Disclosures to Depositors: The Truth in Savings Act and Regulation DD

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By Stephen K. Huber and Alvin C. Harrell

I. Introduction

The Truth in Savings Act ("TIS") is a very important but (as the time of enactment) largely overlooked part of the Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991, whose short title is the FDIC Improvement Act ("FDICIA"). The primary aims of Congress were to reform the deposit insurance system, to protect the deposit insurance funds, and to improve supervision of federally insured depository institutions. TIS is notable for its absence from this list. With the great public and political attention centered on the enormous resolution costs for failed banks and thrifts, mandatory disclosures to depositors was a little noticed subject during the legislative process. Considering that there were such juicy scandals to write about as the failure of Silverado S&L (which had a son of the President of the Senate), the extension of deposit insurance, the savings and loan problems,extended TISA, S. Senate, F. FDIC, P. FDICIA, 12 U.S.C. 1462(a), to be added by 12 U.S.C. 1462(c) (if implemented by Federal Reserve Board Regulation BCC); and the deals of Charles Kesling (assisted by at least five United States Senators, popularly known as "the Kating five"), it is little wonder that issues concerning disclosures to depositors received little attention in the popular or financial press. While TIS did receive modest attention in the legislative process, the adoption of depositor disclosure requirements was not entirely a surprise. Such legislation had previously been adopted in both houses of Congress. The adoption of funds availability standards in 1987 provided a precedent for federal regulation of the deposit relationship. The foreseeability of TIS legislation is not a matter of hindsight. In 1989, one of your authors opined that:

"The adoption of legislation in this area is to be expected. [T]he focus of recent legislative efforts is likely to be on the annual rate of interest paid on an account and the annual yield. (Some observers have been concerned that some institutions are paying interest only on the portion of a deposit not subject to reserve requirements, rather than the full principal amount). The terms and conditions applicable to various classes of accounts, notably fees and other charges are also of enough interest to consumers to merit possible disclosure. A related approach would be to require that disclosures must follow a specified format . . . 7"

Each of the matters just mentioned is now regulated under TIS.

Little noticed provisions of law can nevertheless be of great importance, as America's banks and thrifts have learned time after time in recent years. TIS will have a greater impact on savings banks and thrifts than any other part of FDICIA. The purpose of this article is to demonstrate the validity of this statement by describing and commenting upon the new requirements imposed on banks and thrifts by TIS. In the final analysis it is doubtful that the costs associated with TIS compliance will provide comparable benefits for consumers; the supposed beneficiaries of TIS. This topic will be discussed at the end of the article.

Part II of this article discusses the statutory framework, Part III describes Regulation DD, Parts IV and V cover the Federal Reserve Board's Supplementary Information. There is an extensive discussion between TIS and Regulation Q, and Part VII provides some practical suggestions to assist financial institution compliance.

II. An Overview of TIS

The stated purpose of TIS is to promote competition between depositary institutions by enhancing the ability of consumers to make informed decisions regarding deposit accounts. TIS requires uniform disclosure of the annual percentage yield to the consumer for the payment of interest and the charging of fees in connection with such accounts. The hoped for objective is to promote competition by permitting consumers to choose services that best fit their needs. "The full" comparisons between the competing classes of depository institutions.

TIS was originally scheduled to go into effect no later than eighteen months after enactment of TIS, or June 19, 1993. The initial regulations were required to be adopted within ninety days after publication of final regulations in the Federal Register. Federal Reserve Board Regulation DD implements TIS. It was issued in proposed form on April 13, 1992, and in "final" form on September 14, 1992. It became effective September 21, 1992, and compliance was to be mandatory six months later, on March 21, 1993. However, on October 28, 1992, President Bush signed H.R. 5334, delaying the mandatory compliance date another three months to June 21, 1993. 8 TIS applies to all banks and thrifts, including deposits that are not federally insured. Every bank and thrift will need to adopt policies and procedures recognizing the mandate to make uniform disclosures regarding deposit account interest and fees. Compliance efforts will have to be fully documented. Credit unions are not directly subject to TIS, but the National Credit Union Administration ("NCUA") is required to adopt regulations substantially similar to those prescribed by the FRB under TIS within ninety days. In adopting the regulations, the NCUA may take into account "the unique nature of credit unions and the limitations under which they may pay dividends on member accounts." Other competitors of banks and thrifts, notably securities firms that offer depositary services, are generally not subject to the TIS requirements.

The obvious model for TIS is Truth in Lending ("TIL"), both in name and in concept. Both are disclosure statutes, although TIS imposes substantive requirements with respect to the calculation of interest payments to depositors. As TIL requires disclosures to be provided to debtors, TIS requires disclosures to depositors. One major difference is that TIL applies to all lenders, whereas TIS is limited to banks and thrifts. Courts and regulators have been quite creative in using TIL as an analogy in making decisions about TIS.

TIS provides definitions for several key terms. The "accounts" to which TIS applies are demand, time, and NOW accounts for individuals and unincorporated associations. The "annual percentage yield" ("APY") for an account is the amount that would be received on a $100 deposit, applying the average annual rate of simple interest and the actual number of days in the contract with the depositor for a 365-day period. The APY figure must be expressed as a percentage, and not as a dollar amount. A "multiple rate account" is an account that is subject to two or more rates of simple interest at one time or in succeeding periods. 9 Such accounts are not covered because of the specific provisions in the FRB regulations. 10

A. Account Schedules: Charges and Interest Paid

Depository institutions must maintain a current schedule of the rates and conditions applicable to each class of accounts that is offered, which must be available upon request to any person. 11 These "account schedules" are termed "account disclosures" in Regulation DD. 12 The account schedules/disclosures must be written in clear and plain language that is readily understandable by consumers. The key matters for disclosure about interest-bearing accounts are information about fees and charges, and about the rate of interest paid to depositors. The disclosures required by the statute include:

1. A description of all charges that can be assessed against an account holder and the circumstances under which each charge can be imposed;
2. The amount of such charges, or the method by which the amount is calculated; and
3. Minimum balance requirements, including the balance that is necessary to avoid the charge and the consequences of falling below the minimum. 13

It appears from the general tenor of the statute that TIS encompasses any fees or penalties, without regard to their names or how they are imposed. The account schedule must also set out extensive information about interest paid on the account, including:

1. The annual percentage yield ("APY"); and
2. The period during which the APY will be in effect.
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3. the annual rate of simple interest;
4. the frequency with which interest is compounded and credited;
5. the method used to determine the account balance;
6. any minimum account balance requirements associated with various yields;
7. any minimum time requirements associated with various yields;
8. any early withdrawal penalties; and
9. any other contingency that can cause a reduced payment. 14

The disclosure schedule must be available upon request to any person, and provided to all new depositors.15 A copy of the statement must be mailed within ten days after the initial deposit if the depositor did not open the account in person and was not previously given the statement. For holders of certain time deposits that are renewable without notice from the depositor, a statement must be sent at least thirty days before the date of maturity, or at least 20 days prior to the end of at least a five day grace period.16

As noted, FRB Regulation DD governs disclosure of the APY for accounts with features that preclude the simple computation of an annual rate of return. These include accounts with a rate of interest guaranteed for less than one year; variable rate accounts; accounts without a rate; multiple rate accounts; and accounts paying a specified rate for a stated term. Any change in the account terms must be preceded by notice, given at least thirty days prior to the effective date, to all account holders who are adversely affected by the change.17 This seems to be only a procedural requirement, but it may have significant substantive consequences. The notice requirement may make it more expensive and time consuming to make changes in the account terms and the account schedule. To the extent that institutions make fewer changes in account terms, or make changes less frequently, it is possible that customer satisfaction will increase, but institution income will decrease. (Of course, the opposite may be true in a rising interest rate environment.)

Where there are multiple account holders, any required distribution of the account disclosures (and, presumably, any other notice or disclosure required by TIS, although, the statute does not say so) may be given to any one of those who opened the account, or a representative of the person on whose behalf the account was established.18 Presumably the latter provision is a reference to the law of agency; the entire package is reminiscent of the case law dealing with the mailing of monthly bank statements to the proper party.19 While this case law provides some guidance, it also reflects the potential for troublesome litigation.

B. Periodic Statements

In addition to the general disclosures regarding transaction accounts, and notification of changes to existing accounts, banks and thrifts have a continuing obligation to make several disclosures on a regular basis. Each "periodic statement" provided to an account holder must include "clear and conspicuous" disclosures that set forth:

1. the APY earned on the account;
2. the amount of interest earned;
3. the amount of any fees or charges imposed; and
4. the number of days in the reporting cycle.20

Many disclosures were already common in some form or another prior to TIS, so requiring them only largely codified current practice, but the potential consequences of failing to make the disclosures are now much greater.

C. Calculation of Interest Payments

While TIS is predominantly a disclosure statute, it includes an important substantive restriction that prohibits the compensation paid by thrifts on the true account balance.21 Some banks and thrifts paid the stated rate of interest on the account balance less the reserve requirement. This approach is now prohibited. Interest must be calculated on the full amount in an account that is available for withdrawal by a customer. As explained in Part II.LG, TIS permits several different methods of computing interest, but whatever method is used must be applied to the full available account balance.

Interest on deposited funds must be paid no later than the date on which the funds are available to the customer.22 No particular method of compounding or crediting is required, but interest must be accrued no later than the business day specified in the Excised Deposit Act.23 The Excised Deposit Act ("EFAA" and Regulation CC).24 The EFAA requires that interest accrue not later than the business day on which the depository institution receives proceeds for credit to such funds. However, this is subject to a special rule for credit unions, and an exception when the interest is for deposits checked which are later redeposited to the depositor's unclaimed.25 The reference to proportional credit may require reference to Uniform Commercial Code Article 4, since provisional settlement is recognized in Article 4 but not in the EFAA implementing regulation.26

D. Publicity Regarding Interest Bearing Accounts

Advertisements, announcements and solicitations of interest-bearing deposits by banking organizations or deposit brokers that state a specific rate of interest or a specific yield must clearly and conspicuously disclose the following information:

1. APY, calculated in conformity with FRB regulations;
2. the period during which the APY is in effect;
3. minimum initial deposit, account balance and time requirements to earn the stated yield;
4. a statement that regular fees or other conditions can reduce the yield; and
5. any interest penalty for early withdrawal.27

Where the APY depends on a variety of factors, all ranges and minimum balance requirements must be disclosed in "close proximity" and with "equal prominence." The approach taken by Congress in TIS provides an incentive for depository institutions to drop specific price and yield information from advertisements. Since compliance with the new requirements means more complex advertisements, this is a real possibility. To the extent that banks and thrifts shift to general advertisements, consumers will receive less rather than more information, precisely the opposite of the objective that Congress had in mind. The FRB is authorized to adopt less stringent rules for broadcast advertising and for outdoor displays, if the Board finds that the normally required disclosures are unnecessarily burdensome and, the Board did so in Regulation DD.28 This authorization does not extend to print media advertisements. Inaccurate or misleading advertisements are prohibited.29 What this means is uncertain, but it clearly will give customers (and their counsel) something new to haggle about in disputes between depositors and institutions. There is one peculiar advertising rule, which is that advertisements may not state that an account is free or no-cost if:

1. a minimum balance must be maintained to avoid fees or service charges;
2. there is a limit on the number of transactions; or
3. any service charge or transaction fee is regularly imposed.30

This limitation may require major changes in the advertising practices of depository institutions. It is now risky, and normally inadvisable, for an institution to use terms like "free" or "no cost" with reference to interest bearing accounts in any written materials.

E. Implementing Regulations and Model Forms

As with numerous consumer credit statutes, the authority (and obligation) to create implementing rules for TIS is assigned to the FRB.31 Almost immediately the initial "final" regulation was subject to significant adjustments, in that the mandatory compliance date was moved forward to June 21, 1993, and the rules governing "lobby boards" were relaxed. While these changes were salutory, we can probably expect similar, continual revisions as the FRB gains experience with the new rules. Indeed, this is one of the benefits of agency flexibility as opposed to strict statutory requirements, which are much harder to change. To facilitate compliance with TIS, the FRB was directed to, and did, publish model forms and clausus for common types of disclosures, and in so doing the FRB considered the needs of automated systems. Use of the model clauses is not required, but their (proper) use comports compliance with TIS. Absent a compelling reason to do otherwise, insured institutions should try to follow the FRB forms as closely as possible. The FRB rules are inapplicable to credit unions, which are instead subject to rules to be promulgated by the National Credit Union Administration ("NCUA").32 In practice, credit unions will be subject to similar if not identical rules. The NCUA must adopt rules that are substantially similar to the FRB rules, except where different treatment is appropriate due to the unique nature of credit unions and the manner in which they pay dividends on member accounts.

F. Civil Liability for TIS Violations

Failure to comply with any requirement created by TIS and the implementing regulations can lead to civil liability to any account holder for:

1. any actual damages; plus
2. statutory damages of $100 to $5,000.33

In class actions, the amount of recovery beyond actual damages is a discretionary matter for the court. However, no statutory damages may be more than 10% of the actual damages. The maximum recovery is limited to the lesser of $50,000 or one percent of the net worth of the institution. Among the factors to be considered in setting damages in a class action are the:

1. amount of actual damages;
2. frequency and persistence of compliance failures;
3. resources of the institution;
4. number of persons adversely affected; and
5. the extent to which the compliance failure was intentional.34
inaccessible due to various limitations.

Continuing violations of the same type, relating to the same account, may result in a closure of the account.

The civil liability provisions of TIS parallel those in other federal consumer credit laws, notably TILA, the Equal Credit Opportunity Act ("ECOA"), and the Fair Credit Reporting Act ("FCRA"). The courts will probably follow ECOA and TILA decisions under these statutes in interpreting the TIS provisions. If so, depositor institutions should expect the following results:

1. actual damages will include emotional distress and other forms of nonproperty harm;
2. the courts will interpret TIS in favor of consumers, and will permit recovery for even trivial violations, even though the consumer can demonstrate no out-of-pocket loss; and
3. costs and attorney fees will far exceed monetary damages, even when the statutory damages are inadequate.

TISA actions may be brought in any U.S. District Court, or in any state court of competent jurisdiction, within one year after the "date of the occurrence" of the violation. Where a violation is a continuing one, such as the failure to make disclosure or an inaccurate disclosure, there is only a single violation. A perusing of the statute of limitations language suggests that the date on which the violation took place is the first day it happened, but this is consumer protection legislation so the courts may permit suits brought within one year after the termination of the violation. It does not appear that the consumer must call a violation to the attention of the institution, or give it an opportunity to correct what may have been an oversight, prior to commencing the action.

The limitation of recovery to account holders seems to preclude recovery for failure to disclose charges upon request to any person, even though the Act purports to create civil liability for failure to comply with any requirement. Since depository institutions want to attract new depositors, this problem is unlikely to be a serious one.

G. Administrative Enforcement

The federal banking agencies are responsible for TIS as are the institutions they normally supervise. Oversight will be conducted in the ordinary course of supervising in the same manner as with other consumer legislation. It is less obvious how compliance by institutions without federal deposit insurance will be monitored. While the supervisory agencies must apply the same standards and regulations adopted by the Federal Reserve, they may issue supplemental rules regarding enforcement procedures.

The enforcement powers, including civil fines and cease and desist orders, may be imposed by the responsible supervisory agency. Administrative sanctions are in addition to and entirely separate from any civil liability for TIS violations.

Responsibility for monitoring compliance with TIS disclosure and advertising standards by depository institutions that are not federally insured is assigned to the Federal Trade Commission ("FTC"). The FTC is less than pleased about this new assignment. The consumer credit area, the FTC has considerable expertise because it regulates the numerous credit card issuers that are not depository institutions. However, it does not deal with the deposit side of banking, where banking institutions are quite different from depository grantees of consumer credit.

Unsecured institutions are small in number but diverse in character, and geographically dispersed. Usually, administrative agencies welcome an expansion of their authority, but in this instance the FTC foresees new duties that will be expensive to undertake, and that may be performed badly because of lack of specialization in the agency.

The impact of recovery to account holders seems to preclude recovery for failure to disclose charges upon request to any person, even though the Act purports to create civil liability for failure to comply with any requirement. Since depository institutions want to attract new depositors, this problem is unlikely to be a serious one.

H. Effect of State Law

In a bow to states rights, Congress did not preempt state laws regarding account disclosure, except to the extent the state law is inconsistent with TIS. This is similar to the approach that has been used in other federal consumer credit legislation, but with a difference. As noted state law is preempted only to the extent that it is inconsistent with TIS, however, in contrast to prior practice, inconsistencies are not limited to less rigorous standards. This approach means that the applicable law for insured institutions is less likely to vary from state to state. As banking organizations are increasingly located in more than one state, the efficiency of this approach is evident. However, it is possible to ascertain what provisions of state law are preempted by TIS Responsibility for determining whether a provision of state law is inconsistent with the FRB. Even if the Board were to implement comprehensive definitions for fifty states, a most unlikely occurrence, new problems would arise when a possibly relevant law is adopted or altered in any state.

III. Regulation DD

A. Introduction

Regulation DD, the Federal Reserve System rule implementing the Truth in Savings Act, was issued in proposed form on April 13, 1992 and took effect on September 14, 1992. The regulation was effective September 21, 1992, and compliance was to be achieved within 180 calendar days (on March 21, 1993). However, subsequent legislation extended the mandatory compliance date to June 21, 1993. As noted supra at Part I, Regulation DD applies to all regulated depository institutions except credit unions, which will be subject to a parallel rule proposed by NCUA. Other competitors such as securities firms and insurance companies are not subject to the TIS requirements, unless they act as a "deposit broker" for the agency.

B. Content of Required Account Disclosures

TIS requires certain disclosures for all deposit accounts available to or held by a consumer, including interest-bearing and noninterest-bearing accounts, based on the model of the Truth in Lending Act. Pursuant to Regulation DD, the required disclosures include:

1. Interest rate information. For "fixed-rate" accounts, the "annual percentage yield" (using that term), the "interest rate," (using that term) and the term each will be in effect. For stepped rate accounts and tiered rate accounts all rates for each step or tier must be included. For variable rate accounts, additional disclosures are required, relating to the possibility and frequency of interest changes, calculation of the rates, and any applicable limitations. The annual percentage yield may be abbreviated ("API") if the term is also spelled out.

2. For time deposits, the maturity date, any early withdrawal penalties, and statement describing the impact of early withdrawal on interest paid and compounded.

3. The frequency of crediting and compounding of interest.

4. Minimum balance requirements necessary to open the account, earn the stated rate, or avoid the imposition of fees.

5. An explanation of the method used to determine the balance on which interest is paid.

6. Any account fees or early withdrawal penalties, and the method of calculating such.

7. Any transaction limitations.

8. For time deposits, the account renewal terms.

9. The amount and type of any bonus, and when it will be provided, and any balance or time requirements necessary to receive it.

C. Time and Method of Disclosure

The disclosures described above must be given to any prospective customer before an account is opened or a related service is performed, and must be made available to any person upon request. For accounts opened by mail the disclosures must be mailed within ten days of the account opening. For automatic renewals of time deposits with a term to maturity of one month or less, the disclosures must be given at least 30 days prior to maturity, or at least 30 calendar days before the end of an account term.
Interest must be calculated by one of two methods, the daily balance method or the average daily balance method. The interest rate and APY must be shown on the statement for the most recent 30 days, and the two methods must be clearly explained. The final regulations require that foreign currency transactions be shown in the U.S. dollar equivalent using the closing price on the date the transaction was made.

E. Notice of Change in Terms

Any change in a term or condition of an account subject to the disclosure requirements must be disclosed in advance if the change will reduce the APY or is otherwise adverse to the interest of the consumer. The notice must be given at least 30 days in advance and must state the effective date of the proposed change. However, no additional disclosure is necessary (aside from the disclosures that must be given when the account is opened) for changes in the interest rate or annual percentage yield on variable rate accounts, for changes in check printing fees, or for time deposits with a maturity of one month or less.

F. Periodic Statements

For any account for which the institution sends a periodic statement on a quarterly or more frequent basis, the periodic statement must contain the following disclosures (as applicable):

1. The APY earned during the statement period.
2. The dollar amount of interest earned during the statement period, including any cash "bonuses."
E. "Business Day"

"Business day" is defined in Regulation DD essentially the same as in Regulation CC ("a calendar day other than a Saturday, a Sunday, or any of the legal holidays specified in 5 U.S.C. 6103(a)."

This is quite different from the Uniform Commercial Code definition of "banking day."

F. "Consumer"

TIS applies only to "consumer accounts," so this definition is likewise important to the scope of Regulation DD. "Consumer" is defined as a "natural person" using an account "primarily for personal, family, or household purposes." If it does not include sole proprietorship accounts (which have a business purpose). It does cover unincorporated association accounts held for nonbusiness purposes (such as book clubs, softball leagues, etc.), subject to the special rule discussed supra in Part IV.B, for such accounts opened prior to June 1, 1993. TIS also covers IRA accounts, if the funds are held in an "account" (but not if invested in the account held by a custodian in a professional capacity is not a consumer account, and attorney-client trust accounts and landlord-tenant escrow accounts are not considered consumer accounts (because they have a business purpose). The definition of "consumer account" includes accounts opened under a Uniform Gifts to Minors Act and other nonprofessional trust accounts, but does not include mortgage loan and tax-and-insurance escrow accounts.

G. "Grace Period"

Regulation DD includes a new definition of "Grace Period." It is not in the proposal. This is defined as "a period after maturity of an automatically renenue time account during which the consumer may withdraw funds without being assessed a penalty."

The inclusion of "Grace Period" is important under Regulation DD section 230.4(g)(3)(iv), which requires disclosure of any grace period for an automatically renewed time account. It is also important under section 230.5(b), where it affects the alternative timing for disclosure for certain automatically renewable time accounts.

For certain time accounts with a term to maturity of one month to one year, an institution may provide the disclosures at least 20 days prior to the end of the grace period if the institution provides a grace period of at least 5 days. An institution is free to utilize a grace period or not.

II. "Interest Rate"

"Interest" is defined so that it will never include any bonuses as defined at Regulation DD section 230.4(f), though bonuses are subject to certain disclosures and advertisement requirements under section 230.8 (b) (3). Interest is determined by applying the periodic rate to the account balance. Therefore any customary fees that are not charged in a given case (e.g., for senior citizens) do not carry added interest.

An institution cannot use the term "annual percentage rate" in advertisements, due to possible confusion with the term that also called (the "APR") in loan transactions under the Truth in Lending Act and Regulation Z. Institutions may (but are not required to) use the term "annual percentage rate" in the account disclosures, but this term can only be used in addition to the term "annual percentage yield" and "interest rate."
sures required under section 230.4(b)(3)(ii), but the account is not thereby made a midterm account.

1. "Time Account"

A "Time account" is defined in an account with a specific maturity of seven days or more, where a customer must pay an early withdrawal penalty of at least seven days' interest on the amount withdrawn, e.g., a certificate of deposit. The term "time account" rather than "time deposit" is used in Regulation DD to avoid confusion with the latter term as used in Regulation D (therefore more broadly to include other categories of savings deposits not within the Regulation DD definition of "time deposit.")

M. Variable Rate Account

"Variable Rate Account" is defined in Regulation DD (but not in the TISA), as any "account in which the interest rate may change after the account is opened, unless the institution contracts to give at least 30 calendar days advance written notice of rate decreases." Thus, an institution's passbook savings accounts and interest-bearing checking accounts will not be considered variable rate accounts unless the deposit contract includes the 30 day notice requirement.

Characterization of an account as a variable rate account is important for at least three reasons:

1. These are additional account disclosures when a variable rate account is 2. Rate decreases are excluded from disclosure.

3. Notice is required in advance.

The Regulation DD definition is very flexible and allows passbook accounts to be excluded from this definition (i.e., to be considered fixed rate accounts) if the institution contracts for 30 days notice.

A variable rate account will qualify as such where rate changes are referenced to an index, or a formula, or are at the discretion of the institution. This allows passbook accounts to be treated as variable rate accounts if desired, so long as there is no 30 day notice in the deposit contract.

Each institution will be required to look at the variable rate disclosure requirements and decide whether inclusion or exclusion of various accounts (e.g., passbook accounts) from that definition best fits the institution's operations.

V. TISA Disclosures - Other Practical Points in the Supplementary Information

A. General Disclosure Requirements

The Truth in Savings Act requires the TISA disclosures to be "clear and in plain language." Regulation DD allows for great flexibility; the disclosures can be in any particular order, and they do not have to be segregated from other disclosures and notices.

The disclosures may be made in more than one document, but this authority should be used with caution in order to avoid confusion on the part of customers about which disclosures apply to each type of account. Nonetheless, the ability to use more than one document is important because it permits an institution to segregate those disclosures that change frequently (e.g., interest rate information) from those that do not (e.g., fees and early withdrawal penalties), so that the former can be included on an "inexpensive "throw away sheet" while the latter remains part of a more permanent "account brochure." Of course, in this scenario it is important that staff be instructed to provide all the relevant documents to each party opening an account or requesting account information.

The Regulation DD Supplementary Information recognizes that an institution may not make disclosures on any one or more of the following account features: a passbook, a signature card, rate sheet, schedule, and/or other brochure. Presumably the disclosures could also be part of the deposit account agreement. However, depository institutions are cautioned that "if the disclosure consists of more than one document, all relevant parts of the disclosures provided at the same time, and it must be clear to which account such document relates." An institution may, for example, utilize one brochure and rate sheet (or other documents) for all interest-bearing checking accounts, another set of documents for the time accounts, and still another for passbook accounts. Or an institution may combine all of those disclosures into one brochure or other document.

Alternatively the institution could provide a separate brochure or set of documents for each type and variation of account (e.g., a separate brochure for each type of checking account offered).

Unlike Truth in Lending, no terms have to be disclosed more conspicuously than any other term. Aside from the "annual percentage yield" and "interest rate" and "annual percentage yield" and "interest rate" on particular terminology is mandated in the disclosures, although all terms must be used consistently.

The advertising requirements prohibit use of terms other than "annual percentage yield" and "interest rate" (e.g., use of the term "annual percentage rate" or "APR") would be prohibited), and permit use of the abbreviation "APY" only if the term "annual percentage yield" is also stated somewhere in the advertisement.

Regulation DD does not impose any new consumer reporting laws that define the legal obligation of the parties, but does require that the disclosures be consistent with the legal obligations of the parties. Therefore, disclosures should always reflect the terms of the account at the time the disclosures are made and should never be based on estimated information. For automatically renewable time accounts, disclosures must be based on the account is opened, not on the basis of terms that may apply upon renewal. Disclosure may be made in languages other than English, so long as English-language disclosures are available on request.

The Regulation DD requirements may be fulfilled with disclosures that at the same time satisfy the electronic funds transfer disclosure requirements (under Regulation E). Thus if an institution changes an account since the last Regulation E disclosures, these disclosures may also be used to satisfy Regulation DD.

B. Delivery of Disclosures

1. New Accounts

Where the account being opened is to be held by more than one account holder, the institution may provide the new account disclosures to any of the account holders or their designated representative.

Under subsection 230.4(a)(1) the disclosures must be provided before the account is opened or a disclosed fee is imposed. If the consumer is not present when the account is opened (e.g., if the account is opened by mail), the disclosures may be sent within ten days of the initial deposit. Regulation DD specifies that this means ten business days. The Supplementary Information notes, however, that other Regulation DD time limits may be different; for example, the timing rules for maturing time accounts are stated in terms of calendar days.

The TISA Act provides that new disclosures need not be given to an absent consumer when opening a new account, if the disclosures have been previously given to that consumer (so long as the previous disclosures remain valid and unchanged). The FRB solicited comment on whether there should be a time limit beyond which prior disclosures would not suffice, but the rulemaking did not become effective before the new business days.

Mere inquiry about interest rates does not trigger a duty to send these disclosures. Telephone inquiries from parties "shopping" for the highest rate do not require that written disclosures be sent, unless the party making inquiry specifically requests written information. Repeat callers who request disclosures already provided to them are not entitled to new disclosures, provided the previous disclosures remain accurate.
Once a disclosure requirement is triggered, the full disclosure must be given or sent (in writing) for each type of account about which information was requested. However, if the request concerns only a general interest in a type of account (e.g., a NOW account, or a certificate of deposit), the institution may provide the required disclosures for a sample type of account on file and not for each specific account.198 If the request is made in person disclosures must be provided at that time; otherwise, the disclosures must be made within a reasonable time (deemed to be ten days in the Supplementary Information). The institution is not required to provide disclosures for accounts that are no longer being offered.199

If the request concerns a possibility future deposit, and the rates at that time are unknown, the disclosures given may reflect the interest rate and APY that were offered on that type of account during the most recent seven calendar days, along with a statement that this information is accurate as of a certain date plus a telephone number the consumer can call to receive updated information.199

As noted, a mere inquiry does not trigger a requirement to send written disclosures, unless such a request is treated as a deposit and does not impose any duty on institutions to respond to mere inquiries. However, if the institution responds to a mere inquiry (e.g., a request for rate information), its response must meet the requirements of TIS (e.g., any response that includes rate or yield information must include the APY). Such responses are not considered advertisements and do not trigger any additional advertising disclosures. And although certain responses must include the APY (if interest rate information is provided) and may (but need not) also include the "interest rate," the response is not required to use the terms APY or "interest rate."199

C. Content of Account Disclosures for New Accounts and Requests

The final regulation omitted the proposed requirement that institutions inform customers of the risk of a lack of automatic renewal of time account rates. However, the new account disclosures must reflect actual, current, and yield information.200 If there are no limitations on changes in rates, the institution may not have to disclose the rates.201

For variable rate accounts the following additional interest rate information must be disclosed:

1. The fact that the APY and interest rate may change.
2. The manner of determining the rate.
3. The frequency of possible rate changes.
4. Any limitation on rate changes.202

The fees that must be disclosed include maintenance and activity fees, dormant account fees, per item and transaction fees, ATM fees, stop payment and NSF fees, fees for account inquiries, extra statements, certification fees, and early withdrawal fees.203

The institution need not disclose check printing fees, charges for travelers checks or cashier's checks, safe deposit box fees, bond redemption fees, or wire transfer fees.204 The substance of the transaction, and not the labeled fee, is controlling.204 These disclosures need not be segregated but must be summarized and cannot be aggregated.204 "Rate sheets" may be used for both fixed and variable rate accounts, but only if it is clear which rate applies to which account.204

If a minimum balance is required to earn interest, the institution does not have to disclose a 0% interest rate and APY for accounts below the stated minimums205 if the interest rate and APY are the same, the institution may disclose a single rate but must label it using both terms.205

Automatically renewable time accounts can be offered as new accounts upon renewal. However, renewal of a time account that does not automatically renew is treated as a new account and is subject to the full range of new account disclosures.206 An institution that mailed or delivered at least ten calendar days before the account matures.207 As noted in the Supplementary Information, this should allow most institutions to conform their procedures for accounts that do not renew automatically with their procedures for accounts that do renew automatically, since, in most cases disclosures for automatically renewing accounts will be given at least 30 days prior to maturity (or at the next renewal date).208

D. Timing of Disclosures — Renewal of Time Accounts

As noted above,209 Regulation DD provides an extended deadline for giving the disclosures that are due prior to the automatic renewal of a maturing time account. Regulation DD provides, as an alternative to making disclosures at least 30 days prior to maturity, the maturing of 20 days prior to the end of at least five day grace period.210

Thus if a five day grace period is given, the disclosures must be given or sent at least 15 days prior to maturity of the account (15 days later than the otherwise applicable disclosure deadline). If a ten day grace period is provided, the deadline for sending the disclosures will be ten days before maturity (an extension of 20 days compared to the otherwise applicable 30 day deadline). This provides an incentive for an institution to provide a qualifying, and even generous, grace period.

Note, however, that the extended notice period provided only applies to accounts with a term to maturity of one month or longer that renew automatically.210 Time accounts that do not mature automatically are not considered new accounts and, thus, require that the full new account disclosures be given at or before renewal.211 Renewal of a time account is not considered a "change in terms" requiring 30 days advance disclosure.212

For a time account with a term to maturity of less than or equal to one month, the institution must disclose the consumer the maturity date and whether interest will be paid after maturity (or at a specific grace period).213 The notice of change may be combined with other information on the statement page or may be on a separate page.214 The change may be included as part of an entire updating disclosure, as long as the change is specifically brought to the customer's attention.215

A change in terms notice is not required when the change in question was specifically disclosed in the initial account disclosures.216 The example in the Supplementary Information is where an employer's account becomes subject to a previously waived service charge if the employment is terminated and this is disclosed when the employee is hired and the account is opened.217 Absent such prior disclosure, 30 days advance notice of the change is required. Any change that will occur at or after the end of an automatically renewable time account, e.g., during the subsequent term of a certificate of deposit after maturity and automatic renewal, is not a change in terms subject to Regulation DD section 230.5(a).218 However, such a change likely will have to be disclosed under section 230.5(b), governing renewal of time account that renew automatically and have a term to maturity of more than a month.219 If a change is to take place during the term of a time account (as opposed to after maturity), this would require a 30 day prior notice under section 230.5(c).219 The institution should also give consideration to a unilateral change in the terms of the account during...
the account term would constitute a breach of the deposit contract.
Under Regulation DD section 230.3(a), if a change in terms notice required pursuant to TIS also requires notice under Regulation E, compliance with the disclosure and timing requirements of Regulation E will also satisfy the TIS requirements. 200
Changes in check printing fees do not require 30-day 201 notice.
F. Notice of Maturity and Related Information for Time Accounts

Time accounts that renew automatically are called “rollover” time accounts in the Supplementary Interpretations. 202 The required disclosures that must be given before maturity are described in Regulation DD subsections 230.5(b) and (c). No disclosure notice is required to be sent before the mandatory compliance date of June 21, 1993, even if the renewal date would otherwise trigger a required disclosure before that date. 203

For automatically renewable time accounts, with a term to maturity of one year or less, the basic requirement is to mail or deliver the disclosures described at section 230.5(a) at 30 days before maturity of the account. 204 This is subject to three exceptions:
1. If at least a five day grace period is provided, disclosures must be given at least 20 calendar days prior to the end of the renewal term.
2. For time accounts with a maturity of one year or less, that renew automatically, only certain key information must be disclosed, namely:
   a. The right to advance notice prior to maturity.

   The advance notice disclosure is required to be included only on a rollover time account with a maturity of one year or less. 205

   The right to advance notice prior to maturity must be disclosed only on rollover time accounts. 206

   The advance notice right may be triggered if there is a change in the terms of the account that would constitute a breach of the deposit contract.
Under Regulation DD section 230.3(c), if a change in terms notice required pursuant to TIS also requires notice under Regulation E, compliance with the disclosure and timing requirements of Regulation E will also satisfy the TIS requirements. 207

Changes in check printing fees do not require 30-day 208 notice.

G. Periodic Statement Disclosures

1. Periodic Statements

TIS requires that certain disclosures be included with each periodic account statements. If TIS does not require periodic statements for an account, but if such statements are sent they must include the TIS disclosures. 209
Under Article 4 of the Uniform Commercial Code institutions have a strong incentive to provide periodic statements for checking transactions. In addition FBR Regulation E requires periodic statements for accounts with EFT access. 210 For other accounts, however, such as non-EFT passbook savings accounts (where forgery and alteration risk is minimal because the customer must come into the bank’s office and present a personal page to draw the money), there is no requirement for a periodic statement and the institution may want to avoid use of such statements in order to minimize the burden of TIS compliance. 211 In order to do so the institution may have to convert “statement” savings accounts back to the traditional bookkeeping system by issuing each customer a passbook which to record entries in lieu of sending periodic statements. An alternative is to issue the periodic statement at least quarterly intervals (e.g., semi-annually), since “periodic statement” is defined as one sent “on a regular basis for four or more times per year.” 212
In either case the institution gives up at least some protection regarding forgery and alteration risk; however, this risk needs to be factored into the decision.
For accounts that have a periodic statement feature, the disclosure requirements on comfort account disclosures are identical to comfort account disclosures need only be provided as applicable; for example no interest rate or APY needs to be disclosed for non-interest-bearing accounts. 213
Nor does any interest or APY have to be disclosed for interest-bearing accounts during statement periods when no interest is earned. 214
2. Different Interest and Statement Periods

There is a special disclosure rule for cases where an institution uses the average daily balance method to calculate interest and the interest calculation cycle is different from the statement period. 215 Generally Regulation DD requires institutions to disclose the interest earned during the statement period, “without regard to whether such interest has been credited to the account.” 216 However, if interest is calculated using the average daily balance method used by the comfort account disclosures method, there is no requirement for any periodic statement and the institution may want to avoid use of such statements in order to minimize the burden of TIS compliance. 217 In order to do so the institution may have to convert “statement” savings accounts back to the traditional bookkeeping system by issuing each customer a passbook which to record entries in lieu of sending periodic statements. An alternative is to issue the periodic statement at least quarterly intervals (e.g., semi-annually), since “periodic statement” is defined as one sent “on a regular basis for four or more times per year.” 218
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210 Id.
211 Id. at 61457, adding 12 CFR §235a.3(b)(5)(i), supra note 119.
212 Supplementary Information, 57 Fed. Reg. at 42308.
213 Regulation DD, 12 CFR §230.5(b), supra note 210.
214 TIS 230.5(b)(1), 12 USC 4297, Regulation DD § 230.5(a)(1).
216 Id. at 61457-61458.
217 12 CFR §235a.3(b)(5)(i), supra note 120.
218 12 CFR §235a.3(b)(5)(i), supra note 120.
219 Supplementary Information, 57 Fed. Reg. at 42308.
220 Id. at 42309.
221 Id. at 61457.
223 12 CFR § 235a.3(b)(5)(i), supra note 120.
224 See supra note 120 and id.
225 This rule was provided in the Supplementary Information, 57 Fed. Reg. at 42308.
226 Id. at 61457.
227 Id. at 61457.
228 Supplementary Information, 57 Fed. Reg. at 42308.
229 Id. at 42309.
230 See 12 CFR § 235a.3(b)(5)(i), supra note 120.
236 Id. at 61449.
237 Id. 238 Id. at 61449.
239 Id. at 61449.
240 Id. at 61449.
241 12 CFR §230.5(d).
242 12 CFR §235a.3(b)(5)(i), supra note 120.
243 12 CFR § 235a.3(b)(5)(i), supra note 120.
244 12 CFR § 235a.3(b)(5)(i), supra note 120.
245 12 CFR §235a.3(b)(5)(i), supra note 120.
246 See id. at 61449.
247 12 CFR §230.5(d).
248 See supra note 120.
249 12 CFR §230.5(d).
250 Id. at 61449.
251 12 CFR §230.5(d).
252 Id. at 61449.
253 Id. at 61449.
254 Id. at 61449.
256 TIS 230.5(b)(1), 12 USC 4297, Regulation DD § 230.5(a)(1).
257 Id. at 61457.
258 Id. at 61457.
259 Supplementary Information, 57 Fed. Reg. at 43084.
260 Id. at 43085.
261 See Note 258 supra.
262 12 CFR §230.5(d).
263 See supra note 220.
264 12 CFR §230.5(d).
265 Id. at 61449.
266 Id. at 61449.
267 12 CFR §230.5(d).
268 12 CFR §230.5(d).
269 Id. at 61449.
270 Id. at 61449.
271 Id. at 61449.
272 Id. at 61449.
273 Id. at 61449.
274 Id. at 61449.
275 12 CFR §230.5(d).
276 Id. at 61449.
June 21, 1993. However, the remaining Regulation Q prohibitions relating to payment of interest on demand deposits remain in effect.

As noted Regulation Q section 217.3 prohibits the payment of interest (directly or indirectly) on demand deposits. As discussed below, "interest" is defined very broadly to include compensation in the form of a gift, or "premium," although it does not include compensation of expenses or waiver of a fee or service charge.

Regulation Q section 217.4 requires that the institution provide a written statement at the time of opening a time deposit account. Desire the effect of any early withdrawal penalty. This must (1) state clearly that the customer bears the burden of the deposit for the stated maturity and (2) describe "fully and clearly" how the penalty provisions work (including any practice of the institution of waiving contractual penalty provisions). This statement must be "exposely visible to the customer.

Regulation Q also requires that every automatically renewable certificate, passbook, or other account document representing the time deposit must have been stamped or staked in a conspicuous statement indicating that the account will be renewed automatically upon maturity and indicating the renewal terms.

Regulation Q Interpretation section 217.6.D.1.1 explains that for purposes of Regulation Q the definition of "interest" includes "premium" (whether in the form of merchandise, credit, or cash) given as compensation for a deposit. However, such premiums will not be regarded as interest if (1) the premium is given only when an account is opened or renewed, (2) no more than two premiums per account are given in a 12 month period, and (3) the value of the premium does not exceed $10 for deposits of less than $5,000 or $20 for deposits of $5,000 or more. The institution must retain supporting documentation which shows the cost of each premium, including shipping, wrapping, packaging, and handling costs, and cannot divide accounts into multiples in an effort to circumvent these limitations.

VII. Practical Suggestions For Compliance
A. Steps to Compliance
There are many potential approaches to compliance with TIEIS, and each institution will have its own preferences with regard to the alternative choices faced at each stage of the compliance effort. Nevertheless, some specific advice may be helpful to those responsible for implementing a TIEIS compliance program. The following seven stage process is offered as an example of how such an effort might be approached.

1. Educate the Staff
First, educate the affected members of the institution's staff as to the basic requirements of TIEIS. TIEIS will affect a large number of financial institution staff. Unlike, for example, the Americans With Disabilities Act or the Truth in Lending Act, TIEIS may affect much more than just the compliance staff or one department of the institution. TIEIS will involve nearly all staff who deal with the public, including the receptionists, telephone operators, tellers, and savings counselors, plus all levels of management and operations staff. All of these people will need an introduction to TIEIS at the beginning of the institution's compliance efforts, so they will understand and can participate in that effort.

C. Adopt Policies and Procedures
Second, establish and adopt institutional policies and procedures designed to implement, monitor, and document compliance with TIEIS. This will help set the tone for the institution's compliance effort, as well as provide a road map for affected members of the institution to refer to when they want to draft their own policies and procedures. Others are available commercially. Either way, this will establish the ground rules for the institution's compliance efforts and will signify an organized commitment to compliance.

D. Categorize Accounts
Third, categorize each type of account offered by the institution, according to the TIEIS criteria. Each type of account will need to be put in one of four categories, each with a different set of disclosure requirements.

1. Passbook Savings Accounts
2. Time Accounts
3. Periodic Statement Accounts
4. Other Accounts

The requirements for each type of account are set forth in the TIEIS. In order to know which set of disclosure requirements apply, staff must know how the account is categorized. Some account types may be eliminated or modified in order to fit the account structure in view of TIEIS. These decisions and changes should be made in advance of the effective date of TIEIS (June 21, 1993) if possible, in order to avoid the necessity of additional TIEIS disclosures when the changes are made.

E. Variable or Fixed Rate?
Fourth, each account type will also need to be characterized as variable or fixed rate. Once again the TIEIS disclosure requirements depend on this characteristic, and the institution will need to decide which mix of variable and fixed rate accounts best fits its marketing, operational, and financial needs and goals.

Generally speaking, the variable rate disclosures are more extensive when an account is opened, and less onerous when an account is renewed. The mandate to adopt TIEIS may mean that an institution will have to draft its own accounts and procedures. In contrast, the fixed rate disclosures are less extensive when the account is opened, but more onerous if the interest rate is changed.

To the extent that all such accounts can be characterized the same way (e.g., as either fixed or variable rate accounts), staff handling of the accounts and compliance efforts should be simplified.

F. Term to Maturity
Fifth, the institution should categorize all time accounts by term to maturity and on the basis of whether they automatically renew.

Generally, automatically renewable accounts will be divided into three categories, depending on the term to maturity, with different renewal disclosures for each: (1) time accounts with a term of one month or less, (2) those with a maturity of more than one month to one year, and (3) those with a term to maturity in excess of one year.

Time accounts that do not automatically renew are treated as a new account each time they renew, and there is a special rule governing the timing of such disclosure when the term to maturity is greater than one year.

G. Organize the Disclosures
Sixth, the disclosures for each type of account will need to be organized, planned, and calculated. This will require organization of the disclosures in order to match the institution's account structure with the TIEIS disclosures requirements. As noted earlier, this may be done by providing all of the disclosures to a single document using API and by separating those documents from each other. Alternatively, the institution may choose to group the disclosures for like types of accounts (e.g., all time accounts as checking accounts) together on a single brochure or set of documents. Regulation DD permits great flexibility in this regard, so long as the disclosures are clear and conspicuous, in writing, and in a form the consumer may keep. But this requires the institution to devise an organizational structure that meets both the requirements of TIEIS and the institution's operational needs.

This step will also require consideration of the reporting and distributing the administrative burden relating to the distribution of the necessary disclosures to the appropriate staff. This may require coordination between the compliance officer, operations staff, and the institution's data processing provider.

H. Prepare to Make the Required Disclosures
Seventh, arrangements should be made to include the required disclosure statement note in the first periodic statement issued after June 21, 1993 in order to provide the initial disclosures for new accounts opened after that date and to all parties who request the disclosures. In addition certain disclosures must be made for all time accounts that renew after June 21, 1993, and for certain changes in the terms of accounts.

As June 21, 1993 approaches all systems should be in place to institute the required disclosures in a timely fashion.

1. Re-Educate, Implement, and Monitor
All affected staff should be periodically re-educated as to the TIEIS requirements and the institution's approach to compliance. Once again, a formal policy, adopted by the board and supported by all staff, should assist this process. The compliance officer should use related audit procedures and checklists to assure that the proper compliance systems are in place. When the system is implemented and the disclosures are being made, the compliance officer should review the disclosures and checklists to assure continuing compliance.

VIII. Conclusion
There was no specific impetus for the adoption of TIEIS. There was no public outcry or apparent confusion among consumers that led to the enactment of this statute. Rather, TIEIS embodies an approach that has been considered by Congress over the last several years and supported by consumers. This approach is favored by Congress because it requires no budgetary outlays, yet allows the members to argue that they have been vigilant in protecting the interests of the consuming public.

The costs of TIEIS will be borne initially by banks and thrifts of America and ultimately by their customers. Thus, it is appropriate to ask whether the benefits to the public outweigh the costs. Disclosure legislation, such as TIEIS and TILA, can be justified as aiding the operation of the marketplace by requiring the production of information that will allow a market to disclose costs. To ask that increased information might be helpful is, however, very different from demonstrating that it is in fact helpful, particularly after account is taken of the costs associated with acquiring the information.
Even if consumers have better factual information, it does not follow that these facts will be studied and acted upon. The acquisition of information involves costs in time, and perhaps in money. Empirical studies of consumer behavior have repeatedly demonstrated that consumers base their decisions about purchases on product-related rather than contract-related considerations.\(^{307}\) This behavior is not irrational. Shifting from one banking institution to another involves significant transaction costs. (Reflect on the last time you moved your business from one banking institution to another.) The considerable research on selection of a bank shows that convenience is the dominant consideration, and that among the convenience factors location is much the most important fact. Given an existing choice of a bank or thrift that is optimum for a consumer, it is also true that other institutions are less desirable to that person. Thus an alternative has to be a lot better than the present choice to cause a consumer to change from one banking institution to another. (To use an everyday analogy, consider how good a sale at a grocery store has to be to get you to drive across town instead of going to the store where you regularly shop.) Since location and other convenience factors are central to the choice of a provider of banking services, product information (even about price) may not be a major factor in many consumer decisions.

Twenty-five years of experience with TIL should lead one to have the most modest expectations for the benefits of account information disclosure to consumers. Two leading consumer law scholars concluded, after a careful and detailed study of TIL: "Behavioral scientists, public opinion research, consumer research, and our common sense all tell us the same thing: consumer behavior in a particular transaction is almost certainly not going to be affected by a TIL disclosure statement, notwithstanding the quality of that statement."\(^{308}\) The sad truth about TIL is that the hoped for benefits have not been attained because they are unattainable.

On behalf of TIS, should be said that clear and concise disclosure of important account information may be helpful to some consumers, and perhaps the cost will be less than is generally anticipated. After all, the terms and conditions under which accounts are offered to customers by banks and thrifts are already disclosed in the deposit contract, albeit perhaps not always in the manner most helpful to the customer. Still, savings customers are probably more sophisticated in these matters than Congress recognizes, and it may logically be doubted that much will be gained as a result of TIS.

The major flaw of TIL, and the fear with respect to TIS, is the complexity of the regulation, the cost of compliance, and the risk of litigation, not disclosure. The focus should be on sensible administrative enforcement, not judicial remedies. That way consumers will be the beneficiaries, not the legal profession. At least with respect to banks and thrifts, clear directions about the conduct required, reasonable evaluation of disclosures in the course of regular examinations, and sparse use of presently authorized sanctions should be quite sufficient to bring about adequate levels of compliance in a short period of time. If this approach is adopted, it is at least possible that the modest benefits of TIS will be accompanied by equally modest compliance and litigation costs.

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**Commentary:**

**It's the Banking Legislation, Stupid**

(Continued from page 180)

1. Provisions that increased the penalties for failed banks and expanded the enforcement powers of the regulatory agencies. These provisions have greatly diminished Constitutional due process protections for anyone associated with a regulated financial institution, and have unnecessarily criminalized the bank regulatory process, thereby discouraging healthy risk-taking by bankers.\(^{22}\)

2. Regulatory compliance and consumer transactions. Many compliance requirements unnecessarily increase the regulatory burden on financial institutions without providing any significant benefits to consumers. In addition they increase the potential for technical violations that cause no real harm but can be seized on as a basis for

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