industry commenters express concern about the cost of implementing changes to the way fees are disclosed on periodic statements, which would involve changes to data collection and reporting systems, as well as training and compliance management costs. They note that most institutions' systems do not currently aggregate fee data across different statement cycles, which would be necessary to disclose year-to-date totals. Some commenters also note that systems changes would be needed for some institutions to distinguish between fees imposed for paying overdrafts and fees for handling items that are returned unpaid. Six financial institutions provided cost estimates. At the low end, one institution that stated it uses a third-party vendor for data processing estimated the cost at \$20,000, while two other institutions that outsource data processing estimated the cost to be about \$300,000. Two institutions (including one with \$1.5 billion in assets) provided cost estimates between \$50,000 and \$125,000. Bank of America, noting that it operates the largest banking network in the United States, estimated that expenses for the initial systems modifications for paper statements would exceed \$1 million.

The Board specifically asked for comment on whether the requirement to disclose cumulative year-to-date fee totals on periodic statements should be limited to institutions that market overdraft services. Industry commenters were divided. Several banks that do not promote overdraft services supported limiting the rule; these were generally larger institutions that stated the proposed revisions should focus on institutions whose marketing practices have raised the most concerns. These commenters urged the Board to exempt institutions that do not market overdraft services from being required to disclose aggregate fees for the statement period and year to date. But more industry commenters stated that the rule, if adopted, should apply to all institutions and not just institutions that market overdraft services. Some of these commenters believe a rule based on "marketing" would be too vague; others assert that if the cost disclosure is useful, it would be just as beneficial to consumers regardless of whether the service is marketed. One commenter also noted that institutions' contracts with third-party vendors may limit the cost of system changes from being

imposed directly on individual depository institutions if the changes must be made by all institutions.

TISA was enacted, in part, for the purpose of requiring clear and uniform disclosures regarding deposit account terms and the fees assessable against these accounts. Such disclosures allow consumers to make informed judgments about the use of their accounts, including the consideration of other available options. In proposing that institutions disclose the aggregate amount of fees imposed for overdrafts and returned items, the Board sought to ensure that consumers are more clearly presented with the overall cost of overdrawing their accounts, particularly in light of the fact that institutions' payment of overdrafts has become more routine due to the use of automated systems, and that many institutions encourage consumers to use their overdraft service. Currently, institutions may itemize each fee on the periodic statement, including overdraft and returned-item fees; the itemized charges may be interspersed among other transactions in the account. A periodic statement that itemizes each transaction and fee during the statement cycle, without isolating the total cost of overdrawing the account, does not present a clear picture of the total cost associated with overdrawing the account.

Fees for paying overdrafts and for returned items are typically flat fees unrelated to the amount of the transaction. These amounts may be significant when there are multiple overdrafts, although the items may represent relatively small dollar amounts. Even when consumers are aware that their account is or may become overdrawn, they do not necessarily know the number of overdraft items that will be paid or returned, or the total fees that will be imposed, both of which are determined by the order in which items are presented and the institution's policies regarding the order in which items are paid. Thus, consumers may not be aware of the total amount of fees being imposed and the amount by which the account is overdrawn until the next periodic statement is received. The Board believes disclosure of the aggregate costs may better enable consumers to consider their approach to account management and determine whether the account's terms and features are suited to their needs or whether other types of accounts or services would be more appropriate.

The Board is also mindful, however, of the compliance costs associated with the proposed rule. Limiting the rule to

institutions that advertise the payment of overdrafts avoids imposing compliance burdens on institutions that pay overdrafts infrequently, such as institutions that only pay overdrafts on an ad hoc basis. Requiring institutions to provide aggregate fee disclosures if they promote the payment of overdrafts would provide better cost information for consumers who are encouraged to overdraw their accounts and who are most likely to benefit from the aggregate fee disclosures.

There may be consumers who use overdraft services frequently even though their institution does not market the service; however, a rule based on individual consumer behavior is more difficult to administer. Accordingly, under § 230.11(a)(1), the requirement for disclosing aggregate fees for paying overdrafts and for returning items unpaid is limited to institutions that promote the payment of overdrafts in an advertisement. The total dollar amount for paying overdrafts includes all fees or charges imposed by an institution for paying overdrafts or other items when there are insufficient funds and the account becomes overdrawn. The final rule also clarifies that the required disclosures must be provided for the statement period and for the calendar year to date, for any account to which the advertisement applies. Institutions that do not promote the payment of overdrafts and have merely automated their traditional practice of paying overdrafts on an ad hoc basis are not covered by § 230.11(a)(1). These institutions may continue to itemize fees on periodic statements but whether they itemize fees or group them together by type, institutions must distinguish between fees for paying overdrafts and fees for returning unpaid items. Institutions that do not promote the payment of overdrafts may also group like fees together and provide a total for the statement period on a voluntary basis, consistent with the current rules.

The definition of "advertisement" is broad and includes "a commercial message appearing in any medium, that promotes directly or indirectly the availability" the terms of a deposit account. Thus, the rules for overdraft services would cover any type of promotion, regardless of the advertisement's content, format or the marketing channel used. For example, messages posted on a depository institution's Internet site would be covered, as would promotional e-mail messages and messages printed on an institution's periodic statement. Oral messages communicated in a telephone solicitation would also be covered. See comment 11(a)(1)–1(i).

To ease compliance, the final rule specifies certain types of communications and practices that would not trigger the requirement for disclosing aggregate fees on periodic statements. See § 205.11(a)(2). The safe harbors seek to provide additional certainty to institutions in determining whether compliance with the rule is required in particular circumstances. For example, the safe harbors clarify that an institution is not promoting the payment of overdrafts when providing information about the status of the account or a particular transaction, such as when notifying a consumer that the account has become overdrawn or when including the amount the account is overdrawn on a periodic statement. Similarly, an institution is not deemed to be promoting the payment of overdrafts when it provides notice to a consumer, such as at an ATM, that completing a requested transaction may trigger a fee for overdrawing the account, or when it provides a general notice that items overdrawing an account may trigger a fee.

An institution also is not promoting overdraft services by providing legally required disclosures, by discussing in a deposit account agreement the institution's right to pay overdrafts, or by providing educational materials that do not specifically describe the institution's overdraft service (such as the brochure on "bounce protection" published by the Federal financial regulatory agencies). The rules for overdraft services also would not apply to advertisements for overdraft lines of credit covered by TILA and Regulation Z.

The safe harbors also provide relief in circumstances where institutions would have practical difficulties in complying with the rule. In particular, there are safe harbors for consumer-initiated and face-or-face discussions to relieve institutions of the burden of monitoring individual conversations and responses; this also enables institutions to respond to consumers' direct questions about their accounts without concern that the discussion might trigger additional disclosure requirements. The final rule clarifies that institutions are within the safe harbor when responding (whether by telephone, electronically, or otherwise) to consumer-initiated inquiries about deposit accounts and overdrafts. The revised final rule also explains the limits of this safe harbor; the safe harbor for consumer-initiated inquiries does not apply to institutions' automated systems that are programmed to provide information about the institution's overdraft service, such as an ATM machine, a telephone response

machine, or the institution's Internet site. In these cases, the consumer initiates the contact, but the institution has control over the pre-programmed message that provides information about available overdraft limits, and thus, the same compliance issues as individual inquiries are not presented.

Section 230.11(a)(3) addresses the timing of the aggregate fee disclosures after an institution begins promoting the payment of overdrafts. An institution must make the disclosures under § 230.11(a)(1) for accounts to which the advertisement applies, starting with the first statement period that begins after the institution advertises the payment of overdrafts. For example, if a consumer's statement period typically closes on the 15th of each month, an institution that promotes the payment of overdrafts with respect to the consumer's account on July 1, 2006 must provide the aggregate fee disclosures on subsequent periodic statements for that consumer beginning with the statement reflecting the period from July 16, 2006, through August 15, 2006. In calculating and disclosing total fees for the year-to-date, institutions have the option of including fees imposed since the beginning of the calendar year, or starting with the first full statement period that begins after the institution advertises the payment of overdrafts with respect to the consumer's account.

Comment 11(a)(3)–1 explains that only institutions that continue to advertise the payment of overdrafts on or after the mandatory compliance date of July 1, 2006 will be required to provide aggregate fee periodic statement disclosures for their consumers. Under § 230.11(a)(4) of the final rule, an institution is no longer required to provide the disclosures under § 230.11(a)(1) two years after the institution last promotes its overdraft service with respect to that account, when the likely effect of the advertisement on consumers' use is presumably dissipated.

Where an institution acquires deposit accounts, for example, by merging with or acquiring another institution, under § 230.11(a)(5) the acquiring institution must thereafter provide the aggregate fee disclosures required by § 230.11(a)(1) only if the acquiring institution promotes the payment of overdrafts with respect to the acquired accounts. If disclosures are required for the acquired accounts, the acquiring institution may, but is not required, to include fees imposed prior to the acquisition in the aggregate totals. Comment 11(a)(5)–1 explains that if the acquiring institution does not advertise the payment of overdrafts, or its advertisements do not

apply to the acquired accounts, the institution need not provide the aggregate fee disclosures for the acquired accounts even if the depository institution that previously held the accounts advertised the payment of overdrafts for those accounts.

In response to commenters' requests for clarification, additional guidance has been added to the staff commentary. Comment 11(a)(1)–1 provides examples of circumstances in which an institution would trigger the periodic statement requirements. For example, an institution promotes the payment of overdrafts by stating an overdraft limit or includes the amount of funds available for overdrafts on a periodic statement. *See* comment 11(a)–1(ii). Similarly, an institution promotes the payment of overdrafts if it states an overdraft limit or includes the dollar amount of the overdraft limit in an account balance disclosed on an ATM receipt or by a telephone response system. *See* comment 11(a)–1(iii). Comment 11(a)(1)–3 provides that an institution does not promote the payment of overdrafts, however, if it promotes a service providing for the transfer of funds from another deposit account of the consumer to avoid creating an overdraft.

Comment 11(a)(1)–2 explains that the aggregate fee disclosures must be provided on periodic statement for all accounts to which an advertisement promoting the payment of overdrafts applies. Accordingly, if an institution specifies the types of accounts for which the overdraft service applies, the institution is not required to provide the disclosures for other types of accounts offered by the institution. An institution is required to provide the new aggregate fee disclosures for all of its accounts, however, if the institution generally promotes the payment of overdrafts without specifying the accounts to which the advertisement applies.

Comment 11(a)(1)–4 clarifies that the total dollar amount disclosed for fees charged to the account for paying overdrafts includes per-item fees as well as interest charges, daily or other periodic fees, and fees charged for maintaining an account in overdraft status. It also includes fees charged when there are insufficient funds because previously deposited funds are subject to a hold or are uncollected. The disclosure would not include, however, fees for transferring funds from another account to avoid an overdraft, or fees charged in connection with a line of credit where the institution agrees in writing to pay items that overdraw the account and the service is subject to the Board's Regulation Z.

Comment 11(a)(1)–5 clarifies that in disclosing fees for returning items unpaid, an institution should not include fees imposed when the account holder deposits items that are returned.

In some cases, an institution may provide a statement for the current period reflecting that fees imposed during a previous period were waived and credited to the account. In response to commenters' request for clarification, comment 11(a)(1)–6 provides that such adjustments should not affect the total disclosed for fees imposed during the current statement period. The comment also notes, however, that institutions may, but are not required to, reflect the adjustment in the fee total for the calendar year to date.

In response to commenters' suggestions, comment 11(a)(1)–7 provides guidance on how depository institutions may disclose the year-to-date fee totals when the institution's statement cycle does not coincide with the calendar month. In such cases, the institution may disclose a year-to-date total by aggregating fees for 12 monthly cycles, starting with the cycle that begins during January. Alternatively, the institution may provide a year-to-date total based on the calendar year.

Comment 11(a)(1)–8 provides that institutions that promote the payment of overdrafts may continue to itemize overdraft and returned item fees on periodic statements as an additional voluntary disclosure in addition to the disclosures required by § 230.11(a)(1).

11(b) Advertising Disclosures for Overdraft Services

TISA and Regulation DD require additional information to be provided if an advertisement for a deposit account refers to a specific rate of interest, yield, or rate of earnings. 12 U.S.C. 4302; § 230.8(c). Advertisements for bonuses on deposit accounts also trigger additional information. § 230.8(d). TISA authorizes the Board to exempt "broadcast and electronic media and outdoor advertising from stating some additional information, if the Board finds the disclosures to be unnecessarily burdensome." 12 U.S.C. 4302(b). These limited disclosure rules are implemented in § 230.8(e)(1). The exemptions for broadcast and electronic media do not extend to advertisements posted on the Internet or sent by e-mail.

A principal concern about institutions' promotion of the payment of overdrafts is that consumers may be led to believe that the service represents a traditional line of credit. Some advertisements of overdraft services focus on the dollar amount of the overdraft limit, which may mislead

some consumers to believe that a line of credit for that amount will be provided. Other advertisements create the impression that the payment of overdrafts can be relied upon to obtain short-term extensions of credit from time to time (up to a given amount) at minimal cost. These promotions may mislead or confuse consumers regarding the nature, costs, terms, and limitations of the service. This problem may be magnified somewhat because marketed overdraft services are relatively new.

Additional disclosures in advertising could reduce the potential that some consumers would be misled, and enable consumers to compare the terms offered by different financial institutions. Accordingly, the Board proposed to add § 230.8(f) to require that the following disclosures be included in advertisements for "automated" overdraft services not subject to Regulation Z: (1) The fee for overdrawing an account; (2) the types of transactions covered; (3) the amount of time consumers have to repay or cover any overdraft; and (4) the circumstances under which the institution would not pay an overdraft. The proposed disclosures would have been required for print media and marketing on Internet sites; but because of the practical limitations of time or space, there was an exemption for advertisements using broadcast media, outdoor billboards, and telephone response machines, which would mirror the exemptions in Regulation DD for other types of advertising disclosures. The Board also proposed to add comments 8(f)–1 through 8(f)–3, to provide guidance in applying the new disclosure requirements. The final rule adopts these provisions largely as proposed in § 230.11(b) and the accompanying commentary.

Several industry commenters asked the Board to clarify which "automated" overdraft services would be subject to the advertising disclosures, noting that all institutions automate their processing of overdrafts to some extent. These commenters generally urge the Board to draw a clear line to aid in compliance. The final rule omits the reference to "automated" overdraft services to eliminate unnecessary confusion. The rule was intended to apply to all overdraft services that are advertised by depository institutions. Institutions that have a policy of paying overdrafts only on an ad hoc basis generally do not advertise the service and are expected to be unaffected by the new advertising disclosure requirements.

Most commenters did not disagree with the idea that some additional

information about marketed overdraft services might be helpful to consumers. But several industry commenters have concerns about the scope of the proposed disclosures, or have questions about how the disclosures would be implemented. A few industry commenters express the view that additional disclosures in advertisements would be burdensome and would, therefore, discourage banks from advertising overdraft services; others suggest that the additional disclosures would provide too much information and could confuse consumers. One trade association stated that disclosing specific costs and terms in advertisements might have the unintended effect of encouraging additional use of the service.

On balance, the Board continues to believe that additional disclosures about the terms of overdraft services would benefit consumers, particularly since institutions often add the overdraft feature without consumers' specific request. The final rule thus adopts the new advertising disclosure requirements under § 230.11(b)(1) and the staff commentary largely as proposed, with some modifications and clarifications.

Consistent with the rule for periodic statement disclosures, § 230.11(b)(2)(i) through (xi) specifies circumstances where an institution would not be required to provide the additional advertising disclosures in § 230.11(b)(1). For example, an institution need not provide the disclosures if the advertisement is for a service where the payment of overdrafts is agreed upon in writing and subject to Regulation Z. See § 230.11(b)(2)(i). The advertising disclosures also are not applicable when an institution informs consumers about a specific overdrawn item, when it provides disclosures required by law, or when an institution provides educational materials that do not specifically describe the institution's overdraft service. See § 230.11(b)(2)(vii), (viii), (xi). The advertising disclosures also do not apply to in-person discussions with a consumer, or when institutions are responding to consumer-initiated inquiries about deposit accounts or overdrafts. See § 230.11(b)(2)(ii), (vi).

The final rule also recognizes that in some circumstances, there may be practical limitations on the ability to provide meaningful advertising disclosures. No disclosures would be required for broadcast or outdoor media, consistent with the current advertising rules in Regulation DD, or on ATM receipts, due to space limitations. See §§ 230.11(b)(2)(iii)–(v). The safe harbor for advertisements using broadcast or

electronic media applies to radio and television, but does not extend to advertisements posted on an Internet site, ATM screens, or on telephone response machines, or advertisements sent by e-mail. See comment 11(b)–3. Nevertheless, the advertising disclosures required for ATM screens and telephone response machines are limited to information about fees and the time period for repaying overdrafts. See § 230.11(b)(3).

An institution that advertises the payment of overdrafts on an indoor lobby sign is only required to state that fees may apply and that consumers should contact an employee for information about applicable fees and terms. (An ATM screen would not be considered an indoor sign for purposes of this exemption.) See § 230.11(b)(4). An indoor sign may also direct consumers to additional sources of information, such as the institution's Internet site. While institutions advertising the payment of overdrafts using broadcast or outdoor media, ATMs, telephone response machines or lobby signs may qualify for complete or partial exemptions from the advertising disclosures in § 230.11(b)(1), they would nevertheless continue to be required to provide aggregate fee disclosures on periodic statements under § 230.11(a)(1) for the statement period and the calendar year to date.

The staff commentary contains additional guidance to clarify the obligations of institutions that promote the payment of overdrafts in advertisements. Comment 11(b)–2 clarifies that disclosures are not required if the advertised service provides for the transfer of funds from another consumer account to avoid creating an overdraft. Comment 11(b)–4 describes the types of fees that must be disclosed in an advertisement.

Comment 11(b)–5 provides guidance on disclosing the types of transactions covered by an advertised overdraft service. This guidance was previously in proposed comment 8(f)–1. The guidance is consistent with the disclosures required at account opening. See comment 4(b)(4)–5. Institutions are not required to provide an exhaustive list of transactions. Disclosing that a fee may be imposed for covering overdrafts “created by check, in-person withdrawal, ATM withdrawal, or other electronic means,” as applicable, would satisfy the rule.

Comment 11(b)–6 provides guidance on disclosing the time period for repayment, which is intended to warn consumers that, unlike a line of credit, they are expected to cover the overdraft in a relatively short period. Some

industry commenters noted that an institution's deposit agreement may require immediate repayment even though, in practice, the institution allows consumers to cover the overdraft with their next regular deposit. Other industry commenters assert the disclosure might encourage consumers to defer repayment of the overdraft. In response to the comments, comment 11(b)–6 clarifies that if a depository institution reserves the right to require a consumer to pay an overdraft immediately or on demand instead of affording consumers a specific time period to bring their account to a positive balance, it may disclose that fact to satisfy the rule.

Comment 11(b)–7 provides guidance on how institutions may describe the circumstances under which an institution will not pay an overdraft. This guidance previously was in proposed comment 8(f)–2. Some industry commenters stated that such a disclosure could imply an agreement or promise to pay overdrafts in all other circumstances, which would be contrary to the “discretionary” nature of the overdraft service. Many commenters suggested a more generic disclosure noting that payment of any overdraft is discretionary. The final commentary provision has been revised to address the commenters' concerns and provides model language. An institution must describe the circumstances under which it will not pay an overdraft, but it is sufficient to state, as applicable: “Whether your overdrafts will be paid is discretionary and we reserve the right not to pay. For example, we typically do not pay overdrafts if your account is not in good standing, or you are not making regular deposits, or you have too many overdrafts.”

Comment 11(b)–8 clarifies the relationship between the general guidance in comment 8(a)–10.v. (the rules for advertisements that promote free accounts as well as an account-related service for which a fee is charged) and the requirements of § 230.11(b)(1) when the account-related service being advertised is an overdraft service. This guidance previously was in proposed comment 8(f)–3. When the advertised service is an overdraft service, institutions must disclose the fee or fees for the payment of each overdraft, not merely that a cost is associated with the overdraft service, as well as other required information.

VII. Regulatory Flexibility Analysis

The Board has prepared a final regulatory flexibility analysis as required by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

1. *Statement of the need for and objectives of the proposal.* TISA was enacted, in part, for the purpose of requiring clear and uniform disclosures regarding deposit account terms and fees assessable against these accounts. Such disclosures allow consumers to make meaningful comparisons between different accounts and also allow consumers to make informed judgments about the use of their accounts. 12 U.S.C. 4301. TISA requires the Board to prescribe regulations to carry out the purpose and provisions of the statute. 12 U.S.C. 4308(a)(1). The Board is adopting revisions to Regulation DD to address the uniformity and adequacy of institutions' disclosure of fees associated with overdraft services generally, and to address concerns about advertised overdraft services in particular. As stated more fully above, the existing regulation is amended to require depository institutions offering certain overdraft services to provide more complete information regarding those services. The Board believes that the revisions to Regulation DD discussed above are within the Congress' broad grant of authority to the Board to adopt provisions that carry out the purposes of the statute.

2. *Summary of issues raised by comments in response to the initial regulatory flexibility analysis.* One commenter questioned the statement in the proposal that no Federal rules duplicate, overlap, or conflict with the proposed revisions to Regulation DD because there are other laws that depository institutions must consider when administering an overdraft protection program. Although other laws and regulations may apply to depository institutions' payment of overdrafts, the final revisions to Regulation DD do not duplicate or conflict with the requirements imposed by these other laws. The Board has also considered the interagency guidance on overdraft protection programs issued in February 2005, and has determined that issuance of the final revisions to Regulation DD is consistent with the interagency guidance.

3. *Description of small entities affected by the proposal.* Approximately 14,242 depository institutions in the United States that must comply with the Truth in Savings Act have assets of \$150 million or less and thus are considered small entities for purposes of the Regulatory Flexibility Act, based on 2004 call report data. Approximately 5,765 are institutions that must comply with the Board's Regulation DD; approximately 8,477 are credit unions that must comply with National Credit Union Administration's Truth in

Savings regulations, which must be substantially similar to the Board's Regulation DD.

The Board believes that almost all small depository institutions that offer accounts where overdraft or returned-item fees are imposed currently send periodic statements on those accounts, although the number of small depository institutions that promote their overdraft services is unknown. For those institutions that promote the payment of overdrafts in an advertisement, periodic statement disclosures will need to be revised to display aggregate overdraft and aggregate returned-item fees for the statement period and year to date. All small depository institutions will have to review, and perhaps revise account-opening disclosures and marketing materials.

4. *Recordkeeping, reporting, and compliance requirements.* The revisions to Regulation DD require all financial institutions to provide more complete information to consumers regarding overdraft services. Account-opening disclosures and marketing materials would describe more completely how fees may be triggered. As discussed in more detail above, institutions that promote their overdraft service in an advertisement must separately disclose on periodic statements the total dollar amount of fees and charges imposed on the account for paying overdrafts and the total dollar amount for returning items unpaid. These disclosures must be provided for the statement period and for the calendar year to date for each account to which the advertisement applies. Certain advertising practices are prohibited, and additional disclosures on advertisements of overdraft services are required.

5. *Steps taken to minimize the economic impact on small entities.* The Board solicited comment on how the burden of disclosures on institutions could be minimized. In response to comments received, the final rule limits the requirement to disclose aggregate totals for overdraft and returned-item fees for the statement period and the calendar year to date to institutions that promote the payment of overdrafts in an advertisement, and thereby encourage the routine use of the service. The final rule also specifies certain practices that would not trigger the new overdraft disclosures. The safe harbors provide additional certainty to institutions in determining whether compliance with the rule is required in particular circumstances. Consistent with the rule requiring periodic statement disclosures, the final rule also provides safe harbors to specify circumstances

when an institution would not be required to provide additional advertising disclosures.

Under the final rule, institutions are permitted to provide an illustrative list of categories by which overdrafts may be created, to generally eliminate the need to provide a change-in-terms notice each time a new channel for creating overdrafts is added. The final rule also provides additional guidance regarding the types of fees that should be included in the total dollar amount of fees and charges imposed on the account for paying overdrafts and in the total dollar amount for returning items unpaid.

VIII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Board reviewed the rule under the authority delegated to the Board by the Office of Management and Budget. 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.

The collection of information that is revised by this rulemaking is found in 12 CFR part 230 and in Appendix B. This collection is mandatory (15 U.S.C. 4301 *et seq.*) to evidence compliance with the requirements of Regulation DD and the Truth in Savings Act (TISA). Institutions are required to retain records for twenty-four months. The respondents/recordkeepers are for-profit depository institutions, including small businesses. This regulation applies to all types of depository institutions, not just Federal Reserve-regulated institutions. Under Paperwork Reduction Act regulations, however, the Federal Reserve accounts for the burden of the paperwork associated with the regulation only for Federal Reserve-regulated institutions. Other agencies account for the paperwork burden on their depository institutions under this regulation.

The revisions provide that depository institutions offering certain overdraft payment services would be required to provide more complete information regarding those services. Account-opening disclosures and other marketing materials describe more completely how fees may be triggered. Institutions that promote the payment of overdrafts must separately disclose on periodic statements the total dollar amount of fees and charges imposed on the account for paying overdrafts and the total dollar amount of fees charged to the account for returning items

unpaid. These disclosures must be provided for the statement period and for the calendar year to date for each account to which an advertisement applies. Certain advertising practices are prohibited, and additional disclosures in advertisements for the payment of overdrafts are required. Although the final rule adds these requirements, it is expected that these revisions would not significantly increase the ongoing paperwork burden of depository institutions. However, respondents would face a one-time burden to reprogram and update their systems to include these new notice requirements. The Federal Reserve estimates that it will take the respondents, on average, 8 hours (one business day) to make these system changes; therefore, the Federal Reserve estimates that the total annual burden for revising the periodic disclosure and the account-opening disclosure to be 10,072 hours. Respondents would also face a one-time burden to revise and update their advertising materials. The estimated time to update these materials is approximately 40 hours (one business week); therefore, the Federal Reserve estimates that the total annual burden for this requirement to be 50,360 hours.

With respect to Federal Reserve-regulated institutions, it is estimated that there are 1,259 respondent/recordkeepers. The current annual burden is estimated to be 187,365 hours. The proposed annual burden is estimated to be 247,979, an increase of 60,432 hours.

All depository institutions, of which there are approximately 18,554, potentially are affected by this collection of information, and thus are respondents for purposes of the PRA. The above estimates represent an average across all respondents and reflect variations between institutions based on their size, complexity, and practices. The other federal agencies are responsible for estimating and reporting to OMB the total paperwork burden for the institutions for which they have administrative enforcement authority. They may, but are not required to, use the Federal Reserve's burden estimates. The total estimated annual burden for all financial institutions, including Federal Reserve regulated institutions, subject to Regulation DD would be approximately 3,755,261 hours, using the same burden methodology as above.

Because the records are maintained at depository institutions and the notices are not provided to the Federal Reserve, no issue of confidentiality arises under the Freedom of Information Act.

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: the Office of Management and Budget, Paperwork Reduction Project (7100-0271), Washington, DC 20503, with copies of such comments sent to Michelle Long, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 41, Board of Governors of the Federal Reserve System, Washington, DC 20551.

List of Subjects in 12 CFR Part 230

Advertising, Banks, Banking, Consumer protection, Reporting and recordkeeping requirements, Truth in savings.

■ For the reasons set forth in the preamble, the Board amends Regulation DD, 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 230.2 is amended by revising paragraph (b) to read as follows:

§ 230.2 Definitions.

* * * * *

(b) *Advertisement* means a commercial message, appearing in any medium, that promotes directly or indirectly:

(1) The availability or terms of, or a deposit in, a new account; and

(2) For purposes of § 230.8(a) and § 230.11 of this part, the terms of, or a deposit in, a new or existing account.

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■ 3. Section 230.6 is amended by republishing paragraph (a) and revising paragraph (a)(3) to read as follows:

§ 230.6 Periodic statement disclosures.

(a) *General rule.* If a depository institution mails or delivers a periodic statement, the statement shall include the following disclosures:

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(3) *Fees imposed.* Fees required to be disclosed under § 230.4(b)(4) of this part that were debited to the account during the statement period. The fees shall be itemized by type and dollar amounts. Except as provided in § 230.11(a)(1) of this part, when fees of the same type are imposed more than once in a statement period, a depository institution may itemize each fee separately or group the

fees together and disclose a total dollar amount for all fees of that type.

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■ 4. Section 230.8 is amended by revising paragraph (a), and adding a new paragraph (f) to read as follows:

§ 230.8 Advertising.

(a) *Misleading or inaccurate advertisements.* An advertisement shall not:

(1) Be misleading or inaccurate or misrepresent a depository institution's deposit contract; or

(2) Refer to or describe an account as "free" or "no cost" (or contain a similar term) if any maintenance or activity fee may be imposed on the account. The word "profit" shall not be used in referring to interest paid on an account.

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(f) *Additional disclosures in connection with the payment of overdrafts.* Institutions that promote the payment of overdrafts in an advertisement shall include in the advertisement the disclosures required by § 230.11(b) of this part.

■ 5. Section 230.11 is added to read as follows:

§ 230.11 Additional disclosure requirements for institutions advertising the payment of overdrafts.

(a) *Periodic statement disclosures.*

(1) *Disclosure of Total Fees.* (i) Except as provided in paragraph (a)(2) of this section, if a depository institution promotes the payment of overdrafts in an advertisement, the institution must separately disclose on each periodic statement:

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

(B) The total dollar amount for all fees imposed on the account for returning items unpaid.

(ii) The disclosures required by this paragraph must be provided for the statement period and for the calendar year to date, for any account to which the advertisement applies.

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

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

(ii) Communicating (whether by telephone, electronically, or otherwise)

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

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

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

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

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

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

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

(3) *Time period covered by disclosures.* An institution must make the disclosures required by paragraph (a)(1) of this section for the first statement period that begins after an institution advertises the payment of overdrafts. An institution may disclose total fees imposed for the calendar year by aggregating fees imposed since the beginning of the calendar year, or since the beginning of the first statement period that year for which such disclosures are required.

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

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

required to, include fees imposed prior to acquisition of the account.

(b) *Advertising disclosures for overdraft services.*

(1) *Disclosures.* Except as provided in paragraphs (b)(2),(b)(3), and (b)(4) of this section, any advertisement promoting the payment of overdrafts shall disclose in a clear and conspicuous manner:

(i) The fee or fees for the payment of each overdraft;

(ii) The categories of transactions for which a fee for paying an overdraft may be imposed;

(iii) The time period by which the consumer must repay or cover any overdraft; and

(iv) The circumstances under which the institution will not pay an overdraft.

(2) *Communications about the payment of overdrafts not subject to additional advertising disclosures.*

Paragraph (b)(1) of this section does not apply to:

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

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

(iii) An advertisement made through broadcast or electronic media, such as television or radio;

(iv) An advertisement made on outdoor media, such as billboards;

(v) An ATM receipt;

(vi) An in-person discussion with a consumer;

(vii) Disclosures required by federal or other applicable law;

(viii) Information included on a periodic statement or a notice informing a consumer about a specific overdrawn item or the amount the account is overdrawn;

(ix) A term in a deposit account agreement discussing the institution's right to pay overdrafts;

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

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

(3) *Exception for ATM screens and telephone response machines.* The disclosures described in paragraphs (b)(1)(ii) and (b)(1)(iv) of this section are not required in connection with any advertisement made on an ATM screen or using a telephone response machine.

(4) *Exception for indoor signs.*

Paragraph (b)(1) of this section does not apply to advertisements for the payment of overdrafts on indoor signs as described by § 230.8(e)(2) of this part, provided that the sign contains a clear and conspicuous statement that fees may apply and that consumers should contact an employee for further information about applicable fees and terms. For purposes of this paragraph (b)(4), an indoor sign does not include an ATM screen.

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■ 6. In Supplement I to part 230:

■ a. Under § 230.2 Definitions, under (b) *Advertisement*, the introductory sentence to paragraph 2. is republished, paragraph 2.iii. is revised, and new paragraphs 2.iv. through 2.vi. are added.

■ b. Under § 230.4 Account disclosures, under (b)(4) *Fees*, a new paragraph 5. is added.

■ c. Under § 230.6 Periodic statement disclosures, under (a)(3) *Fees imposed*, paragraph 2. is revised.

■ d. Under § 230.8 Advertising, under (a) *Misleading or inaccurate advertisements*, a new paragraph 10. is added.

■ e. A new § 230.11 Additional disclosure requirements for institutions advertising the payment of overdrafts, is added to the end of Supplement I.

Supplement I To Part 230—Official Staff Interpretations

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Section 230.2 Definitions

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(b) *Advertisement*

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2. *Other messages.* Examples of messages that are not advertisements are—

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iii. For purposes of § 230.8(b) of this part through § 230.8(e) of this part, information given to consumers about existing accounts, such as current rates recorded on a voice-response machine or notices for automatically renewable time account sent before renewal

iv. Information about a particular transaction in an existing account

v. Disclosures required by federal or other applicable law

vi. A deposit account agreement

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Section 230.4 Account Disclosures

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(b) *Content of account disclosures*

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(b)(4) Fees

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5. *Fees for overdrawing an account.* Under § 230.4(b)(4) of this part, institutions must disclose the conditions under which a fee may be imposed. In satisfying this requirement institutions must specify the categories of transactions for which an overdraft fee may be imposed. An exhaustive list of transactions is not required. It is sufficient for an institution to state that the fee applies to overdrafts "created by check, in-person withdrawal, ATM withdrawal, or other electronic means," as applicable. Disclosing a fee "for overdraft items" would not be sufficient.

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Section 230.6 Periodic statement disclosures

(a) General rule

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(a)(3) Fees imposed

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2. *Itemizing fees by type.* In itemizing fees imposed more than once in the period, institutions may group fees if they are the same type. (See § 230.11(a)(1) of this part regarding certain fees that are required to be grouped when an institution promotes the payment of overdrafts.) When fees of the same type are grouped together, the description must make clear that the dollar figure represents more than a single fee, for example, "total fees for checks written this period." Examples of fees that may not be grouped together are—

- i. Monthly maintenance and excess-activity fees
- ii. "transfer" fees, if different dollar amounts are imposed" such as \$.50 for deposits and \$1.00 for withdrawals
- iii. fees for electronic fund transfers and fees for other services, such as balance-inquiry or maintenance fees
- iv. fees for paying overdrafts and fees for returning checks or other items unpaid

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Section 230.8 Advertising

(a) Misleading or inaccurate advertisements

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10. *Examples.* Examples of advertisements that would ordinarily be misleading, inaccurate, or misrepresent the deposit contract are:

- i. Representing an overdraft service as a "line of credit," unless the service is subject to the Board's Regulation Z, 12 CFR part 226.
- ii. Representing that the institution will honor all checks or authorize payment of all transactions that overdraw an account, with or without a specified dollar limit, when the institution retains discretion at any time not to honor checks or authorize transactions.
- iii. Representing that consumers with an overdrawn account are allowed to maintain a negative balance when the terms of the account's overdraft service require consumers promptly to return the deposit account to a positive balance.
- iv. Describing an institution's overdraft service solely as protection against bounced checks when the institution also permits

overdrafts for a fee for overdrawing their accounts by other means, such as ATM withdrawals, debit card transactions, or other electronic fund transfers.

v. Advertising an account-related service for which the institution charges a fee in an advertisement that also uses the word "free" or "no cost" (or a similar term) to describe the account, unless the advertisement clearly and conspicuously indicates that there is a cost associated with the service. If the fee is a maintenance or activity fee under § 230.8(a)(2) of this part, however, an advertisement may not describe the account as "free" or "no cost" (or contain a similar term) even if the fee is disclosed in the advertisement.

* * * * *

Section 230.11 Additional disclosure requirements for institutions advertising the payment of overdrafts

*(a) Periodic statement disclosures.**(a)(1) Disclosure of total fees.*

1. *Examples of institutions advertising the payment of overdrafts.* An institution would trigger the periodic statement disclosures if it:

- i. Promotes the institution's policy or practice of paying some overdrafts (unless the service would be subject to the Board's Regulation Z (12 CFR part 226)), in advertisements using broadcast media, brochures, telephone solicitations or electronic mail, or on Internet sites, ATM screens or receipts, billboards, or indoor signs. (But see § 230.11(a)(2) of this part regarding communications about the payment of overdrafts that would not trigger periodic statement disclosures);
- ii. Includes a message on a periodic statement informing the consumer of an overdraft limit or the amount of funds available for overdrafts. For example, an institution that includes a message on a periodic statement informing the consumer of a \$500 overdraft limit or that the consumer has \$300 remaining on the overdraft limit, is promoting an overdraft service;
- iii. Discloses an overdraft limit or includes the dollar amount of an overdraft limit in a balance disclosed by any means, including on an ATM receipt or on an automated system, such as a telephone response machine, ATM screen, or the institution's Internet site.

2. *Applicability of periodic statement disclosures.* The periodic statement disclosures apply to all accounts for which the institution has advertised the payment of overdrafts. For example, if an advertisement promoting the payment of overdrafts specifies the types of accounts to which the advertisement applies, the institution would not be required to provide the periodic statement disclosures for other types of accounts offered by the institution for which the advertisement does not apply. If an advertisement does not specify the types of accounts to which it applies, the advertisement would be considered to apply to all of an institution's deposit accounts.

3. *Transfer services.* The overdraft services covered by § 230.11(a)(1) of this part do not include a service providing for the transfer of funds from another deposit account of the

consumer to permit the payment of items without creating an overdraft, even if a fee is charged for the transfer.

4. *Fees for paying overdrafts.* An institution that advertises the payment of overdrafts must disclose on periodic statements a total dollar amount for all fees charged to the account for paying overdrafts. The institution must disclose separate totals for the statement period and for the calendar year to date. The total dollar amount includes per-item fees as well as interest charges, daily or other periodic fees, or fees charged for maintaining an account in overdraft status, whether the overdraft is by check or by other means. It also includes fees charged when there are insufficient funds because previously deposited funds are subject to a hold or are uncollected. It does not include fees for transferring funds from another account to avoid an overdraft, or fees charged when the institution has previously agreed in writing to pay items that overdraw the account and the service is subject to the Board's Regulation Z, 12 CFR part 226.

5. *Fees for returning items unpaid.* An institution that advertises the payment of overdrafts must disclose a total dollar amount for all fees charged to the account for dishonoring or returning checks or other items drawn on the account. The institution must disclose separate totals for the statement period and for the calendar year to date. Fees imposed when deposited items are returned are not included.

6. *Waived fees.* In some cases, an institution may provide a statement for the current period reflecting that fees imposed during a previous period were waived and credited to the account. Institutions may, but are not required to, reflect the adjustment in the total for the calendar year to date. Such adjustments should not affect the total disclosed for fees imposed during the current statement period.

7. *Totals for the calendar year to date.* Some institutions' statement periods do not coincide with the calendar month. In such cases, the institution may disclose a calendar year-to-date total by aggregating fees for 12 monthly cycles, starting with the period that begins during January and finishing with the period that begins during December. For example, if statement periods begin on the 10th day of each month, the statement covering December 10, 2006 through January 9, 2007 may disclose the year-to-date total for fees imposed from January 10, 2006 through January 9, 2007. Alternatively, the institution could provide a statement for the cycle ending January 9, 2007 showing the year-to-date total for fees imposed January 1, 2006 through December 31, 2006.

8. *Itemization of fees.* An institution may itemize each fee in addition to providing the disclosures required by § 230.11(a)(1) of this part.

(a)(3) Time period covered by disclosures

1. *Periodic statement disclosures.* The disclosures under § 230.11(a)(1) of this part must be included on periodic statements provided by an institution reflecting the first statement period that begins after the institution advertises the payment of overdrafts. For example, if a consumer's statement period typically closes on the 15th

of each month, an institution that promotes the payment of overdrafts on July 1, 2006 must provide the disclosures required by § 230.11(a)(1) of this part on subsequent periodic statements for that consumer beginning with the statement reflecting the period from July 16, 2006 through August 15, 2006. Only depository institutions that promote the payment of overdrafts in an advertisement on or after July 1, 2006 must provide disclosures on periodic statements under § 230.11(a)(1) of this part.

(a)(5) Acquired accounts

1. *Examples.* As provided in § 230.11(a)(5) of this part, an institution that acquires deposit accounts through merger or acquisition must provide the disclosures required by paragraph (a)(1) of this section for the first statement period that begins after the institution promotes the payment of overdrafts in an advertisement that applies to the acquired account. If the acquiring institution does not advertise the payment of overdrafts, or the advertisement does not apply to the acquired accounts, the institution need not provide the disclosures required by § 230.11(a)(1) of this part for the acquired accounts even if the depository institution that previously held the accounts advertised the payment of overdrafts with respect to those accounts.

(b) Advertising Disclosures in Connection With Overdraft Services

1. *Examples of institutions promoting the payment of overdrafts.* A depository institution would be required to include the advertising disclosures in § 230.11(b)(1) of this part if the institution:

i. Promotes the institution's policy or practice of paying overdrafts (unless the service would be subject to the Board's Regulation Z (12 CFR part 226)). This includes advertisements using print media such as newspapers or brochures, telephone solicitations, electronic mail, or messages posted on an Internet site. (But see § 230.11(b)(2) of this part for communications that are not subject to the additional advertising disclosures);

ii. Includes a message on a periodic statement informing the consumer of an overdraft limit or the amount of funds available for overdrafts. For example, an institution that includes a message on a periodic statement informing the consumer of a \$500 overdraft limit or that the consumer has \$300 remaining on the overdraft limit, is promoting an overdraft service.

iii. Discloses an overdraft limit or includes the dollar amount of an overdraft limit in a balance disclosed on an automated system, such as a telephone response machine, ATM screen or the institution's Internet site. (See, however, § 230.11(b)(3) of this part.).

2. *Transfer services.* The overdraft services covered by § 230.11(b)(1) of this part do not include a service providing for the transfer of funds from another deposit account of the consumer to permit the payment of items without creating an overdraft, even if a fee is charged for the transfer.

3. *Electronic media.* The exception for advertisements made through broadcast or electronic media, such as television or radio, does not apply to advertisements posted on

an institution's Internet site, on an ATM screen, provided on telephone response machines, or sent by electronic mail.

4. *Fees.* The fees that must be disclosed under § 230.11(b)(1) of this part include per-item fees as well as interest charges, daily or other periodic fees, and fees charged for maintaining an account in overdraft status, whether the overdraft is by check or by other means. The fees also include fees charged when there are insufficient funds because previously deposited funds are subject to a hold or are uncollected. The fees do not include fees for transferring funds from another account to avoid an overdraft, or fees charged when the institution has previously agreed in writing to pay items that overdraw the account and the service is subject to the Board's Regulation Z, 12 CFR part 226.

5. *Categories of transactions.* An exhaustive list of transactions is not required. Disclosing that a fee may be imposed for covering overdrafts "created by check, in-person withdrawal, ATM withdrawal, or other electronic means" would satisfy the requirements of § 230.11(b)(1)(ii) of this part where the fee may be imposed in these circumstances. See comment 4(b)(4)–5 of this part.

6. *Time period to repay.* If a depository institution reserves the right to require a consumer to pay an overdraft immediately or on demand instead of affording consumers a specific time period to establish a positive balance in the account, an institution may comply with § 230.11(b)(1)(iii) of this part by disclosing this fact.

7. *Circumstances for nonpayment.* An institution must describe the circumstances under which it will not pay an overdraft. It is sufficient to state, as applicable: "Whether your overdrafts will be paid is discretionary and we reserve the right not to pay. For example, we typically do not pay overdrafts if your account is not in good standing, or you are not making regular deposits, or you have too many overdrafts."

8. *Advertising an account as "free."* If the advertised account-related service is an overdraft service subject to the requirements of § 230.11(b)(1) of this part, institutions must disclose the fee or fees for the payment of each overdraft, not merely that a cost is associated with the overdraft service, as well as other required information. Compliance with comment 8(a)–10.v. is not sufficient.

By order of the Board of Governors of the Federal Reserve System, May 19, 2005.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 05–10348 Filed 5–23–05; 8:45 am]

BILLING CODE 6210–01–P