

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 707

RIN: 3133-AD72

Truth in Savings

AGENCY: National Credit Union Administration (NCUA).

ACTION: Interim final rule with request for comments.

SUMMARY: On July 22, 2009, NCUA published a final rule amending Part 707, which implements the Truth in Savings Act, and the official staff interpretations to the regulation. The final rule addressed credit unions' disclosure practices related to overdraft services, including balances disclosed to members through automated systems. This interim final rule amends part 707 and official staff interpretations to address the application of the July 2009 final rule to retail sweep programs and the terminology for overdraft fee disclosures and to make amendments that conform to the Federal Reserve Board's (Federal Reserve) final Regulation E amendments addressing

overdraft services, adopted in November 2009. This rule also includes a minor technical correction to sample form B-12 for formatting purposes.

DATES: This rule is effective [Insert date 30 days from the date of publication in the FEDERAL REGISTER], except for §707.11(a)(1)(i), which is effective October 1, 2010. Comments must be received by [Insert date 60 days from date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments by any of the following methods (**Please send comments by one method only**):

- NCUA Web Site: http://www.ncua.gov/news/proposed_regs/proposed_regs.html. Follow the instructions for submitting comments.
- E-mail: Address to regcomments@ncua.gov. Include “[Your name] Comments on Interim Final Rule (Truth in Savings)” in the e-mail subject line.
- Fax: (703) 518-6319. Use the subject line described above for e-mail.
- Mail: Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.
- Hand Delivery/Courier: Same as mail address.

Public inspection: All public comments are available on the agency’s website at <http://www.ncua.gov/RegulationsOpinionsLaws/comments> as submitted, except as may not be possible for technical reasons. Public comments will not be edited to remove

any identifying or contact information. Paper copies of comments may be inspected in NCUA's law library, at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9:00 a.m. and 3:00 p.m. To make an appointment, call (703) 518-6546 or send an e-mail to OGCMail@ncua.gov.

FOR FURTHER INFORMATION CONTACT: Justin M. Anderson, 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 within 90 days of the effective date of the Federal Reserve's rules. 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. *Id.* In compliance with TISA, NCUA is issuing this interim final rule with request for comment that is substantially similar to the Federal Reserve's June 2010 final rule. NCUA is also making technical corrections to the aggregate overdraft and returned item fees sample form for formatting purposes.

On January 29, 2009, the Federal Reserve published a final rule amending Regulation DD, its TISA rule, and the official staff commentary to address depository institutions' disclosure practices related to overdraft services, including balances disclosed to

consumers through automated systems. 74 FR 5584 (January 29, 2009). NCUA issued a similar final rule on July 22, 2009. 74 FR 36102 (July 22, 2009). Both rules had an effective date of January 1, 2010.

In November 2009, the Federal Reserve adopted a final rule amending Regulation E, which implements the Electronic Fund Transfer Act. This final rule limits a financial institution's ability to assess fees for paying ATM and one-time debit card transactions pursuant to the institution's discretionary overdraft service without the consumer's affirmative consent to such payment.

Since publication of the Federal Reserve's January 2009 final rule, institutions and others have requested clarification of particular aspects of the rule and further guidance regarding compliance with the rule. In addition, the Federal Reserve believed conforming amendments to Regulation DD were necessary in light of certain provisions subsequently adopted in the Regulation E final rule. Accordingly, in March 2010, the Federal Reserve proposed to amend Regulation DD and the official staff commentary. 75 FR 9126 (March 1, 2010). Based on comments it received, the Federal Reserve issued a final rule on June 4, 2010. 75 FR 31673 (June 4, 2010).

II. Interim Final Rule

The NCUA Board (the Board) is adopting interim final revisions to part 707 and the accompanying official staff interpretations that are substantively identical to the Federal Reserve's June 2010 final rule. Like the Federal Reserve's approach, the effective date

of this rule will be 30 days from the date of publication in the Federal Register, but compliance with the changes to §707.11(a)(1)(i) will not be mandatory until October 1, 2010. This will give credit unions sufficient time to implement the necessary system changes to comply with this rule.

The Board is issuing this rule as an interim final rule because there is a strong public interest in having consumer-oriented rules in places that are consistent with those recently promulgated by the Federal Reserve. Additionally, as discussed above, NCUA is statutorily required to issue rules substantially similar to those of the Federal Reserve within 90 days of the effective date of the Federal Reserve's rules.

III. Section-by-Section Analysis

A. Section 707.6(b) – Periodic Statement Disclosures; Statement Disclosures

Section 707.6(b) describes disclosures regarding certain charges or fees required when a credit union provides a periodic statement to its members. The Board is making an amendment to §707.6(b) and the related official staff interpretation. First, the Board is adding new §707.6(b)(5) to state explicitly that the aggregate fee disclosures required by §707.11(a)(1), discussed below, are among the disclosures required to be provided on periodic statements for purposes of §707.6(b). Second, the Board is revising comment 6(b)(3)-2 to eliminate the reference to the promotion of the payment of overdrafts because NCUA's July 22, 2009 final rule eliminated the distinction between credit unions that promote overdraft fees and those that do not.

B. Section 707.11(a) – Additional Disclosure Requirements for Overdraft Services

Although periodic statements are not required under TISA, §707.11(a)(1)(i) requires credit unions that provide periodic statements to disclose the total dollar amount of 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 for the month and calendar year-to-date. 12 CFR 707.11(a)(1)(i). Sample Form B–12 displays this total as “Total Overdraft Fees.” Section 707.11(a)(1)(ii) requires credit unions to separately disclose the total dollar amount of all fees or charges imposed on the account for returning items unpaid for the month and calendar year-to-date. 12 CFR 707.11(a)(1)(ii). Comment 11(a)(1)–3 states that credit unions may use terminology such as “returned item fee” or “NSF fee” to describe fees for returning items unpaid. These fee totals must be disclosed in a tabular format substantially similar to Sample Form B–12. 12 CFR 707.11(a)(3).

Some credit unions may use terms other than “Overdraft Fee” to describe per item overdraft fees in their account agreements. Comment 3(a)–3 to part 707 provides that credit unions must use consistent terminology to describe terms or features that are required to be disclosed. Based on this comment and a similar comment in Regulation DD, institutions have questioned whether they may use terminology other than “Total Overdraft Fees” in the periodic statement aggregate fee disclosure to describe the total amount of all fees or charges imposed on the account for paying overdrafts.

This interim final rule, in conformity with the Federal Reserve's recent final rule, revises §707.11(a)(1)(i) to clarify that the periodic statement aggregate fee disclosure must state the total dollar amount for all fees or charges imposed on the account for paying overdrafts, using the term "Total Overdraft Fees." This rule also amends comment 11(a)(1)–2 to explain that this provision supersedes comment 3(a)–3.

Section 707.11(a)(1)(i) requires credit union to provide a fee total that includes all overdraft fees, including any additional daily or sustained overdraft, negative balance, or similar fees or charges imposed by the credit union. See comment 11(a)(1)–2. Thus, the use of terminology other than "Total Overdraft Fees" may not capture the various fees associated with an overdraft service. Further, the purpose of the aggregate fee disclosure is to provide members who use overdraft services with additional information about fees to help them better understand the costs associated with the service. The Board believes permitting the use of terminology other than "Total Overdraft Fees" could be confusing to members and potentially undermines their ability to compare costs, particularly if a member has accounts at different credit unions that each use different terminology.

C. Section 707.11(c)—Disclosure of Account Balances

Comment 11(c)-2—Retail Sweep Programs

Section 707.11(c) of NCUA's TISA rule addresses the disclosure of account balance information to a member through an automated system. Under §707.11(c), credit unions must disclose a balance that does not include additional amounts the credit union may provide to cover an item when there are insufficient or unavailable funds in the member's account, including under a service to transfer funds from another account of the member. The Board adopted this provision in its July 2009 final rule to ensure members receive accurate information about their account balances and to help avoid member confusion as to whether an account has sufficient funds to cover a transaction.

After publication of the final rule, questions were raised about the application of this provision to retail sweep programs. In a retail sweep program, a credit union establishes two legally distinct subaccounts, a share draft subaccount and a share savings subaccount, which together make up the member's account. The credit union allocates and transfers funds between the two subaccounts in order to maximize the balance in the share savings subaccount while complying with the monthly limitations on transfers out of savings accounts under the Federal Reserve's Regulation D. 12 CFR 204.2(d)(2).

Retail sweep programs are distinguishable in several respects from overdraft protection plans that transfer funds from a member's linked accounts. In particular, retail sweep

programs are generally not established for the purpose of covering overdrafts. Rather, a credit union typically establishes retail sweep programs by agreement with the member in order for the credit union to minimize its transaction account reserve requirements and, in some cases, to provide a higher interest rate than the member would earn on a transaction account alone. Furthermore, most retail sweep programs are structured so that the member (or person acting on behalf of the member) cannot independently access the funds in the share savings subaccount; all transfers out of, and deposits or transfers into, the share savings subaccount component of a retail sweep program are effected through the share draft subaccount. Notwithstanding the establishment of two legally distinct subaccounts under a retail sweep program, the periodic statements that members receive show a single member account balance and a single account on which all transactions into and out of the account are reflected.

By contrast, linked accounts can be used and funded independently of one another. For example, a member can directly make deposits into and withdrawals from a share savings account whether or not it is linked to a share draft account. The link between accounts under an overdraft protection program is primarily established for purposes of providing funds from the share savings account in the event the member has insufficient funds in the share draft account. Additionally, while retail sweep programs typically do not impose fees on transfers between the share subaccount and the share draft subaccount, credit unions typically charge fees for transfers from linked accounts to cover an overdraft.

Based on the foregoing, the Board believes that members under a retail sweep program may reasonably expect to see a single balance combining the funds in the share draft subaccount and the share savings subaccount when they request an account balance. Members could be confused if a balance that only includes funds in the share draft subaccount were provided because, in some cases, the balance in the share draft subaccount could be zero if funds had been transferred to the share subaccount at the time of the balance inquiry. This rule, therefore, adds new comment 11(c)-2 to clarify that §707.11(c) does not require a credit union to exclude funds that may be transferred from another account pursuant to a retail sweep program from the member's balance.

Comment 11(c)-3—Additional Balance

Section 707.11(c) of NCUA's July 2009 final rule permitted credit unions to disclose an additional balance including overdraft funds so long as the credit union prominently states that the balance contains additional overdraft funds. Comment 11(c)-2 of the final rule provided guidance on how credit unions could appropriately identify the additional funds. The comment, however, only addressed opt-outs. The Federal Reserve subsequently adopted the November 2009 Regulation E final rule, which requires institutions to obtain a consumer's affirmative consent, or opt-in, to the institution's overdraft service, before charging any fees for paying ATM and one-time debit card transactions. In light of the final Regulation E opt-in requirement, the Board is amending comment 11(c)-2, redesignated as comment 11(c)-3, to include references to the opt-in requirement. References to opt-outs were retained in some

instances because some credit unions may provide an opt-out choice with respect to checks, ACH, and other types of transactions not subject to the Regulation E final rule restrictions.

The Board is also extending the requirement to indicate, when applicable, that funds in the additional balance may not be available for all transactions to circumstances under which funds from overdraft services subject to the Federal Reserve's Regulation Z or from services that transfer funds from another account are not available for all transactions. For example, if a member has an overdraft line of credit, but under the terms of the agreement, the member cannot access the line of credit when using a debit card at a point-of-sale transaction, any additional balance displayed through an automated system should indicate that the overdraft funds are not available for all transactions.

Appendix B: B-12 – Aggregate Overdraft and Returned Item Fees Sample Form

The Board is also making minor technical corrections to sample form B-12. These changes are for formatting purposes and to ensure conformity with the Federal Reserve's model disclosure.

D. Effective Date

Because some credit unions may be using terminology other than “Total Overdraft Fees” in their aggregate fee disclosure under §707.11(a)(1), the revisions to §707.11(a)(1)(i) are effective October 1, 2010, which conforms to the effective date set by the Federal Reserve. This effective date also satisfies §302 of the Riegle Community Improvement Development and Regulatory Improvement Act of 1994, 12 U.S.C. 4802, which requires regulations that impose additional disclosure requirements to take effect on the first day of a calendar quarter beginning on or after the date on which the regulations are published in final form, unless the agency determines, for good cause published with the regulation, that the regulation should become effective before such time. 12 U.S.C. §4802(b). The Board believes that this effective date is appropriate because the final §707.11(a)(1)(i) amendments will require some credit unions to modify the disclosures provided to members. The remaining provisions of the final rule are effective [Insert date 30 days from the date of publication in the FEDERAL REGISTER].

III. Regulatory Procedures

Section III of the Supplementary Information to the July 2009 final rule sets forth the Board’s analyses under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR part 1320 Appendix A.1), the Small Business Regulatory Enforcement Fairness Act (Pub. L. 104-121), Executive Order 13132, and the Treasury and General Government Appropriations Act (Pub. L.

105-277, 112 Stat. 2681 1998). See 74 FR 36102 - 36106. Because the final amendments are clarifications and do not alter the substance of the analyses and determinations accompanying that final rule, the Board continues to rely on those analyses and determinations for purposes of this rulemaking.

By the National Credit Union Administration Board on July 29, 2010.

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, the Model Disclosures, and the Official Staff Interpretations 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 707.6 is amended by adding paragraph (b)(5) to read as follows:

§ 707.6 Periodic statement disclosures.

(b) * * *

(5) Aggregate fee disclosure. If applicable, the total overdraft and returned item fees required to be disclosed by §707.11(a).

* * * * *

- 3. Section 707.11 is amended by revising paragraph (a)(1)(i) to read as follows:

§ 707.11 Additional disclosure requirements for overdraft services.

(a) * * * (1) * * *

(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, using the term “Total Overdraft Fees;” and

* * * * *

- 4. Amend Appendix B to part 707, by revising B-12 to read as follows:

APPENDIX B TO PART 707 – MODEL CLAUSES AND SAMPLE FORMS

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[GRAPHIC] [SEE ATTACHED]

- 5. In Appendix C to part 707,
 - a. In Section 707.6(b)(3), the first two sentences of paragraph 2. are revised.
 - b. In Section 707.11(a)(1), paragraph 2. is revised.
 - c. In Section 707.11(c), paragraphs 2. and 3. are redesignated as paragraphs 3. and 4. respectively.

- d. In Section 707.11(c), new paragraph 2. is added.
- e. In Section 707.11(c), newly designated paragraph 3. is revised.

Appendix C to Part 707—Official Staff Interpretations

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Section 707.6 Periodic Statement Disclosures

(a) General Rule

(a)(3) Fees Imposed

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2. Itemizing fees by type. In itemizing fees imposed more than once in the period, credit unions may group fees if they are the same type. (See §707.11(a)(1) of this part regarding certain fees that are required to be grouped.) * * *

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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

* * * * *

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 for each of these periods 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, debit card transaction, or by any other transaction type. 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 of the member to avoid an overdraft, or fees charged under a service subject to the Federal Reserve Board's Regulation Z (12 CFR part 226). See also comment 11(c)–2. Under §707.11(a)(1)(i), the disclosure must describe the total dollar amount for all fees or charges imposed on the account for the statement period and calendar year-to-date for paying overdrafts using the term “Total Overdraft Fees.” This requirement applies notwithstanding comment 3(a)–2.

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(c) Disclosure of account balances

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2. Retail sweep programs. In a retail sweep program, a credit union establishes two legally distinct subaccounts, a share draft subaccount and a share savings subaccount, which together make up the member's account. The credit union allocates and transfers funds between the two subaccounts in order to maximize the balance in the share savings account while complying with the monthly limitations on transfers out of savings accounts under the Federal Reserve Board's Regulation D, 12 CFR 204.2(d)(2). Retail sweep programs are generally not established for the purpose of covering overdrafts. Rather, credit unions typically establish retail sweep programs by agreement with the member in order for the credit union to minimize its transaction account reserve requirements and, in some cases, to provide a higher interest rate than the member would earn on a share draft account alone. Section 707.11(c) does not require a credit union to exclude funds from the member's balance that may be

transferred from another account pursuant to a retail sweep program that is established for such purposes and that has the following characteristics:

i. The account involved complies with the Federal Reserve Board's Regulation D, 12 CFR 204.2(d)(2),

ii. The member does not have direct access to the share savings subaccount that is part of the retail sweep program, and

iii. The member's periodic statements show the account balance as the combined balance in the subaccounts.

3 [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 the Federal Reserve Board's Regulation Z (12 CFR part 226), 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 members "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 not opted into, or as applicable, has opted out of the credit union's discretionary overdraft service, any additional balance disclosed should not include funds that otherwise might be available under that service. Where a member has not opted into, or as applicable, has opted out of, the credit union's discretionary overdraft service for some, but not all transactions (e.g., the member has

not opted into overdraft services for ATM and one-time debit card transactions), a credit union that includes these additional overdraft funds in the second 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 one-time (or everyday) debit card transactions. Similarly, if funds are not available for all transactions pursuant to a service subject to the Federal Reserve Board's Regulation Z (12 CFR part 226) or a service that transfers funds from another account, a second balance that includes such funds should also indicate this fact.