

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 707

RIN 3133-AD57

Truth in Savings

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: NCUA is amending its Truth in Savings rule and official staff interpretation to remove the provisions regarding the electronic delivery of disclosures. The official staff interpretations are amended to include guidance on electronic disclosures. Additionally, NCUA is amending the rule to require all credit unions to disclose aggregate overdraft fees on periodic statements regardless of whether they promote the payment of overdrafts. The final rule also addresses account balance disclosures provided to members through automated systems.

DATES: This rule is effective January 1, 2010.

FOR FURTHER INFORMATION CONTACT: Moissette Green, Staff Attorney, Office of General Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428, or telephone: (703) 518-6540.

SUPPLEMENTARY INFORMATION:

I. Background

The Truth in Savings Act (TISA) requires NCUA to promulgate regulations substantially similar to those promulgated by the Federal Reserve Board (FRB). 12 U.S.C. 4311(b). In doing so, NCUA is to take into account the unique nature of credit unions and the limitations under which they pay dividends on member accounts. In March 2009, NCUA proposed amendments to its TISA rule to align it with recent changes the Federal Reserve Board made to Regulation DD. See 74 FR 13129 (March 26, 2009).

As required by the Truth in Savings Act (TISA), NCUA proposed to amend its TISA rule and official staff interpretation to align it with the Federal Reserve Board's Regulation DD. Specifically, the proposed rule contained the provisions and guidance on the electronic delivery of disclosures. Additionally, NCUA proposed to amend the rule and the official staff commentary to require all credit unions to disclose aggregate overdraft fees on periodic statements. The proposed rule also addressed balance disclosures credit unions provide to members through automated systems.

II. Comments and the Final Rule

NCUA is adopting the rule as it was proposed with minor changes. Specifically, the final rule amends §707.1 to include the Office of Management and Budget approval number for the information collections in the rule and includes a minor technical correction to the sample form in Appendix B-12 for formatting purposes.

NCUA received comments from two credit unions and two trade associations. One credit union supported the proposal to withdraw the provisions regulating electronic delivery of disclosures under TISA and to permit electronic disclosures in accordance with the E-Sign Act, but opposed the proposed amendments that would require all credit unions to disclose the aggregate periodic and year-to-date fees charged to a member account for overdraft services. The credit union commented the amendment would be burdensome and act as a disincentive to credit unions that do not advertise or market overdraft programs to their members. NCUA must issue TISA rules that are substantially similar to Regulation DD, 12 CFR Part 230, unless the unique nature of credit unions and their payment of dividends call for different regulations. See 12 U.S.C. 4311(b). The Board concludes the nature of credit unions and the payment of dividends do not give it reason to issue regulations regarding overdraft fees and the electronic delivery of disclosures that differ from Regulation DD.

The second credit union commenter requested a final rule become effective no earlier than January 1, 2010, to give credit unions sufficient time to make the necessary operational changes and educate members. The Board is aware that credit unions have anticipated amendments to Part 707 since the Federal Reserve Board issued

amendments to Regulation DD in December 2008. Therefore, the Board is issuing this final rule with an effective date of January 1, 2010.

One trade association supported the proposed amendments regarding electronic disclosures, but had concerns with the provisions involving disclosure of overdraft fees. It does not believe the benefit of the rule would outweigh the burden. To mitigate the burden, the trade association suggested permitting members to request the aggregate overdraft fee disclosures instead of requiring credit unions to provide them to all members. Additionally, it encouraged NCUA to differentiate between overdraft fees resulting from credit unions paying funds to cover an overdraft as a courtesy and fees that result from a credit union's contractual obligation to pay a transaction, such as under an agreement with VISA or MasterCard. The trade association believes credit unions should be required to disclose the fees resulting from a courtesy payment, but not the fees that stem from a contractual obligation. Another trade association supported the provisions that would exclude funds in an overdraft program from a member's available balance disclosed in response to a balance inquiry on an automated system and that address electronic disclosures, but questioned the need for the amendments to the overdraft fee disclosures.

The final rule requires all credit unions to disclose periodic and aggregate year-to-date overdraft fees on periodic statements, regardless of whether they advertise or promote member use of overdraft services. Under the current TISA regulation, credit unions that provide periodic statements must disclose fees or charges imposed on a member

account during the statement period. 12 CFR 707.6(a)(3). Further, credit unions that promote the payment of overdrafts in an advertisement must also disclose the aggregate totals for overdraft fees and returned item fees for both the statement period and calendar year-to-date. 12 CFR 707.11(a). The rule eliminates the distinction between credit unions that promote overdraft services and those that do not, and requires all credit unions offering overdraft services to disclose the fees imposed for the payment of overdrafts for each statement period and the year-to-date aggregate. The amendment also eliminates the confusion surrounding the distinction between marketing and educational materials for purposes of determining when to disclose the year-to-date fees.

Additionally, credit unions are not required to offer overdraft services and may restrict the payment of overdrafts on debit card or point-of-sale transactions. Credit unions generally impose a fee for overdraft services regardless of whether the payment of an overdraft is a courtesy or results from a contractual obligation. To inform members about the fees charged for using discretionary overdraft services and to help them better understand the costs associated with their accounts, the rule requires all credit unions to disclose the aggregate fee information for the statement period and calendar year-to-date.

III. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact any regulation may have on a substantial number of small entities. 5 U.S.C. 603(a). For purposes of this analysis, NCUA considers credit unions having under \$10 million in assets small entities. Interpretive Ruling and Policy Statement 03-2, 68 FR 31949 (May 29, 2003). As of March 31, 2009, out of 7,749 federally insured credit unions, 3,335 had less than \$10 million in assets.

NCUA prepared a regulatory flexibility analysis as a part of the proposed rule issued in March 2009. 74 FR 13129, 13135 (March 26, 2009). The Board received no comments addressing how the rule would affect small credit unions.

This final rule aligns NCUA's regulation with the Federal Reserve Board's Regulation DD, as required under TISA. 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 financial institutions 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), 4311(b). The Board is adopting revisions to part 707 to address the uniformity and adequacy of credit unions' disclosure of fees associated with overdraft services. Additionally, the rule eliminates the regulatory burden associated with credit unions providing disclosures to their members through electronic means.

Credit unions must consider other laws when administering an overdraft protection program. Although other laws and regulations may apply to a credit union's payment of overdrafts, the final revisions to part 707 do not duplicate or conflict with the requirements imposed by these 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 part 707 is consistent with the interagency guidance. 70 FR 9127 (February 24, 2005).

This final rule directly affects all credit unions that offer overdraft services or provide electronic disclosures. While NCUA does know how many credit unions provide electronic disclosures, it estimates 2,782 credit unions offer overdraft services other than a traditional line of credit, and 226 of them are small credit unions. Therefore, NCUA has determined this final rule will not have an impact on a substantial number of small entities.

Additionally, NCUA has determined the economic impact on small credit unions affected by the final rule will not be significant. NCUA expects the rule will increase the paperwork burden for disclosing overdraft fees and eliminate the burden for electronic delivery of disclosures. Therefore, the economic impact, if any, will be minimal. A majority of credit unions use software vendors to provide the disclosures required under TISA and the implementing regulations. The vendors routinely provide updates to software and other products to credit unions to ensure compliance with regulatory requirements under the terms of the service contract. NCUA expects credit unions

employing a third party vendor to provide TISA disclosures will incur minimal additional costs, if any. Accordingly, the Board certifies this rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq., the Board has submitted the information collection requirements contained in this final rule to the Office of Management and Budget (OMB). The NCUA 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 current OMB control number for the Truth in Savings program is 3133-0134. This information collection has been revised to include the requirements of this final rule. The proposed rule contained a discussion of the revised information collection. 74 FR 13129, 13136 (March 26, 2009). OMB approval is pending.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, Pub. L. 104-121, provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by Section 551 of the Administrative Procedures Act. 5 U.S.C. 551. The Office of Information and Regulatory Affairs, an office within OMB, is reviewing this final rule for purposes of SBREFA, and a determination is pending.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. The final rule will not have substantial direct effect on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined this final rule does not constitute a policy that has federalism implications for purposes of the executive order.

The Treasury and General Government Appropriations Act, 1999 – Assessment of Federal Regulations and Policies on Families

NCUA has determined that this final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105-277, 112 Stat. 2681 (1998).

By the National Credit Union Administration Board on July 16, 2009.

Mary F. Rupp

Secretary of the Board

List of Subjects in 12 CFR Part 707

Advertising, Credit unions, Consumer protection, Reporting and record keeping requirements, Truth in Savings.

For the reasons set forth in the preamble, NCUA amends 12 CFR Part 707 and the Official Staff Commentary as set forth below:

PART 707—TRUTH IN SAVINGS

1. The authority citation for part 707 continues to read as follows:

Authority: 12 U.S.C. 4311.

2. Section 707.1 is amended by revising paragraph (a) to read as follows:

§707.1 Authority, purpose, coverage, and effect on state laws.

(a) Authority. This regulation is issued by the National Credit Union Administration to implement the Truth in Savings Act of 1991 (TISA), contained in the Federal Deposit Insurance Corporation Improvement Act of 1991, 12 U.S.C. 3201 et seq., Pub. L. 102-242, 105 Stat. 2236. Information collection requirements in this regulation have been approved by the Office of Management and Budget under the provisions of 44 U.S.C. 3501 et seq. and have been assigned OMB No. 3133-0134.

* * * * *

3. Section 707.3 is amended by revising paragraph (a), to read as follows, and removing paragraph (g):

§707.3 General disclosure requirements.

(a) Form. Credit unions must make the disclosures required by §§707.4 through 707.6 of this part, as applicable, clearly and conspicuously, in writing, and in a form the member or potential member may keep. Credit unions may provide the disclosures required by this part to a member or potential member in electronic form, subject to compliance with the consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act), 15 U.S.C. 7001 et seq. Credit unions may provide the disclosures required by §§707.4(a)(2) and 707.8 to a member or potential member in electronic form without regard to the consent or other provisions of the E-Sign Act in the circumstances set forth in those sections. Disclosures for each account offered by a credit union may be presented separately or combined with disclosures for the credit union's other accounts, as long as it is clear which disclosures are applicable to the member or potential member's account.

* * * * *

4. Section 707.4 is amended by republishing paragraph (a)(1)(i) and revising paragraphs (a)(1)(ii) and (a)(2)(i), to read as follows:

§707.4 Account disclosures.

(a) Delivery of account disclosures—

(1) Account opening. (i) General. A credit union must provide account disclosures to a member or potential member before an account is opened or a service is provided, whichever is earlier. A credit union is deemed to have provided a service when a fee required to be disclosed is assessed. Except as

provided in paragraph (a)(1)(ii) of this section, if a member or potential member is not present at the credit union when the account is opened or the service is provided and has not already received the disclosures, the credit union must mail or deliver the disclosures no later than 10 business days after the account is opened or the service is provided, whichever is earlier.

(ii) Timing of electronic disclosures. If a member or potential member who is not present at the credit union uses electronic means, for example, an internet website, to open an account or request a service, the disclosures required under paragraph (a)(1) of this section must be provided before the account is opened or the service is provided.

(2) Requests. (i) A credit union must provide account disclosures to a member or potential member upon request. If a member or potential member who is not present at the credit union makes a request, the credit union must mail or deliver the disclosures within a reasonable time after it receives the request and may provide the disclosures in paper form or electronically if the member or potential member agrees.

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4. Section 707.10 is removed and reserved.

§707.10 [Reserved]

5. Section 707.11 is amended by revising the heading, paragraphs (a), (b)(2)(x) and (b)(2)(xi), and adding paragraphs (b)(2)(xii) and (c) to read as follows:

§707.11 Additional disclosure requirements for overdraft services.

(a) Disclosure of total fees on periodic statements. (1) General. A credit union must separately disclose on each periodic statement, as applicable:

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

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

(2) Totals required. The disclosures required by paragraph (a)(1) of this section must be provided for the statement period and for the calendar year-to-date.

(3) Format requirements. The aggregate fee disclosures required by paragraph (a) of this section must be disclosed in close proximity to fees identified under §707.6(a)(3), using a format substantially similar to Sample Form B-10 in appendix B.

(b) Advertising disclosures for overdraft services. * * *

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

(x) a notice provided to a member, 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;

(xi) informational or educational materials concerning the payment of overdrafts if the materials do not specifically describe the credit union's overdraft service; or

(xii) an opt-out or opt-in notice regarding the credit union's payment of overdrafts or provision of discretionary overdraft services.

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(c) Disclosure of account balances. If a credit union discloses balance information to a member through an automated system, the balance may not include additional amounts that the credit union may provide to cover an item when there are insufficient or unavailable funds in the member's account, whether under a service provided in its discretion, a service subject to part 226 of this title (Regulation Z), or a service to transfer funds from another member account. The credit union may, at its option, disclose additional account balances that include such additional amounts, if the credit union prominently states that any such balance includes such additional amounts and, if applicable, that additional amounts are not available for all transactions.

6. Amend Appendix B to part 707, by adding B-12 to read as follows:

APPENDIX B TO PART 707 – MODEL CLAUSES AND SAMPLE FORMS

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B-12 Aggregate Overdraft and Returned Item Fees Sample Form

	<i>Total For This Period</i>	<i>Total Year-to-Date</i>
<i>Total Overdraft Fees</i>	<i>\$60.00</i>	<i>\$150.00</i>
<i>Total Returned Item Fees</i>	<i>\$0.00</i>	<i>\$30.00</i>

7. In Appendix C to Part 707, the following amendments are made:

- a. In Section 707.4—Account disclosures, under (a)(2)(i), paragraphs 3. and 4. are revised.
- b. In Section 707.8—Advertising, under (a) Misleading or inaccurate advertisements, paragraph 9. is revised and new paragraph 11. is added.
- c. In Section 707.8—Advertising, under (b) Permissible rates, paragraph 4. is removed.
- d. In Section 707.8—Advertising, under (e)(1)(i), paragraph 1. is revised.
- e. Section 707.10—Electronic Communication is removed and reserved.
- f. In Sections 707.11 and 707.11(a), the headings are revised and paragraphs (a)(1)-1. and (a)(1)-2. are removed.
- g. In Section 707.11, paragraphs (a)(1)-3. through (a)(1)-8. are redesignated as paragraphs (a)(1)-1. through (a)(1)-6, respectively.
- h. In Section 707.11, new paragraphs (a)(1)-2. through (a)(1)-4 are revised.
- i. In Section 707.11, paragraph (a)(3)-1. is revised.
- j. In Section 707.11, paragraph (a)(5)-1. is removed.
- k. In Section 707.11, new paragraphs (c)-1. through (c)-3. are added.

The amendments read as follows:

APPENDIX C TO PART 707—OFFICIAL STAFF INTERPRETATIONS

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Section 707.4—Account Disclosures

(a) Delivery of Account Disclosures

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(a)(2) Requests

(a)(2)(i)

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

4. Use of electronic means. If a member or potential member who is not present at the credit union makes a request for account disclosures, including a request made by telephone, e-mail, or via the credit union's website, the credit union may send the disclosures in paper form or, if the member or potential member agrees, may provide the disclosures electronically, such as to an email address that the member or potential member provides for that purpose, or on the credit union's website, without regard to the consent or other provisions of the E-Sign Act. The regulation does not require a credit union to provide, nor a member or potential member to agree to receive, the disclosures required by §707.4(a)(2) in electronic form.

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Section 707.8—Advertising

(a) Misleading or Inaccurate Advertisements

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9. Electronic advertising. If an electronic advertisement, such as an advertisement appearing on an internet website, displays a triggering term, such as a bonus or annual percentage yield, the advertisement must clearly refer the member to the location where the additional required information begins. For example, an advertisement that includes

a bonus or annual percentage yield may be accompanied by a link that directly takes the member to the additional information.

* * * * *

11. Additional disclosures in connection with the payment of overdrafts. The rule in §707.3(a), providing that disclosures required by §707.8 may be provided to the member in electronic form without regard to E-Sign Act requirements, applies to the disclosures described in §707.11(b), which are incorporated by reference in §707.8(f).

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(e) Exemption for certain advertisements

(e)(1) Certain media

(e)(1)(i)

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

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Section 707.11 Additional disclosures regarding the payment of overdrafts

(a) Disclosure of total fees on periodic statements

(a)(1) General

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2. Fees for paying overdrafts. Credit unions must disclose on periodic statements a total dollar amount for all fees or charges imposed on the account for paying overdrafts. The credit union 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 member account to avoid an overdraft, or fees charged under a service subject to part 226 of this title (Regulation Z).

3. Fees for returning items unpaid. The total dollar amount for all fees for returning items unpaid must include all fees charged to the account for dishonoring or returning checks or other items drawn on the account. The credit union 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. Credit unions may use terminology such as “returned item fee” or “NSF fee” to describe fees for returning items unpaid.

4. Waived fees. In some cases, a credit union may provide a statement for the current period reflecting that fees imposed during a previous period were waived and credited to the account. Credit unions may, but are not required to, reflect the adjustment in the total for the calendar year-to-date and in the applicable statement period. For example, if a credit union assesses a fee in January and refunds the fee in February, the credit union could disclose a year-to-date total reflecting the amount credited, but it should not affect the total disclosed for the February statement period, because the fee was not assessed in the February statement period. If a credit union assesses and then waives and credits a fee within the same cycle, the credit union may, at its option, reflect the adjustment in the total disclosed for fees imposed during the current statement period and for the total for the calendar year-to-date. Thus, if the credit union assesses and

waives the fee in the February statement period, the February fee total could reflect a total net of the waived fee.

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(a)(3) Time period covered by disclosures

1. Periodic statement disclosures. The disclosures under §707.11(a) must be included on periodic statements provided by a credit union starting with the first statement period that begins after January 1, 2010. For example, if a member's statement period typically closes on the 15th of each month, a credit union must provide the disclosures required by §707.11(a)(1) on subsequent periodic statements for that member beginning with the statement reflecting the period from January 16, 2010 to February 15, 2010.

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(c) Disclosure of account balances

1. Balance that does not include additional amounts. For purposes of the balance disclosure requirement in §707.11(c), if a credit union discloses balance information to a member through an automated system, it must disclose a balance that excludes any funds the credit union may provide to cover an overdraft pursuant to a discretionary overdraft service that will be paid by the credit union under a service subject to part 226 of this title (Regulation Z) or that will be transferred from another account held individually or jointly by a member. The balance may, but need not, include funds that are deposited in the member's account, such as from a check, that are not yet made available for withdrawal in accordance with the funds availability rules under part 229 of the title (Regulation CC). In addition, the balance may, but need not, include funds that

are held by the credit union to satisfy a prior obligation of the member, for example, to cover a hold for an ATM or debit card transaction that has been authorized but for which the credit union has not settled.

2. Additional balance. The credit union may disclose additional balances supplemented by funds that may be provided by the credit union to cover an overdraft, whether pursuant to a discretionary overdraft service, a service subject to part 226 of this title (Regulation Z), or a service that transfers funds from another account held individually or jointly by the member, so long as the credit union prominently states that any additional balance includes these additional overdraft amounts. The credit union may not simply state, for instance, that the second balance is the member's "available balance," or contains "available funds." Rather, the credit union should provide enough information to convey that the second balance includes these amounts. For example, the credit union may state that the balance includes "overdraft funds." Where a member has opted out of the credit union's discretionary overdraft service, any additional balance disclosed should not include funds credit unions provide under that service. Where a member has opted out of the credit union's discretionary overdraft service for some, but not all transactions, e.g., the member has opted out of overdraft services for ATM and debit card transactions, a credit union that includes funds from its discretionary overdraft service in the balance should convey that the overdraft funds are not available for all transactions. For example, the credit union could state that overdraft funds are not available for ATM and debit card transactions.

3. Automated systems. The balance disclosure requirement in §707.11(c) applies to any automated system through which the member requests a balance, including, but

not limited to, a telephone response system, the credit union's internet site, or an ATM. The requirement applies whether the credit union discloses a balance through an ATM owned or operated by the credit union or through an ATM not owned or operated by the credit union, including an ATM operated by an entity that is not a financial institution. If the balance is obtained at an ATM, the requirement also applies whether the balance is disclosed on the ATM screen or on a paper receipt.

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