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: Proposed Rule.

SUMMARY: The Board proposes to amend 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 accounts. The proposed amendments, in part, address a specific service offered by depository institutions, commonly referred to as "bounced-check protection" or "courtesy overdraft protection."

Bounced-check protection is an automated service that is sometimes provided to deposit account consumers as an alternative to a traditional line of credit. To address concerns about the marketing of bounced-check protection services, a proposed revision to the regulation would expand the prohibition against misleading advertisements to cover communications with current consumers about existing accounts; the staff commentary would provide examples. Proposed revisions to Regulation DD would require additional fee and other disclosures about automated overdraft services, including in advertisements. The Board also is proposing amendments of general applicability that would require institutions to provide more uniform disclosures about overdraft and returned-item fees.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by Docket No. R-1197, by any of the following methods:

- Agency Web Site: http://www.federalreserve.gov. Follow the instructions for submitting comments at http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.

- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

- E-mail: regs.comments@federalreserve.gov. Include docket number in the subject line of the message.

- FAX: 202/452-3819 or 202/452-3102.

- Mail: Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, D.C. 20551.

All public comments are available from the Board's web site at www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm as submitted, except as necessary for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP-500 of the Board's Martin Building (20th and C Streets, N.W.) between 9:00 a.m. and 5:00 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Eurgubian, Attorney, or Ky Tran-Trong or Krista P. DeLargy, Senior Attorneys, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, at (202) 452-3667 or 452-2412; for users of Telecommunications Device for the Deaf ("TDD") only, contact (202) 263-4869.

SUPPLEMENTARY INFORMATION:

I. The Truth in Savings Act

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

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. There is a prohibition against advertisements, announcements, or solicitations that are inaccurate or misleading, or that misrepresent the deposit contract. Institutions are also 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 Bounced-Check Protection 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 automated programs to institutions, particularly to smaller ones. 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 stating a dollar amount that consumers would be allowed to overdraw and by encouraging consumers to overdraw their accounts and use the service as a line of credit.

While bounced-check protection services vary among institutions, many programs have the following characteristics:

- Institutions inform consumers that overdraft protection is a feature of their accounts and promote the use of the service. Institutions also inform consumers of their aggregate dollar limit under the overdraft protection program.

- Coverage is automatic for consumers who meet the institution's criteria (e.g., account has been open a certain number of days, deposits are made regularly). Typically, the institution performs no credit underwriting.

- Overdrafts generally are paid up to the aggregate limit set by the institution for the specific class of accounts, typically $100 to $500.

- Many program disclosures state that payment of an overdraft is discretionary on the part of the institution, and may disclaim any legal obligation of the institution to pay any overdraft.

- The service may extend to check transactions as well as other transactions, such as withdrawals at automated teller machines ("ATMs"), transactions using debit cards, pre-authorized automatic debits from a consumer's account, telephone-initiated funds transfers, and on-line banking transactions.

- A flat fee is charged each time the service is triggered and an overdraft item is paid. Commonly, a fee in the same amount would be charged even if the overdraft item were not paid. A daily fee also may apply for each day the account remains overdrawn.

- Some institutions offer closed-end loans to consumers who do not bring their accounts to a positive balance within a specified time period. These repayment plans allow consumers to repay their overdrafts and fees in installments.

In November 2002, when it published the annual proposed update to the staff commentary to Regulation Z, the Board solicited comment and information from the public about how bounced-check protection services are designed and operated, to determine the need for guidance to depository institutions under Regulation Z or other laws (67 FR 72618, December 6, 2002). The Board received approximately 350 comment letters; most were from industry representatives describing how the services work.

Consumer advocates, state agency representatives, and others believed that bounced-check protection services should be subject to TILA and Regulation Z. They noted that in addition to warning consumers about the high cost of the service, Truth in Lending disclosures would apprise consumers about the true nature of the service as a credit transaction. Industry commenters opposed coverage under TILA, stating that the current disclosure requirements under TISA are adequate, and that coverage under TILA would be burdensome. The Board believes that consumers would benefit from more uniform and complete information about the costs and terms of overdraft services not covered under TILA, including in advertisements. Improvements in the disclosures provided to consumers could aid them in understanding the costs associated with overdrawing their accounts and promote better account management. The Board is not proposing at this time to cover these services under TILA and Regulation Z, although further consideration of the need for such coverage may be appropriate if concerns about these overdraft programs persist in the future.

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; 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 was designed to facilitate depository institutions' ability to accommodate consumers on an ad-hoc basis.

The Board's study of bounced-check protection services has identified a number of concerns about some programs. One major concern relates to the adequacy of information provided to consumers whose accounts are eligible for bounced-check protection services. The proposed revisions to Regulation DD and the staff commentary are intended to improve the information provided to consumers about these overdraft services.

Other concerns center on institutions' marketing practices. Although the service is 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 of the marketing plans include material that informs consumers of the availability of the bounced-check protection 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 bounced-check protection services that involve substantial fees. In addition, 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. Proposed revisions to Regulation DD's advertising rules and disclosure requirements are intended to address these concerns.

In addition to the Board's proposed revisions to Regulation DD and the staff commentary, the member agencies of the Federal Financial Institution Examination Council (FFIEC) have developed proposed supervisory guidance for institutions that offer bounced-check protection services. The proposed interagency guidance, which is being published for comment, would include best practices addressing the marketing and operation of bounced-check protection services. For example, institutions would be encouraged to obtain customers consent to receive overdraft protection or inform customers how they may "opt out" of the service, avoid encouraging routine or intentional overdrafts, and to promptly notify consumers when they access an overdraft protection service.

III. Concerns About Uniform Disclosure of Overdraft Fees

The Board 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 overdrafts in their accounts and the fees imposed, including notices that are sent at the time the overdraft occurs and on periodic statements. These practices and disclosures are not uniform among institutions, however, and some consumers may not receive adequate information on a timely basis.

Fees for paying overdrafts and for returned items are typically flat fees unrelated to the amount of the item. 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 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 regarding the order in which items are paid. Accordingly, some 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. And when the periodic statement is provided, it may intersperse fees among other items rather than providing a total. As a result, the overall cost of obtaining credit through an overdraft service is not clearly presented to consumers.

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 among different accounts and to make informed judgments about the use of their accounts. To further the

purposes of TISA, the Board is proposing uniform requirements for notifying consumers about returned-item fees and overdraft fees (whether the overdraft is created by check, by ATM withdrawal or other electronic transfer, or by other means). These rules will also help ensure that where an overdraft is paid, consumers are uniformly notified about the account's status. Information about overdrafts and returned items that is provided on a regular and timely basis may enable consumers to avoid unnecessary fees; it may assist consumers to better 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.

IV. Summary of Proposed Revisions

Pursuant to its authority under Section 269(a) of TISA, the Board is proposing the following 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 automated overdraft services ("bounced-check protection services") in particular:

Disclosures Concerning Overdraft Fees Generally

Periodic statements. Institutions that provide periodic statements would be required to include the total amount of fees imposed for overdrafts and the total amount of fees for returned items for the statement period and for the calendar year to date.

Account-opening disclosures. Institutions would be required to specify in the account-opening disclosures provided under the Truth in Savings Act whether overdraft protection fees may be imposed in connection with checks, automated teller machine (ATM) withdrawals, or other electronic fund transfers.

Additional Protections for Accounts with Certain Overdraft Protection Services (Bounced-Check Protection)

Additional advertising disclosures. To reduce consumer confusion about the nature of the overdraft service and how it differs from a traditional line of credit, institutions that market automated overdraft payment services that are not covered by TILA would have to include in their advertisements about the service: the fee for the payment of each overdraft item, the types 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. An exemption in Regulation DD for broadcast media, billboards, and telephone response machines, which applies to other types of advertising disclosures, would also apply here.

Prohibiting misleading advertisements. TISA prohibits advertisements, announcements, or solicitations that are misleading or that misrepresent the deposit contract. Currently, Regulation DD applies the prohibition only to advertisements for prospective accounts. To address concerns about overdraft protection services,

Regulation DD would be amended to also apply the prohibition to communications with consumers about the terms of their current accounts.

Examples of misleading advertisements. The staff commentary would also be revised to provide five examples of advertisements that would ordinarily be deemed misleading: (1) representing an overdraft protection 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 may overdraw their accounts and maintain a negative balance for an indefinite or extended period when the terms of the service require consumers to promptly return the deposit account to a positive balance; (4) describing a service solely as protection against bounced checks when the overdraft service may be imposed 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" and also promoting a service for which there is a fee (including a bounced-check protection service), unless the advertisement clearly and conspicuously indicates there is a cost associated with the service.

V. Section-by-Section Analysis

Section 230.2 Definitions

2(b) Advertisements

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 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 is proposing to revise the definition of an advertisement to cover communications with existing consumers for some purposes. The revised definition does not affect rules for triggering additional disclosures when an advertisement states an APY or bonus; the existing definition of "advertisement," which would continue to apply for this purpose, would be redesignated as § 230.2(b)(1) and would also be modified for stylistic consistency; no substantive change is intended.

Proposed § 230.2(b)(2) applies TISA's prohibition against misleading or inaccurate advertisements or misrepresentations of the deposit contract to communications with consumers about existing accounts. The expanded definition of an advertisement that covers existing accounts would also apply in determining whether a communication is an advertisement that triggers additional disclosures about overdraft protection services.

An advertisement includes a commercial message that invites, offers, or otherwise promotes a deposit or other service in connection with an account or class of accounts.

The revision to the definition of "advertisement" does not affect providing required disclosures on an account, such as at account opening, on a periodic statement, or on an electronic terminal receipt (as required by TISA or the Electronic Fund Transfer Act, 15 U.S.C. 1693 et seq.), for example. See new comment 2(b)-2. Current comment 2(b)-2 would be redesignated as comment 2(b)-3.

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; § 2305(a).

Currently the guidance for describing fees is quite general, providing that "naming and describing the fee will typically satisfy these requirements." See comment 4(b)(4)-3. Proposed comment 4(b)(4)-5 would require institutions to state in their account-opening disclosures the types of transactions for which an overdraft protection fee may be imposed. Solely describing an overdraft protection fee 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. The proposed comment would clarify that the disclosure must indicate that a fee may be imposed in connection with checks, ATM withdrawals, or other electronic fund transfers that overdraw the account, if that is the case.

Section 230.6 Periodic Statement Disclosures

6(a) General Rule
6(a)(3) Fees Imposed

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. To assist consumers in better understanding the costs associated with overdrawing their accounts, the Board is proposing to revise the requirements for providing cost disclosures on periodic statements.

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 to the regulation 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. For clarity, this guidance would be moved to § 230.6(a)(3)(i) of the regulation.

Under proposed § 230.6(a)(3)(ii), institutions would be required to disclose overdraft fees or returned-item fees on periodic statements on an aggregate basis for the statement period. Institutions that currently disclose each fee as a separate charge on periodic statements could continue to do so as an additional voluntary disclosure. Comment 6(a)(3)-2 provides guidance on itemizing and describing fees on periodic statements. The comment would be revised to reflect the proposed revisions to the regulation concerning overdraft fees and returned-item fees and to clarify that these two types of fees may not be grouped together as fees for insufficient funds.

To highlight the overall cost to consumers of presenting items on an account with insufficient funds on a routine basis, proposed § 230.6(a)(3)(ii) would require institutions' periodic statements to show the total amounts for overdraft fees and returned-item fees for the calendar year to date. The Board believes that disclosure of year-to-date totals would better inform consumers about the cumulative effect of using an overdraft service on a regular basis. An institution's disclosures regarding the total overdraft fees paid by a consumer during the calendar year might also serve as a source of information for financial institutions seeking to monitor consumers' frequency in overdrawing their accounts. The Board requests comment on whether the requirement to disclose cumulative year-to-date fee totals should be limited to institutions that market overdraft payment services, and thereby encourage the routine use of the service.

Section 230.8 Advertising

Under the proposal, § 230.8(a) of Regulation DD would be reorganized for clarity. The regulation and staff commentary would be revised to specifically address the promotion of bounced-check protection services.

8(a) Misleading or Inaccurate Advertisements
8(a)(1)

Some bounced-check protection services, typically those provided under programs developed by third-party vendors, include marketing plans that appear designed to increase customer usage of overdrafts. Some marketing plans include materials that encourage consumers to overdraw their accounts and use the service as a line of credit by stating that overdrafts up to a specific dollar amount will be paid. Some marketing plans also include statements suggesting that consumers may treat the service as a line of credit, for example, to take an advance on their next paycheck or to cover unexpected expenses.

Notwithstanding the marketing promises, the vendors' programs include qualifying language disclaiming any legal obligation by the institution to pay any individual overdraft, regardless of the amount. The institutions' reservation of the right not to pay overdrafts may not appear prominently or conspicuously in the marketing materials. Moreover, unlike traditional lines of credit, consumers using bounced-check protection services generally are not permitted to carry a credit balance forward at a predetermined and disclosed rate of interest. Instead, consumers using the service are

generally charged a flat fee for each overdraft item and are expected to repay the entire overdraft amount within a short period. Under these circumstances, implying that the overdraft service is a traditional line of credit or suggesting that the service can be used like a line of credit may be inconsistent with the actual terms and limitations of the service.

As discussed above, Regulation DD would be revised to apply TISA's prohibition against misrepresentations and misleading advertisements to communications with consumers about their existing accounts, to cover institutions' marketing of deposit-related services, including bounced-check protection services. A new comment 8(a)-10 would be added to provide guidance on the types of advertisements that may violate the rule.

Five new examples would be added to the commentary relating to the promotion of overdraft payment services. The staff commentary would be revised to state that institutions may not mislead consumers by representing an overdraft service as a "line of credit" unless the service is subject to the Board's Regulation Z. An advertisement could also mislead consumers if it represents 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 would state 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.

A fifth new 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. Examples of fees that trigger the prohibition against advertising an account as free are listed in comment 8(a)-3.

Comment 8(a)-4 lists certain account-related fees that are not considered to be maintenance or activity fees, for example, check-printing fees, stop-payment fees, or fees associated with checks that are returned unpaid. Likewise, fees for bounced-check protection services would not be considered maintenance or activity fees, because the fees relate to the institution's provision of credit as opposed to fees related to the use of the consumer's own funds in the account. Nevertheless, there has been concern that some institutions promote bounced-check protection services as a feature of their free checking accounts, and that consumers may be misled into thinking that overdraft protection on such accounts is without costs.

The commentary would be revised to state that an advertisement would be deemed misleading if the account is described as "free" and 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. Under proposed comment 8(a)-10, the advertisement may, but need not, state the actual cost of the service, although such a disclosure may be required under proposed § 230.8(f) for certain advertisements. The proposed comment applies to fees for account-related services that are not considered "maintenance or activity fees" (such as fees for bounced-check protection or for specially designed checks). Regulation DD's prohibition against advertising an account as "free" if the institution imposes a "maintenance or activity fee" is unaffected by the proposal.

Comment is also solicited on other types of advertisements of overdraft protection services that would potentially mislead consumers about (i) the terms, limitations, costs, or nature of the service and (ii) the fact that the service is not a traditional line of credit. For example, where an institution's payment of overdrafts is automated, does advertising to consumers that the institution will pay overdrafts up to a specified dollar amount mislead consumers about the nature of the service? Furthermore, would such an advertisement potentially mislead consumers about whether the bank may not pay an overdraft? Does encouraging consumers to use the service to obtain credit instead of using it to cover inadvertent overdrafts mislead consumers about the actual terms of the service? Do advertisements that encourage the regular or routine use of the service mislead consumers about the cost of the service?

Section 230.8(a)(1) is revised for stylistic consistency, without substantive change.

8(a)(2)

TISA's limitation on advertising an account as free is implemented in § 230.8(a). This provision would be redesignated as § 230.8(a)(2), without any substantive change.

8(f) Additional Disclosures in Connection with Automated 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 overdraft protection services is that consumers may be led to believe that the service represents a traditional line of

credit. Some marketing materials focus on the dollar amount of the overdraft limit, which may lead consumers to believe that a line of credit is being provided. Some advertisements create the impression that the service 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 automated overdraft services are relatively new.

Where consumers are targeted with advertisements about overdraft protection services, additional disclosures could reduce the potential that some consumers would be misled, and generally educate consumers about the nature of the service to enable them to compare the terms offered by different financial institutions. Accordingly, in order to ensure that advertisements promoting overdraft protection services are not misleading, the Board is proposing to revise Regulation DD to require certain disclosures in advertisements for automated overdraft payment services. To reduce consumer confusion about the costs, terms, and limitations of the service and how it differs from a traditional line of credit, advertisements would be required to disclose (1) the fee for the payment of each overdraft item; (2) the types of transactions covered; (3) the amount of time the consumer has to repay or cover any overdraft; and (4) the circumstances under which the institution would not pay an overdraft.

The proposed rule would provide an exemption for certain types of advertisements to mirror exemptions provided for other types of advertising disclosures. Under TISA and Regulation DD, advertisements that state the annual percentage yield for an account must also disclose certain other information. The regulation specifically exempts from these disclosure requirements, advertisements using broadcast media, outdoor billboards, and telephone response machines. These exemptions were based on concerns about the practical limitations of time and space for these types of media; these concerns are not as significant for print advertising or marketing on Internet web sites. These exemptions would also apply to the advertising rules for automated overdraft payment services under proposed § 230.8(f). Proposed comment 8(f)-1 would clarify that for purposes of the advertising disclosures, institutions may describe the types of transactions covered in the same manner as the disclosures required before account-opening (see proposed comment 4(b)(4)-5).

Comment 8(f)-2 provides that in describing the circumstances under which an institution will not pay an overdraft, a general description will typically satisfy the requirement, for example, statements such as "overdrafts will not be paid if your account is not in good standing, you are not making regular deposits, or you have too many overdrafts."

Comment 8(f)-3 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 § 230.8(f) when the account-related service being advertised is an automated overdraft service.

VI. Form of Comment Letters

Comment letters should refer to Docket No. R-1197 and, when possible, should use a standard typeface with a font size of 10 or 12; this will enable the Board to convert text submitted in paper form to machine-readable form through electronic scanning, and will facilitate automated retrieval of comments for review. Comments may be mailed electronically to regs.comments@federalreserve.gov.

VII. Solicitation of Comments Regarding the Use of "Plain Language"

Section 722 of the Gramm-Leach-Bliley Act of 1999 requires the Board to use "plain language" in all proposed and final rules published after January 1, 2000. The Board invites comments on whether the proposed rules are clearly stated and effectively organized, and how the Board might make the proposed text easier to understand.

VIII. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires federal agencies to publish an initial regulatory flexibility analysis to describe the impact of proposed rules on small entities. A final regulatory flexibility analysis will be prepared and will consider comments received during the public comment period.

1. Statement of the objectives of the proposal. The Board is proposing revisions to Regulation DD to address the uniformity and adequacy of insitutions' disclosure of overdraft fees generally, and to address concerns about advertised automated overdraft services ("bounced-check protections services") in particular. As stated more fully above, the existing regulation would be amended to 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 would describe more completely how fees may be triggered. The total dollar amount of overdraft and returned-item fees for the period and for the calendar year to date would be required on periodic statements. Certain advertising practices would be prohibited, and additional disclosures would be required.

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 authorizes the Board to prescribe regulations to carry out the purpose and provisions of the statute. 12 U.S.C. 4308(a)(1). The act expressly states that the Board's regulations may contain "such classifications, differentiations, or other provisions, . . . as, in the judgment of the Board, are necessary or proper to carry out the purposes of [the Act], to prevent circumvention or evasion of the requirements of [the Act], or to facilitate compliance with the requirements of [the Act]." . 12 U.S.C. 4308(a)(3). The Board believes that the proposed 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. Small entities affected by the proposal. The number of small entities affected by this proposal is unknown. Approximately 14,580 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 2003 call report data. Approximately 5,900 are institutions that must comply with the Board's Regulation DD; approximately 8,860 are credit unions that must comply with National Credit Union Administration regulations, which must be substantially similar to the Board's Regulation DD. The Board believes small depository institutions that offer accounts where overdraft or returned-item fees are imposed currently send periodic statements on those accounts. Periodic statement disclosures would need to be revised to display aggregate overdraft and aggregate returned-item fees for the statement period and year to date. Account-opening disclosures and marketing materials would have to be reviewed, and perhaps revised.

3. Other federal rules. The Board believes no federal rules duplicate, overlap, or conflict with the proposed revisions to Regulation DD.

4. Significant alternatives to the proposed revisions. As discussed above, the Board requests comment on whether the requirement to disclose cumulative year-to-date totals for overdraft and returned-item fees should be limited to institutions that market overdraft payment services, and thereby encourage the routine use of the service.

IX. 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 state member banks. Under Paperwork Reduction Act regulations, however, the Federal Reserve accounts for the burden of the paperwork associated with the regulation only for state member banks. Other agencies account for the paperwork burden on their respective constituencies under this regulation.

The proposed 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 would describe more completely how fees may be triggered. The total dollar amount of overdraft and returned-item fees for the period and for the calendar year to date would be

required on periodic statements, and year-to-date totals would be required. Certain advertising practices would be prohibited, and additional disclosures would be required. Although the proposal adds these requirements, it is expected that these revisions would not significantly increase the paperwork burden of depository institutions. With respect to state member banks, it is estimated that there are 976 respondent/recordkeepers. Current annual burden is estimated to be 146,644 hours.

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

The Federal Reserve requests comments from depository institutions, especially state member banks, that will help to estimate burden of the various disclosures that would be made in the first year this proposed regulation would be effective. Comments are invited on: (a) the cost of compliance; (b) ways to enhance the quality, utility, and clarity of the information to be disclosed; and (c) ways to minimize the burden of disclosures on respondents, including through the use of automated disclosure techniques or other forms of information technology. Comments on the collection of information should be sent to the Office of Management and Budget, Paperwork Reduction Project (7100-0271), Washington, DC 20503, with copies of such comments sent to Cynthia Ayouch, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 97, Board of Governors of the Federal Reserve System, Washington, DC 20551.

Text of Proposed Revisions

Certain conventions have been used to highlight the proposed revisions. New language is shown inside bold-faced arrows while language that would be deleted is set off with bold-faced brackets.

List of Subjects in 12 CFR Part 230

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

For the reasons set forth in the preamble, the Board proposes to amend 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 (f) of this part, the terms of, or a deposit in, a new or existing account.◄
* * * * *

3. Section 230.6 is amended by 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:
* * *

(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.

►(i) General. Except as provided in paragraph (a)(3)(ii) of this section, 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.

(ii) Overdraft and returned-item fees. Institutions must disclose a total dollar amount for all overdraft fees and a total dollar amount for all returned-item fees for the statement period and for the calendar year to date. The total dollar amount for overdraft fees shall include all overdrafts on the account, whether created by check, by ATM withdrawal or other electronic transfer, or by other means. Institutions may itemize each overdraft fee or returned-item fee, in addition to providing the disclosures required by this paragraph.◄
* * * * *

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◄ [and shall not] misrepresent a depository institution's deposit contract.

►(2)◄ [An advertisement shall not] 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.

* * * * *

►(f) Additional disclosures in connection with automated overdraft services.

Except for an advertisement subject to paragraph (e)(1) of this section, any announcement, solicitation, or advertisement promoting an automated overdraft service that is not subject to the Board's Regulation Z (12 CFR part 226) shall disclose in a clear and conspicuous manner:

(1) The fee for the payment of each overdraft;

(2) The types of transactions for which a fee for overdrawing an account may be imposed;

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

(4) The circumstances under which the institution would not pay an overdraft.◄

* * * * *

5. In Supplement I to part 230:

a. Under Section 230.2 Definitions, under (b) Advertisement, existing paragraph 2. is redesignated as paragraph 3.; a new paragraph 2. is added; and paragraph 3.iii. is revised.

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

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

d. Under Section 230.8 Advertising, under (a) Misleading or inaccurate advertisements, a new paragraph 10. is added, a new paragraph title (f) Additional disclosures in connection with automated overdraft services is added, and new paragraph (f) 1. through (f) 3. are added.

SUPPLEMENT I TO PART 230—OFFICIAL STAFF INTERPRETATIONS
* * * * *

Section 230.2 Definitions
* * * * *

(b) Advertisement
* * * * *

►2. Existing accounts. For purposes of the prohibition on misleading advertisements in § 230.8(a) of this part and disclosure requirements under § 230.8(f) of this part, an advertisement includes a commercial message in visual, oral, or print media that invites, offers, or otherwise promotes a deposit in, or other service available in connection with, an existing consumer account or class of accounts. An institution is not promoting a deposit or service solely by providing disclosures required by federal or other applicable law at account opening, on a periodic statement, or on an electronic terminal receipt.◄

►3.◄ Other messages. Examples of messages that are not advertisements are:
* * *

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.
* * * * *

Section 230.4 Account disclosures
* * * * *

(b) Content of account disclosures
* * * * *

(b)(4) Fees
* * * * *

►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 types of transactions for which an overdraft fee may be imposed. In describing the conditions, an institution must state whether the fee applies to overdrafts created by check, or by ATM withdrawal or other electronic transfer, as applicable. For example, where a fee may be imposed in such circumstances, disclosing a fee for covering an overdraft "created by check, or by ATM withdrawal or other electronic transfer" would typically satisfy this requirement; disclosing a fee "for overdraft items" would not.◄
* * * * *

Section 230.6 Periodic statement disclosures
* * * * *

(a) General rule
* * * * *

(a)(3) Fees imposed
* * * * *

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. ►(But overdraft and returned-item fees each must be separately totaled for the statement period and cumulatively for the calendar year. See § 230.6(a)(3)(ii).)◄ [But]►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 transactions that overdraw an account and fees for returning checks or other items unpaid.◄
* * * * *

Section 230.8 Advertising

(a) Misleading or inaccurate advertisements
* * * * *

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

i. Representing an overdraft protection 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 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 to promptly return the deposit account to a positive balance.

iv. Describing a service solely as protection against bounced checks when the service being promoted allows consumers to overdraw 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 a fee will be charged 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.◄

* * * * *

►(f) Additional disclosures in connection with automated overdraft services.

1. Types of transactions. Disclosing that a fee may be imposed for covering overdrafts on an account "created by check, or by ATM withdrawal or other electronic transfer" would typically satisfy the requirements of § 230.8(f)(2) of this part where the fee may be imposed in these circumstances. See comment 4(b)(4)-5.

2. Circumstances for nonpayment. In describing the circumstances under which an institution will not pay an overdraft, a general description will typically satisfy the requirement, for example, statements such as "overdrafts will not be paid if your account is not in good standing, or you are not making regular deposits, or you have too many overdrafts."

3. Advertising an account as "free." Comment 8(a)-10.v. provides general guidance to institutions that advertise free accounts with an account-related service for which a fee will be charged, and requires that the advertisement state that a cost is associated with the service. If the advertised account-related service is an overdraft service subject to the requirements of § 230.8(f) of this part, institutions must disclose the fee for the payment of each overdraft, not merely that a cost is associated with the overdraft service, as well as other required information.◄

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By order of the Board of Governors of the Federal Reserve System, May 27, 2004.

Jennifer J. Johnson (signed)
Jennifer J. Johnson,
Secretary of the Board