

7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 707

RIN: 3133-AD72

Truth in Savings

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

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 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 was previously issued as an interim final rule, which became effective on September 7, 2010, except for the amendment to §707.11(a)(1)(i), which became effective October 1, 2010.

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.*

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

In compliance with TISA, NCUA issued an interim final rule with request for comment on July 29, 2010, that was substantially similar to the Federal Reserve's June 2010 final rule. The interim final rule also included technical corrections to the aggregate overdraft

and returned item fees sample form for formatting purposes. The Board issued the rule as an interim final rule because there is a strong public interest in having consumer-oriented rules in place 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. Summary of Comments

NCUA received three comments on the interim final rule. Two comments were from credit union trade associations and one comment was from a state credit union league. Each commenter suggested some degree of change to the final rule. As discussed below, the three areas where comments offered suggestions were use of the term "Total Overdraft Fees," use of model form B-12, and the mandatory compliance date for the amendments to §707.11(a)(1)(i).

First, all three commenters requested the Board permit credit unions to use terms other than "Total Overdraft Fees" in a member's periodic statement. One commenter argued that the use of "Total Overdraft Fees" would actually result in more confusion as a credit union's account opening and promotional materials might use a different term than the one required by the rule on periodic statements. Another commenter suggested that the Board should allow credit unions to use the term "Total Overdraft Fees for paid items," which, the commenter argues, will further enhance the distinction between fees paid for items that are covered by the credit union and fees paid because an item is

returned for insufficient funds. The third commenter requested that the Board allow credit unions to use a term that is substantially similar to “Total Overdraft Fees,” which the commenter argues is in line with the Federal Reserve’s regulations. The Board disagrees with these comments and reiterates its position from the interim final rule that 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 the member has accounts at different credit unions that each use different terminology. Further, the Board notes that requiring credit unions to use the term “Total Overdraft Fees” is identical to the requirement in the Federal Reserve’s rule and this term in conjunction with the other provisions in the current rule provide sufficient distinction between overdraft fees and fees for insufficient funds.

Two commenters provided suggestions on the technical changes to model form B-12. One commenter asked for additional guidance on the requirement that credit unions disclose the information in model form B-12 in a tabular format. Another commenter requested that credit unions be required to continue using the original form to prevent them from needing to spend money on reformatting periodic disclosure forms. With regard to both comments, the Board notes that §707.11(a)(3) of NCUA’s regulations requires credit unions to use a format that is substantially similar to model form B-12. With respect to the first comment, the Board does not believe that a non-tabular disclosure is “substantially similar” to model form B-12 and, therefore, would be impermissible under the rule. With respect to the second comment, however, the Board does believe using model form B-12 without the interim final rule’s technical corrections

would be considered substantially similar. The technical corrections made in the interim final rule do not change the substance or purpose of the form, but rather ensure conformity with the model form used by the Federal Reserve. Credit unions can continue to use the non-amended form until their supplies are depleted.

Finally, one commenter requested the Board extend the mandatory compliance date for the use of the term “Total Overdraft Fees” to provide credit unions with sufficient time to implement this change. Since the mandatory compliance date has already passed and credit unions are currently required to use the term “Total Overdraft Fees,” this comment is moot. Further, as noted in the preamble to the interim final rule, the Board did consider the burden on credit unions and chose a date that would allow compliance in conjunction with the Federal Reserve while minimizing the inconvenience to credit unions.

IV. 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 January 13, 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.

Accordingly, the interim final rule amending 12 CFR Part 707, which was published at 75 FR 47173 on August 5, 2010, is adopted as a final rule without change.

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

* * * * *

[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

* * * * *

Section 707.6 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, 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.) * * *

* * * * *

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.

* * * * *

(c) Disclosure of account balances

* * * * *

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.