

**BUREAU OF CONSUMER FINANCIAL PROTECTION**

**12 CFR Part 1075**

**[Docket No.: CFPB-2013-0012]**

**RIN 3170-AA38**

**Consumer Financial Civil Penalty Fund Rule**

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Proposed rule with request for public comment.

**SUMMARY:** The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Act) establishes a “Consumer Financial Civil Penalty Fund” (Civil Penalty Fund) into which the Consumer Financial Protection Bureau (Bureau) must deposit any civil penalty it obtains against any person in any judicial or administrative action under Federal consumer financial laws. Under the Act, funds in the Civil Penalty Fund may be used for payments to the victims of activities for which civil penalties have been imposed under Federal consumer financial laws. In addition, to the extent that such victims cannot be located or such payments are otherwise not practicable, the Bureau may use funds in the Civil Penalty Fund for the purpose of consumer education and financial literacy programs. This proposal is related to a final rule published elsewhere in today’s **Federal Register**. That final rule implements the statutory Civil Penalty Fund provisions by articulating the Bureau’s interpretation of what kinds of payments to victims are appropriate and by establishing procedures for allocating funds for such payments to victims and for consumer education and financial literacy programs. This notice of proposed rulemaking seeks comments on possible revisions, adjustments, or refinements to the rule.

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

**ADDRESSES:** You may submit comments, identified by Docket No. CFPB-2013-0012 or Regulatory Identification Number (RIN) 3170-AA38, by any of the following methods:

- *Electronic:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail/Hand Delivery/Courier:* Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552.

*Instructions:* All submissions should include the agency name and docket number or RIN for this rulemaking. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to <http://www.regulations.gov>. In addition, comments will be available for public inspection and copying at 1700 G Street NW., Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning (202) 435-7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Comments will not be edited to remove any identifying or contact information.

**FOR FURTHER INFORMATION CONTACT:** Kristin Bateman, Attorney-Advisor, Legal Division, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552, at (202) 435-7821.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

Title X of the Dodd-Frank Act established the Bureau with a mandate to regulate the offering and provision of consumer financial products and services under the Federal consumer financial laws. Public Law No. 111-203, § 1011(a) (2010), *codified at* 12 U.S.C. 5491(a). The Dodd-Frank Act authorizes the Bureau, among other things, to enforce Federal consumer financial laws through judicial actions and administrative adjudication proceedings. 12 U.S.C. 5563, 5564. In those actions and proceedings, a court or the Bureau may require a party that has violated the law to pay a civil penalty. *See, e.g.*, 12 U.S.C. 5565.

Section 1017(d)(1) of the Dodd-Frank Act establishes a separate fund in the Federal Reserve, the “Consumer Financial Civil Penalty Fund” (Civil Penalty Fund or Fund), into which the Bureau must deposit civil penalties it collects from any person in any judicial or administrative action under Federal consumer financial laws. 12 U.S.C. 5497(d)(1). Under the Act, amounts in the Fund may be used “for payments to the victims of activities for which civil penalties have been imposed under the Federal consumer financial laws.” 12 U.S.C. 5497(d)(2). In addition, “[t]o the extent that such victims cannot be located or such payments are otherwise not practicable,” the Bureau may use amounts in the Fund for consumer education and financial literacy programs. *Id.*

Today, the Bureau is issuing a final rule entitled “Consumer Financial Civil Penalty Fund Rule” (Final Rule) that implements this section of the Dodd-Frank Act. Because the Final Rule is interpretive and procedural and relates to benefits, it is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act. Nonetheless, the Bureau believes public input on the Final Rule would be valuable. The Bureau therefore seeks comment on the

choices reflected in the Final Rule and on possible revisions, adjustments, refinements, or other changes to the rule. This notice of proposed rulemaking presents several such changes that the Bureau is considering. In addition to those changes, the Bureau seeks comment on all aspects of the Final Rule and suggestions for modifications or alternatives.

## **II. Summary of the Proposal**

Today, the Bureau is issuing a Final Rule to implement section 1017(d)(2) of the Dodd-Frank Act, 12 U.S.C. 5497(d)(2). As the Supplementary Information to the Final Rule explains in greater detail, the Final Rule specifies the conditions under which victims will be eligible for payment from the Civil Penalty Fund and the amounts of the payments that the Bureau may make to them. The Final Rule also establishes procedures for allocating funds for payments to victims and for consumer education and financial literacy programs, and for distributing allocated funds to individual victims. This notice of proposed rulemaking seeks comment on, and proposes to amend, the Final Rule.

First, this notice of proposed rulemaking seeks comment on the Final Rule's provision on the category of victims who are eligible for payments. Under the Final Rule, a victim is eligible for payment from the Civil Penalty Fund if a final order in a Bureau enforcement action imposed a civil penalty for the violation or violations that harmed the victim. The Bureau is considering whether it should make payments to a broader category of victims: victims of any *type* of "activities" for which civil penalties have been imposed under the Federal consumer financial laws, even if no enforcement action imposed a civil penalty for the *particular* "activities" that harmed the victim. The Bureau also seeks comment on how, under this alternative approach, it might identify the types of "activities" for which civil penalties were imposed, and how it might

identify the victims of those types of activities who are eligible to receive Civil Penalty Fund payments.

Second, this notice of proposed rulemaking seeks comment on the Final Rule's provisions on the amounts of the payments that victims may receive. Under the Final Rule, the Bureau will use funds in the Civil Penalty Fund for payments to compensate eligible victims' uncompensated harm. The Bureau is considering whether it should instead pay victims a share of the civil penalties collected for the particular violations that harmed them. This notice also sets forth for comment two variations on that alternative. Under one, the Bureau would pay victims a share of the civil penalties collected for the particular violations that harmed them, but only to the extent that those payments do not exceed the victims' uncompensated harm. Under the other alternative, victims could receive a share of the civil penalties collected for the violations that harmed them, as well as additional amounts from the Civil Penalty Fund, up to the amount of their uncompensated harm. Under that alternative, when victims of a violation for which a civil penalty is obtained had already received full compensation, the amount of that civil penalty would become available for payments to victims of other violations who had not received full compensation.

This notice also seeks comment on the Final Rule's provisions regarding uncompensated harm. The Final Rule provides that a victim's uncompensated harm is the victim's compensable harm, as described in § 1075.104(c), minus any compensation for that harm that the victim has received or is reasonably expected to receive. This notice seeks comment on possible amendments to the provisions regarding what amounts a victim is "reasonably expected to receive" and what qualifies as compensable harm. The Final Rule provides that a victim is "reasonably expected to receive," among other things, redress that does not arise from a Bureau

enforcement action if a party has paid such redress to an intermediary for distribution to the victim. This notice seeks comment on whether the Bureau should also deem victims reasonably likely to receive any redress that a final judgment in a non-Bureau action orders a party to pay, unless there is some indication that the party will not pay it. The notice also seeks comment on whether it should change what qualifies as a victim's compensable harm in cases where the amount of that harm cannot be determined based on the terms of a final order alone. Under the Final Rule, victims' compensable harm in those circumstances is equal to their out-of-pocket losses. This notice seeks comment on whether victims' compensable harm in those circumstances should instead be whatever amount of harm the Fund Administrator determines is practicable given the facts of the particular case.

Third, this notice seeks comment on the schedule that the Final Rule establishes for allocating funds for payments to victims and for consumer education and financial literacy programs. Under the Final Rule, the Fund Administrator—a Bureau employee charged with administering the Civil Penalty Fund—will allocate funds in the Civil Penalty Fund to classes of victims and, as appropriate, to consumer education and financial literacy programs every six months. This seeks comment on whether the Fund Administrator should allocate funds more or less frequently, or whether a different method of timing allocations would be appropriate.

Fourth, this notice seeks comment on the procedures for allocating funds to classes of victims, *i.e.*, to groups of similarly situated victims who suffered the same or similar violations for which the Bureau obtained relief in an enforcement action. In particular, the notice seeks comment on possible alternatives to the allocation procedures that the Final Rule establishes for when sufficient funds are not available to compensate fully the uncompensated harm of all victims to whom it is practicable to make payments.

Under the Final Rule, classes of victims are assigned to six-month periods based on when they first had uncompensated harm, and the Fund Administrator will prioritize allocations to classes of victims from the most recent six-month period. This notice describes and seeks comment on several alternatives or modifications to these allocation procedures. As one option, instead of prioritizing allocations to certain classes, the Fund Administrator might attempt to allocate available funds among all classes with uncompensated harm. As a second alternative, the Fund Administrator could prioritize allocations to classes of victims from the oldest, rather than most recent, six-month periods. As a third alternative, the Fund Administrator could prioritize allocations to classes in which individual victims have the greatest amount of uncompensated harm. As a fourth alternative, at times when insufficient funds are available to compensate fully the uncompensated harm of all victims, the Fund Administrator could make a discretionary decision about how to allocate the limited funds.

This notice also seeks comment on whether it should modify the allocation procedures to specify the amounts to be allocated to each class when the available funds are not sufficient to provide full compensation for the uncompensated harm of all victims from all classes from a single six-month period. In particular, the notice seeks comment on whether, in those circumstances, the Fund Administrator should allocate funds to the classes of victims from a single six-month period in a manner designed to ensure, to the extent possible, that the victims in those classes to whom it is practicable to make payments will receive compensation, through redress and Civil Penalty Fund payments, for an equal percentage of their compensable harm.

Fifth, this notice seeks comment on the provisions governing allocations to consumer education and financial literacy programs. Under the Final Rule, if the Fund Administrator allocates sufficient funds to classes of victims to provide full compensation for the

uncompensated harm of all victims to whom it is practicable to make payments, she may allocate any remaining funds to consumer education and financial literacy programs. This notice seeks comment on whether the rule should limit the amount of funds that the Fund Administrator may allocate to consumer education and financial literacy programs in these circumstances.

Sixth, this notice seeks comment on possible amendments to the procedures that the Final Rule establishes for disposing of funds allocated to a class of victims that remain undistributed after the payments administrator has made, or attempted to make, payments to the victims in that class. Under the Final Rule, such remaining funds will be distributed to victims in the class to which the funds were allocated, up to the amount of the victims' remaining uncompensated harm. The Bureau seeks comment on whether it should instead require such remaining funds to be returned to the Civil Penalty Fund.

Finally, this notice also generally invites comment on all aspects of the Final Rule.

### **III. Legal Authority**

The Bureau is proposing this rule pursuant to its authority under section 1022(b)(1) of the Dodd-Frank Act, which authorizes the Bureau to prescribe rules as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of Federal consumer financial law, 12 U.S.C. 5512(b)(1); and under section 1017(d) of the Dodd-Frank Act, which establishes the Civil Penalty Fund and authorizes the Bureau to use amounts in that Fund for payments to victims and for consumer education and financial literacy programs.

### **IV. Section-by-Section Description**

*Section 1075.100 Scope and Purpose*



Section 1075.100 of the Final Rule describes the rule’s scope and purpose, as explained in greater detail in the Supplementary Information to the Final Rule. The Bureau is not proposing changes to this section.

*Section 1075.101 Definitions*

Section 1075.101 of the Final Rule defines terms used in the rule, as described in greater detail in the Supplementary Information to the Final Rule. The Bureau seeks comment on each of the definitions set forth in the Final Rule and any suggested clarifications, modifications, or alternatives.

*Section 1075.102 Fund Administrator*

As discussed in greater detail in the Supplementary Information to the Final Rule, § 1075.102 of the Final Rule establishes within the Bureau the position of Civil Penalty Fund Administrator (Fund Administrator) and describes that person’s role and the role of the Civil Penalty Fund Governance Board. The Bureau is not proposing changes to this section.

*Section 1075.103 Eligible Victims*

Section 1075.103 of the Final Rule provides that a victim is eligible for payment from the Civil Penalty Fund if a final order in a Bureau enforcement action imposed a civil penalty for the violation or violations that harmed the victim. This implements the Dodd-Frank Act, which authorizes Civil Penalty Fund payments to “the victims of activities for which civil penalties have been imposed under the Federal consumer financial laws.” 12 U.S.C. 5497(d)(2). The Act does not clearly specify whether the particular activities that affected a particular victim must have been found to be violations in an enforcement action before the victim may receive payments from the Civil Penalty Fund. However, as explained in greater detail in the Supplementary Information to the Final Rule, the Bureau has interpreted section 1017(d)(2) of

the Dodd-Frank Act as authorizing such payments only to the victims of particular violations for which civil penalties were imposed.

The Bureau seeks comment on the criteria for victims' eligibility for payment from the Civil Penalty Fund, as well as suggestions for modifications or alternatives. The Bureau also specifically seeks comment on whether it should instead interpret section 1017(d)(2) of the Dodd-Frank Act more broadly to authorize payments to victims of any *type* of "activities" for which civil penalties were imposed under the Federal consumer financial laws, even if no enforcement action identified as a violation, or imposed a civil penalty for, the *particular* "activities" that harmed the victim.

The Bureau also seeks comment on how it might identify the types of "activities" that would qualify as "activities for which civil penalties have been imposed" under this alternative interpretation. One possibility would be for such activities to include actions by a defendant that are similar to actions by the same defendant that gave rise to a civil penalty. Another possibility would be to define the "activities" for which civil penalties are imposed at a higher level of generality. Under that approach, victims of a particular *type* of activity—for example, deceptive marketing of credit card add-on products or unlawful collection of advance fees in exchange for debt settlement services—would qualify as victims of "activities for which civil penalties have been imposed" so long as civil penalties had been imposed for those kinds of violations.

More broadly interpreting "activities for which civil penalties have been imposed" in either of these ways would make more victims eligible for payment from the Fund. On the other hand, this approach would be harder to administer, as it would not be as straightforward to identify the "activities" for which civil penalties were imposed as it would be to identify the violations for which civil penalties were imposed. This approach—and the second proposed way

of defining the “activities” for which civil penalties are imposed, in particular—could require difficult subjective judgments about whether activities were sufficiently similar to activities that gave rise to civil penalties. The Bureau seeks comment on ways in which the Bureau might mitigate these potential problems.

*Section 1075.104 Payments to Victims*

104(a) In General

Section 1075.104(a) of the Final Rule provides that the Bureau will use funds in the Civil Penalty Fund for payments to compensate eligible victims’ uncompensated harm, as described in paragraph (b) of this section. As explained in greater detail in the Supplementary Information to the Final Rule, this provision gives effect to the Bureau’s interpretation of section 1017(d)(2) of the Dodd-Frank Act as authorizing payments to victims only up to the amount necessary to compensate them for the harm they suffered as a result of a violation.

The Bureau requests comment on this interpretation and suggestions for modifications or alternatives. The Bureau also specifically seeks comment on possible alternatives proposed here.

First, the Bureau seeks comment on whether it should base payments not on the amount of a victim’s uncompensated harm, but rather solely on the size of the civil penalty paid for the violation that harmed the victim. Under that alternative, each payment would be a share of the civil penalty collected for the particular violation that harmed the victim receiving the payment, without regard to whether the payment was more or less than the victim’s uncompensated harm. This approach would, in effect, take the civil penalty collected from one defendant and distribute it just to that defendant’s victims. This differs from the approach taken in the Final Rule, which pools civil penalties from multiple cases for distribution to classes of eligible victims from all

cases, as the discussion of § 1075.103 in the Supplementary Information to the Final Rule explains in further detail.

The Bureau also seeks comment on how, under this alternative approach, it would determine the share of a civil penalty that a victim would receive. For example, victims could receive equal shares of the civil penalty collected for the violation that harmed them, or they could receive shares of the civil penalty in proportion to the amount of harm they suffered from the violation.

The proposed alternative approach might be easier to administer than the approach taken in the Final Rule, because the Fund Administrator would consider individual civil penalty amounts and individual classes of victims in isolation. The amount of each payment also could be easier to calculate if victims simply received equal shares of the civil penalty imposed for the violation or violations that harmed them. In addition, under this proposed alternative, payments could be made more quickly because there would be no reason to wait to disburse funds after they are deposited in the Fund. Whenever a defendant paid a civil penalty into the Fund, the Fund Administrator could immediately allocate the amount of that penalty for distribution to that defendant's victims.

On the other hand, this approach could undercompensate some victims while overcompensating others. Victims of defendants with limited financial resources, or victims of defendants who for other reasons do not or cannot pay full redress or large penalties, likely would not receive full compensation for their harm under this approach. At the same time, victims of defendants who paid full redress would likely receive windfall payments.

The Bureau is also considering, and seeks comment on, two additional alternatives that would mitigate one or both of these negative consequences. First, the Bureau could pay victims

a share of the civil penalties collected for the particular violations that harmed them, but only to the extent that those payments do not exceed victims' uncompensated harm. This could be somewhat more difficult to administer than the first proposed alternative because it would require calculation of victims' uncompensated harm, but it would avoid overcompensating victims. It could also lead to under-compensation of some victims, however. Under this approach, a victim could not receive any more than a share of the civil penalty paid for the violation that harmed the victim. If a victim's share of the civil penalty paid for the violation that harmed the victim was not enough to provide full compensation for the victim's uncompensated harm, the victim would not be eligible for additional payments. In cases where the victims of a violation for which a civil penalty was imposed had already received full compensation, the civil penalty amount would not be used for payments to victims of other violations, but would instead be used for consumer education and financial literacy programs.

A second additional alternative would avoid overcompensating victims while also giving all victims the opportunity to receive full compensation for their uncompensated harm. Under this second alternative, the Bureau could first pay victims their share of the civil penalty collected for the violation that harmed them, up to the amount of their uncompensated harm. Remaining amounts of that individual civil penalty could then go into a common pool of funds available for distribution to all eligible victims who have not yet received compensation for their uncompensated harm. Those victims could then receive additional amounts from that common pool up to the amount of their uncompensated harm. This approach, like the approach taken in the Final Rule, would neither under- nor over-compensate victims. Unlike the approach taken in the Final Rule, however, this alternative would ensure that funds from a particular defendant's

civil penalty would not be used to pay victims of other defendants if the victims of that defendant had not yet received full compensation.

#### 104(b) Victims' Uncompensated Harm

As noted above and explained in further detail in the Supplementary Information to the Final Rule, § 1075.104(a) of the Final Rule provides that the Bureau will use funds in the Civil Penalty Fund for payments to compensate eligible victims' uncompensated harm. In addition, some of the alternatives to that approach discussed above would also base the amount of Civil Penalty Fund payments in part on the amount of victims' uncompensated harm. Section 1075.104(b) of the Final Rule describes what constitutes victims' uncompensated harm. The Bureau seeks comment on this provision, as well as suggestions for modifications or alternatives.

Under § 1075.104(b) of the Final Rule, a victim's uncompensated harm is the victim's compensable harm, as described in § 1075.104(c), minus any compensation for that harm that the victim has received or is reasonably expected to receive. As the Supplementary Information to the Final Rule explains in greater detail, the Final Rule describes three categories of compensation that a victim "has received or is reasonably expected to receive" for purposes of this provision. The Bureau specifically requests comment on what categories of compensation a victim should be deemed "reasonably expected to receive."

In particular, the Bureau invites comment on when victims should be deemed "reasonably expected to receive" redress that does not arise from a Bureau enforcement action. Under the Final Rule, a victim is reasonably expected to receive such "other" redress only if a party has paid that redress to an intermediary for distribution to the victim. As the Supplementary Information to the Final Rule explains, this does not include amounts that a party has been ordered to pay but has not yet paid because the Bureau may not know whether a party is

actually likely to pay redress ordered in a case to which the Bureau is not a party. As an alternative, the Bureau could instead deem victims reasonably likely to receive redress ordered in a final judgment in a non-Bureau action unless and until there is some indication that the defendant will not pay, such as if the defendant fails to pay by the time ordered. This approach could decrease the chances that a Civil Penalty Fund payment would duplicate compensation that a victim receives in the future as a result of other litigation.

#### 104(c) Victims' Compensable Harm

As explained above, under the Final Rule, the Bureau will use funds in the Civil Penalty Fund for payments to compensate victims for their compensable harm, minus any compensation for that harm that they have received or are reasonably expected to receive. Section 1075.104(c) of the Final Rule describes the amount of victims' compensable harm for purposes of this rule. The Bureau seeks comment on this provision, as well as suggestions for modifications or alternatives.

As explained further in the Supplementary Information to the Final Rule, the Bureau interprets section 1017(d)(2) of the Dodd-Frank Act as directing the Bureau to make payments to victims only to the extent that such payments are practicable. For payments to be practicable, the Bureau must be able to determine the amount of the payments that the victims may receive—which, under the Final Rule, depends on the amount of the victims' harm—using means that are reasonable in the context of the Civil Penalty Fund. Section 1075.104(c) accordingly defines “compensable harm” to include only those amounts of harm that are practicable to calculate given the nature of the Civil Penalty Fund and the likely volume of payments. In particular, § 1075.104(c) of the Final Rule reflects the Bureau's understanding that it will be practicable to calculate only those harm amounts that can be determined by applying objective standards on a

classwide basis. Section 1075.104(c) implements this understanding by describing specific measures by which harm may practicably be ascertained and by establishing procedures that the Fund Administrator will follow to determine compensable harm in each of several categories of cases.

Under the Final Rule, the amount of a victim's compensable harm will be based on the objective terms of a final order to the extent possible. Specifically, under the Final Rule, the Fund Administrator will refer to the terms of a final order to determine victims' compensable harm in three categories of cases. First, if a final order in a Bureau enforcement action ordered redress for a class of victims, the compensable harm of each victim in that class is equal to the victim's share of the total redress ordered, including any amounts that have been suspended or waived. Second, if the Bureau sought redress for a class of victims but a court or administrative tribunal denied that request for redress in the final order, the victims in that class have no compensable harm. Third, if the final order in a Bureau enforcement action neither ordered nor denied redress to victims but did specify the amount of their harm, including by prescribing a formula for calculating that harm, each victim's compensable harm is equal to that victim's share of the amount specified.

The Final Rule also describes how the Fund Administrator will determine the compensable harm of victims in classes for which the final order does not order redress, deny a request for redress, or specify the amount of harm—and thus for which it is not possible to base the amount of compensable harm on the terms of the final order alone. Under § 1075.104(c)(2)(iii) of the Final Rule, the compensable harm of victims of such classes is equal to their out-of-pocket losses that resulted from the violation or violations for which a civil penalty was imposed, except to the extent such losses are impracticable to determine. As



explained further in the Supplementary Information to the Final Rule, this measure of harm is what would be “practicable” for the Bureau to determine in the context of disbursing funds from the Civil Penalty Fund. In particular, out-of-pocket losses generally may be measured by applying objective standards on a classwide basis, and evidence of such losses generally will be straightforward to obtain and assess without a need to make complex or subjective judgments.

The Bureau specifically requests comment on whether the Final Rule appropriately reflects what scope of harm would be practicable to calculate in cases in which the amount of that harm cannot be based on the terms of the final order alone. The Bureau also seeks suggestions for alternative ways in which the Fund Administrator could practicably determine victims’ compensable harm in such cases, including suggestions for alternative measures of harm that may be practicable to calculate. The Bureau specifically requests comment on whether, rather than specifying a consistent measure of harm that will be practicable to determine in most cases, it should permit the Fund Administrator to decide on a case-by-case basis what measure of harm would be practicable to calculate given the circumstances of the particular case. The Bureau also seeks comment on what factors could make harm amounts practicable or impracticable to calculate. For example, harm could be impracticable to calculate if the relevant evidence is hard to find or gather. It may also be impracticable to calculate harm in the context of the Civil Penalty Fund if the harm or the relevant evidence requires subjective evaluation. In some cases, calculating harm could be impracticable if doing so would involve complex calculations, or if developing a formula for calculating the amount of harm would require substantial economic analysis.

*Section 1075.105 Allocating Funds from the Civil Penalty Fund—In General*

Section 1075.105 of the Final Rule establishes basic procedures that the Fund Administrator will follow when allocating funds in the Civil Penalty Fund to classes of victims and to consumer education and financial literacy programs. In particular, this section describes the schedule for making allocations and specifies what funds will be available for the allocations made on that schedule. The Bureau seeks comment on this section and suggestions for modifications or alternatives.

#### 105(a) In General

Section 1075.105(a) of the Final Rule provides that the Fund Administrator will allocate the funds specified in § 1075.105(c) to classes of victims and, as appropriate, to consumer education and financial literacy programs according to the schedule described in § 1075.105(b) and the guidelines set forth in §§ 1075.106 and 1075.107.

#### 105(b) Schedule for Making Allocations

Section 1075.105(b)(1) of the Final Rule directs the Fund Administrator to establish and publish on [www.consumerfinance.gov](http://www.consumerfinance.gov) a schedule of six-month periods. As explained in greater detail in the Supplementary Information to the Final Rule, that schedule will govern when the Fund Administrator will allocate funds from the Civil Penalty Fund, what amounts will be available for allocation, and when classes of victims may be considered for allocations.

As the Supplementary Information to the Final Rule explains, the Bureau has chosen to make payments on a six-month schedule in part because it would be less fair to make payments on a continual basis, as funds are deposited and as classes of victims with uncompensated harm arise. If a class happened to have uncompensated harm for the first time on a day shortly after the Bureau had just allocated a substantial portion of the Civil Penalty Fund to some other class, victims in the new class would receive relatively small payments. Conversely, if a large amount

were deposited into the Civil Penalty Fund, a class of victims that next had uncompensated harm would be relatively likely to receive full compensation for that harm. In both cases, coincidental timing would dictate the results. Allocating funds on a six-month schedule, by contrast, will give equal treatment to all classes from a given six-month period. The Bureau seeks comment on the proposed schedule for making allocations and suggestions for modifications or alternatives. The Bureau specifically requests comment on whether the periods under the schedule should be longer or shorter than six months, and on whether a different method of timing allocations would be appropriate.

#### 105(c) Funds Available for Allocation

As the Supplementary Information to the Final Rule explains in greater detail, § 1075.105(c) of the Final Rule provides that the funds available for allocation following the end of a six-month period are those funds that were in the Civil Penalty Fund on the end date of that six-month period, minus (1) any funds already allocated, (2) any funds that the Fund Administrator determines are necessary for authorized administrative expenses, and (3) any funds collected pursuant to an order that has not yet become a final order. The Bureau seeks comment on this provision and suggestions for modifications or alternatives.

#### Section 1075.106 Allocating Funds to Classes of Victims

Section 1075.106 of the Final Rule describes how funds will be allocated to classes of victims and establishes which victim classes will get priority and how much money the Fund Administrator will allocate to victim classes when there are not enough funds available to provide full compensation to all eligible victims who have uncompensated harm. The Bureau requests comment on this provision and suggestions for modifications or alternatives.

#### 106(a) Allocations When There Are Sufficient Funds Available to Compensate All Uncompensated Harm

As the Supplementary Information to the Final Rule explains in greater detail, § 1075.106(a) of the Final Rule provides that, if the funds available under § 1075.105(c) are sufficient, the Fund Administrator will allocate to each class of victims the amount necessary to compensate fully the uncompensated harm, determined under § 1075.104(b) as of the last day of the most recently concluded six-month period, of all victims in that class to whom it is practicable to make payments.

The Bureau requests comment on this procedure for allocating funds when the available funds are sufficient to compensate fully the uncompensated harm of all victims to whom it is practicable to make payments. The Bureau also requests suggestions for modifications or alternatives.

#### 106(b) Allocations When There Are Insufficient Funds Available to Compensate All Uncompensated Harm

Section 1075.106(b) of the Final Rule establishes the procedures that the Fund Administrator will follow when the funds available under § 1075.105(c) are not sufficient to provide full compensation as described by paragraph (a). This section groups classes of victims according to the six-month period in which the victims first had uncompensated harm as described in § 1075.104(b). Paragraph (b)(1) specifies how classes of victims will receive priority according to their respective six-month periods. Paragraph (b)(2) explains how the Fund Administrator will identify the six-month period to which a class of victims belongs.

The Bureau seeks comment on these procedures for allocating funds when the available funds are not sufficient to compensate fully the uncompensated harm of all victims to whom it is practicable to make payments, and suggestions for modifications or alternatives.

#### 106(b)(1) Priority to Classes of Victims From the Most Recent Six-Month Period

Under § 1075.106(b)(1) of the Final Rule, when there are insufficient funds available to provide all victims full compensation as described in paragraph (a), the Fund Administrator will prioritize allocations to classes of victims from the most recent six-month period. If funds remain after allocating to each class of victims from that six-month period the amount necessary to compensate fully the uncompensated harm, determined under § 1075.104(b) as of the last day of the most recently concluded six-month period, of all victims in that class to whom it is practicable to make payments, the Fund Administrator next will allocate funds to classes of victims from the preceding six-month period, and so forth until no funds remain. As the Supplementary Information to the Final Rule explains in greater detail, this process of allocating funds to classes of victims from one six-month period at a time will be more administratively efficient than allocating funds to all classes at once and will reduce the total administrative cost of distributing payments as well as the administrative cost per dollar distributed to victims.

The Bureau seeks comment on this provision and suggestions for alternatives or modifications. The Bureau also specifically seeks comment on several proposed alternatives or modifications.

*Alternatives to the method for prioritizing allocations.* First, the Bureau specifically seeks comment on several alternatives to the method that the Final Rule prescribes for prioritizing allocations. As one alternative, instead of prioritizing allocations to certain classes, the Bureau could attempt to allocate funds among all classes with uncompensated harm. That approach could distribute funds more evenly, but could result in significantly smaller individual payments.

As another alternative, instead of prioritizing allocations to classes of victims from more recent six-month periods, the Bureau could prioritize allocations to classes of victims from older

six-month periods. On the one hand, giving priority to classes of victims from more recent six-month periods ensures that funds go first to victims who have not yet had an opportunity to receive payment from the Civil Penalty Fund, and next to victims who have had only one previous opportunity, and so forth. In addition, the records on classes of victims from more recent periods may be more up-to-date than the records on classes from older periods, and distributing funds to those more recent classes might therefore be more successful and require less cost and effort. Prioritizing allocations to classes from those more recent periods thus may result in more funds reaching victims. On the other hand, giving priority instead to classes of victims from older six-month periods would enable funds to be distributed to the victims in those classes before records age further and it becomes more difficult and costly to make payments to those victims.

As yet another alternative, the Bureau could prioritize allocations based on factors other than the six-month period in which a class became eligible for allocations from the Civil Penalty Fund. For example, the Bureau could prioritize allocations to the classes in which individual victims have the greatest amount of uncompensated harm. Under such an approach, the Bureau could assign classes to tiers based on the average uncompensated harm of the victims in the class. For example, classes of victims with an average uncompensated harm of \$10,000 or more could be one tier; classes of victims with an average uncompensated harm of \$1,000 to \$9,999 could be another tier; and so forth. The Fund Administrator could then allocate funds first to the classes in the tier with the highest amount of average uncompensated harm, and then successively to each lower tier to the extent funds remain. This approach would ensure that victims with the largest amount of uncompensated harm would get priority. The Bureau seeks

comment on this possible approach, and any modifications or alternatives, and on what the dollar thresholds for the tiers of average uncompensated harm should be under such an approach.

Another way in which the Bureau could prioritize allocations based on factors other than a class's six-month period would be to leave it to the Fund Administrator's discretion how to allocate funds at times when insufficient funds are available to compensate fully the uncompensated harm of all victims. This approach would give the Fund Administrator flexibility to consider all relevant circumstances to decide how to allocate funds most equitably. The Bureau seeks comment on all of these possible alternatives for prioritizing allocations when the available funds are not sufficient to compensate fully the uncompensated harm of all victims to whom it is practicable to make payments.

*Modification to prescribe the amounts to be allocated.* Second, the Bureau also specifically seeks comment on whether it should modify § 1075.106(b) to provide more detail on the amounts to be allocated when the available funds are not sufficient to provide full compensation for the uncompensated harm of all victims to whom it is practicable to make payments. The Final Rule specifies that the Fund Administrator will allocate to each class of victims from a single six-month period the amount necessary to compensate fully the uncompensated harm, determined under § 1075.104(b) as of the last day of the most recently concluded six-month period, of all victims in that class to whom it is practicable to make payments before allocating funds to classes from an earlier six-month period. The Final Rule is silent, however, on how funds will be allocated if insufficient funds are available to provide such full compensation to all classes from a single six-month period.

The Bureau seeks comment on whether it should modify § 1075.106(b) to prescribe the amounts that the Fund Administrator will allocate in those circumstances. In particular, the rule

could direct the Fund Administrator to allocate funds to the classes of victims from a single six-month period in a manner designed to ensure, to the extent possible, that the victims in those classes to whom it is practicable to make payments will receive compensation, through redress and Civil Penalty Fund payments, for an equal percentage of their compensable harm, as described in § 1075.104(c). Consistent with the approach the Bureau takes generally in the Final Rule, that allocation would be based on the amount of each class’s uncompensated harm as of the last day of the most recently concluded six-month period.

This allocation method could also apply if the Bureau adopted an alternative way of prioritizing allocations—other than by six-month period—as discussed above. For example, if the Bureau instead assigned classes of victims to tiers based on the average amount of uncompensated harm of the victims in the class, and prioritized allocations based on those tiers, this proposed modification could prescribe the amounts that the Fund Administrator would allocate to classes of victims from a single such tier.

The following examples illustrate how this allocation method would work. First, suppose there were two classes of victims from the most recent six-month period, and there were not enough funds to compensate fully the uncompensated harm of all victims in both classes. Imagine that those classes had suffered the harm and had received the payments reflected in this table<sup>1</sup>:

	<b>Number of victims</b>	<b>Compensable harm per victim</b>	<b>Redress paid by defendant to each victim</b>	<b>Each victim's uncompensated harm</b>	<b>Total uncompensated harm of the class</b>	<b>% of compensable harm for which each victim has received</b>
--	--------------------------	------------------------------------	---	---	--	---

<sup>1</sup> This chart is provided solely for explanatory purposes. The numbers are hypothetical and are not based on any actual class of victims that is or may be eligible for payment from the Civil Penalty Fund.



						<b>compensation</b>
<b>Class 1</b>	40	\$250	\$125	\$125	\$5,000	50%
<b>Class 2</b>	25	\$400	\$0	\$400	\$10,000	0%

Under the proposed modification, the Fund Administrator would allocate amounts in the Fund in a way designed to equalize, to the extent possible, the percentage of compensable harm for which each victim would receive compensation. Thus, if there were \$7,500 in the Fund, the Fund Administrator would allocate \$1,250 to Class 1 and \$6,250 to Class 2, such that the following would result:

	<b>Number of victims</b>	<b>Compensable harm per victim</b>	<b>Redress paid by defendant to each victim</b>	<b>Amount allocated to the class from CPF</b>	<b>CPF payment to each victim</b>	<b>Total payments (redress + CPF) to each victim</b>	<b>% of compensable harm for which each victim will receive compensation</b>
<b>Class 1</b>	40	\$250	\$125	\$1,250	\$31.25	\$156.25	62.5%
<b>Class 2</b>	25	\$400	\$0	\$6,250	\$250	\$250.00	62.5%

In some circumstances, it will not be possible to equalize the percentage of compensable harm for which each victim receives compensation because one class of victims has already received compensation in the form of redress, and there are not enough funds in the Civil Penalty Fund to give comparable compensation to other victim classes. In these circumstances, the Fund Administrator would not—and, indeed, could not—actually achieve the goal of equalizing the percentage of compensable harm for which all victims receive compensation. Instead, under the proposed modification, the Fund Administrator would simply allocate funds in a way that

equalizes the level of compensation across classes only to the extent possible. Thus, for example, assume that in the above scenario, the defendant paid the victims in Class 1 \$200 each rather than \$125 each:

	<b>Number of victims</b>	<b>Compensable harm per victim</b>	<b>Redress paid by defendant to each victim</b>	<b>Each victim's uncompensated harm</b>	<b>Total uncompensated harm of the class</b>	<b>% of compensable harm that each victim has had compensated</b>
<b>Class 1</b>	40	\$250	\$200	\$50	\$2,000	80%
<b>Class 2</b>	25	\$400	\$0	\$400	\$10,000	0%

If there were \$7,500 in the Fund, under the proposed modification, the Fund Administrator would allocate it all to Class 2, such that the following would result:

	<b>Number of victims</b>	<b>Compensable harm per victim</b>	<b>Redress paid by defendant to each victim</b>	<b>Amount allocated to the class from CPF</b>	<b>CPF payment to each victim</b>	<b>Total payments (redress + CPF to each victim)</b>	<b>% of compensable harm that each victim will have compensated</b>
<b>Case 1</b>	40	\$250	\$200	\$0	\$0	\$200	80%
<b>Case 2</b>	25	\$400	\$0	\$7,500	\$300	\$300	75%

This modification would not authorize or require the Fund Administrator to recover any funds already distributed to victims or to reverse a previous allocation to a class of victims, even if a class of victims would receive or had already received compensation for a greater percentage of their harm than other classes.

The Bureau seeks comment on this possible modification, as well as suggestions for other ways in which to prescribe the amounts to be allocated when insufficient funds are available to provide full compensation for the uncompensated harm of all victims in classes from a single six-month period.

## 106(b)(2) Assigning Classes of Victims to a Six-Month Period

As noted above, § 1075.106(b)(1) of the Final Rule instruct the Fund Administrator to allocate funds among classes of victims from a single six-month period before allocating funds to classes of victims from an earlier six-month period. Paragraph (b)(2) of this section of the Final Rule explains that for purposes of paragraph (b), a class of victims is “from” the six-month period in which those victims first had uncompensated harm as described in § 1075.104(b). The provision further specifies how the Fund Administrator will determine when a class of victims first had such uncompensated harm.

First, if redress was ordered for a class of victims in a Bureau enforcement action but suspended or waived in whole or in part, the class of victims first had uncompensated harm, if it had any, on the date the suspension or waiver became effective. Second, if redress was ordered for a class of victims in a Bureau enforcement action, but the Chief Financial Officer determined that redress to be uncollectible in whole or in part, the class of victims first had uncompensated harm, if it had any, on the date the Chief Financial Officer made that determination. Finally, if no redress was ordered for a class of victims in a Bureau enforcement action, the class of victims first had uncompensated harm, if any, on the date the order imposing a civil penalty became a final order. As the Supplementary Information to the Final Rule explains in further detail, this provision corresponds to the definition of uncompensated harm in § 1075.104(b).

The Bureau seeks comment on this provision and suggestions for modifications or alternatives.

## 106(c) No Allocation to a Class of Victims If Making Payments Would Be Impracticable

Section 1075.106(c) of the Final Rule provides that, notwithstanding any other provision in this section, the Fund Administrator will not allocate funds available under § 1075.105(c) to a

class of victims if she determines that making payments to that class of victims would be impracticable. As noted above, the Bureau understands the Dodd-Frank Act to direct payments from the Civil Penalty Fund to victims only to the extent that such payments are practicable. In some cases, it may be impracticable to make payments to an entire class of victims; the Fund Administrator will not allocate funds to such a class.

The Bureau requests comment on this provision and suggestions for modifications or alternatives.

#### 106(d) Fund Administrator's Discretion

Section 1075.106(d)(1) of the Final Rule provides that, notwithstanding any provision in this part, the Fund Administrator, in her discretion, may depart from the procedures specified by this section, including by declining to make, or altering the amount of, any allocation provided for by this part. As the Supplementary Information to the Final Rule explains further, this provision is designed to give the Fund Administrator the flexibility to depart from the allocation procedures established by § 1075.106 when the circumstances warrant. Because the Bureau cannot anticipate all such circumstances, the Final Rule does not delineate particular circumstances in which the Fund Administrator may deviate from § 1075.106's allocation procedures, but rather leaves the decision to deviate to the Fund Administrator's discretion. Under the Final Rule, whenever the Fund Administrator exercises this discretion, she must provide the Civil Penalty Fund Governance Board a written explanation of the reasons for departing from the allocation procedures specified by this section.

The Final Rule makes clear that exercising this discretion cannot increase the funds available in a given time period for allocation to consumer education and financial literacy programs. Specifically, § 1075.106(d)(2) of the Final Rule provides that, if the Fund

Administrator, in allocating funds during a given time period described by § 1075.105(b)(2), exercises her discretion under paragraph (d)(1) of this section, she may allocate funds to consumer education and financial literacy programs under § 1075.107 during that time period only to the same extent she could have absent that exercise of discretion.

The Bureau seeks comment on this provision and suggestions for modifications or alternatives.

*Section 1075.107 Allocating Funds to Consumer Education and Financial Literacy Programs*

107(a)

Section 1075.107(a) of the Final Rule implements the second sentence of section 1017(d)(2) of the Dodd-Frank Act, which authorizes the Bureau to use funds in the Civil Penalty Fund for the purpose of consumer education and financial literacy programs to the extent that victims cannot be located or payments to victims are otherwise not practicable. In particular, § 1075.107(a) provides that, if funds available under § 1075.105(c) remain after the Fund Administrator allocates funds as described in § 1075.106(a), she may allocate the remaining funds for consumer education and financial literacy programs. An allocation under § 1075.106(a) provides full compensation for the uncompensated harm of all victims to whom it is practicable to make payments. Thus, any funds remaining after such an allocation are available for consumer education and financial literacy programs.

The Bureau seeks comment on this provision and suggestions for modifications or alternatives. The Bureau specifically requests comment on whether the provision should limit the amount of funds that the Fund Administrator may allocate to consumer education and financial literacy programs. In particular, the rule could instead authorize the Fund Administrator to allocate only some portion of remaining funds to such programs. Limiting the

Fund Administrator's authority to allocate remaining funds to consumer education and financial literacy programs could help ensure that, when funds remain after allocating funds to provide full compensation to all classes of victims to whom it is practicable to make payments, a balance will remain in the Fund for future victims. This would mitigate the risk that the Civil Penalty Fund would later lack sufficient funds to provide full compensation to classes of victims that become eligible for allocations in the future.

The Bureau also requests comment on what portion of remaining funds the Fund Administrator should be able to allocate to consumer education and financial literacy programs. One possible approach would be to authorize the Fund Administrator to allocate a certain percentage of remaining funds to consumer education and financial literacy programs. Another possible approach would be to require a specified amount to remain in the Fund and to authorize the Fund Administrator to allocate only the funds that exceed that particular "reserved" amount to consumer education and financial literacy programs. Yet another possible approach could cap the amount that the Fund Administrator may allocate to consumer education and financial literacy programs in any given period. Other alternatives could combine these approaches, for example, by authorizing the Fund Administrator to allocate a percentage of the funds that exceed the reserved amount to consumer education and financial literacy programs, but only up to a particular maximum amount. The Bureau also requests comment on what the appropriate percentage, reserved amount, and maximum amount would be under these possible approaches.

107(b)

Section 1075.107(b) clarifies that the Fund Administrator's authority to allocate funds for consumer education and financial literacy programs does not include the authority to allocate funds to particular consumer education or financial literacy programs or otherwise to select the

particular consumer education or financial literacy programs for which allocated funds will be used. Instead, the Fund Administrator's authority is limited to determining the amount that is allocated for expenditure on those kinds of programs. As the Supplementary Information to the Final Rule notes, the Bureau has developed, and posted at [http://files.consumerfinance.gov/f/201207\\_cfpb\\_civil\\_penalty\\_fund\\_criteria.pdf](http://files.consumerfinance.gov/f/201207_cfpb_civil_penalty_fund_criteria.pdf), its criteria for selecting these programs. These criteria are beyond the scope of this rule. The Bureau is not proposing changes to this section.

#### *Section 1075.108 Distributing Payments to Victims*

As the Supplementary Information to the Final Rule explains, after the Fund Administrator allocates funds to a class of victims, those funds will be distributed to the individual victims in that class. Section 1075.108 of the Final Rule describes the process for distributing payments to victims.

##### 108(a) Designation of a Payments Administrator

Section 1075.108(a) of the Final Rule provides that, upon allocating funds to a class of victims under § 1075.106, the Fund Administrator will designate a payments administrator who will be responsible for distributing payments to the victims in that class. The payments administrator may be any person, including a Bureau employee or contractor. The Bureau is not proposing changes to this paragraph.

##### 108(b) Distribution Plan

Section 1075.108(b) of the Final Rule requires a payments administrator to submit to the Fund Administrator a proposed plan for distributing the funds that have been allocated to a class of victims. The Fund Administrator will then approve, approve with modifications, or disapprove the proposed distribution plan. If the Fund Administrator disapproves a proposed

plan, the payments administrator must submit a new proposed plan. The Bureau is not proposing changes to this paragraph.

#### 108(c) Contents of Plan

Section 1075.108(c) of the Final Rule indicates that the Fund Administrator will instruct the payments administrator to prepare a distribution plan and sets forth several elements that the Fund Administrator may require a distribution plan to include. The Supplementary Information to the Final Rule, and the Final Rule itself, provide further detail on the elements that the Fund Administrator may require a distribution plan to include. The Bureau requests comment on the contents of distribution plans and suggestions for modifications or alternatives.

#### 108(d) Distribution of Payments

Section 1075.108(d) of the Final Rule provides that the payments administrator will make payments to victims in a class, except to the extent such payments are impracticable, in accordance with the distribution plan approved under paragraph (b) of this section and subject to the Fund Administrator's supervision. The Bureau requests comment on this provision and suggestions for modifications or alternatives.

#### 108(e) Disposition of Funds Remaining After Attempted Distribution to a Class of Victims

Section 1075.108(e) of the Final Rule addresses the circumstance in which some of the funds allocated to a class of victims remain undistributed after the payments administrator has made, or attempted to make, payments to the victims in that class. Funds might remain if the payments administrator cannot make payments to all victims in a class—because some victims cannot be located, because some victims do not redeem their payments, or because of other similar circumstances. To the extent practicable, the payments administrator will distribute the remaining funds to victims in that class up to the amount of their remaining uncompensated harm



as described in § 1075.104(b). As the Supplementary Information to the Final Rule explains, distributing remaining funds among victims in that class will often be the most efficient use of remaining funds because the payments administrator will have up-to-date information on the victims to whom it successfully made payments, and a second distribution to those victims likely will also be successful. Then, if funds remain after providing full compensation for the uncompensated harm of such victims, the remaining funds will be returned to the Civil Penalty Fund. Those funds will then be available for future allocation. The Supplementary Information to the Final Rule provides illustrative examples of how remaining funds would be distributed under this provision of the Final Rule.

The Bureau requests comment on this provision and any suggestions for modifications or alternatives.

The Bureau also specifically seeks comment on whether, instead of distributing remaining funds among victims in the class who have not yet received full compensation, it should return remaining funds to the Civil Penalty Fund for future allocation. Although this approach may not be as efficient as the approach taken in the Final Rule, it could ensure that victims receive the level of compensation that an allocation was designed to give them. Under this alternative, the happenstance of how many victims in a class could not practicably be paid would not affect the amount that other victims in that class would receive.

#### *Section 1075.109 When Payments to Victims Are Impracticable*

As noted above, pursuant §§ 1075.106 and 1075.108 of the Final Rule, the Bureau will not make payments to individual victims when doing so would be impracticable and will not allocate funds to a class of victims to the extent making payments to that class would be

impracticable. Section § 1075.109 of the Final Rule identifies circumstances in which payments to victims will be deemed not practicable.

For reasons explained in the Supplementary Information to the Final Rule, whether payments to victims are practicable depends in part on the costs of those payments, in comparison to the size of the payments. Section 1075.109 of the Final Rule contains two paragraphs that implement that understanding of practicability by identifying circumstances in which the costs of making payments will likely be so great, relative to the size of the payments, that making those payments would be impracticable. The first paragraph discusses payments to individual victims, and the second relates to payments to entire classes of victims.

The Bureau seeks comment on the interpretation of “practicable” embodied in this section and suggestions for modifications or alternatives. It also seeks comment on the circumstances in which payments to individual victims or a class of victims will be impracticable under this provision, as well as suggestions for modifications or alternatives.

#### *Section 1075.110 Reporting Requirements*

Section 1075.110 requires the Fund Administrator to issue regular reports, on at least an annual basis, that describe how funds in the Civil Penalty Fund have been allocated, the basis for those allocations, and how funds that have been allocated to classes of victims have been distributed. The section further provides that these reports will be made available to the public on [www.consumerfinance.gov](http://www.consumerfinance.gov).

The Bureau requests comment on the proposed requirement for the Fund Administrator to issue reports on the Civil Penalty Fund and on subjects to be addressed in the report, as well as suggestions for modifications or alternatives to this provision.

#### **V. Request for Comment**

The Bureau invites comment on all aspects of the Final Rule, this notice of proposed rulemaking, and the specific issues upon which comment is solicited elsewhere herein, including on any appropriate modifications or exceptions to the Final Rule.

#### **V. Section 1022(b)(2) of the Dodd-Frank Act**

In developing the proposed rule, the Bureau is considering potential benefits, costs, and impacts, and has consulted or offered to consult with the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the National Credit Union Administration, and the Federal Trade Commission, including with regard to consistency with any prudential, market, or systemic objectives administered by those agencies.<sup>2</sup> The analysis considers the benefits, costs, and impacts of the alternatives discussed in the proposal against a baseline that includes the Final Rule; that is, the analysis evaluates the benefits, costs, and impacts of the alternatives discussed as compared to the status quo where the provisions of the Final Rule remain in effect.<sup>3</sup>

This notice of proposed rulemaking seeks comment on several changes or amendments to the Final Rule's provisions that the Bureau is considering: the category of victims eligible for payments; the amounts of the payments that victims may receive, including the method for

---

<sup>2</sup> Section 1022(b)(2)(A) of the Dodd-Frank Act, 12 U.S.C. 55212(b)(2), directs the Bureau, when prescribing a rule under the Federal consumer financial laws, to consider the potential benefits and costs of regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on insured depository institutions and credit unions with \$10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act; and the impact on consumers in rural areas. Section 1022(b)(2)(B) of the Dodd-Frank Act directs the Bureau to consult with appropriate prudential regulators or other Federal agencies regarding consistency with prudential, market, or systemic objectives that those agencies administer. The manner and extent to which these provisions apply to a rulemaking of this kind that does not establish standards of conduct is unclear. Nevertheless, to inform this rulemaking more fully, the Bureau performed the described analyses and consultations.

<sup>3</sup> The Bureau has discretion in any rulemaking to choose an appropriate scope of analysis with respect to potential benefits and costs and the appropriate baseline.

determining compensable harm; the schedule for allocating funds for payments to victims and for consumer education and financial literacy programs; the procedures for allocating funds to classes of victims; the allocations to consumer education and financial literacy programs; and the procedures for disposing of certain undistributed funds.

The alternatives discussed in this proposal would not impose any obligations on consumers or covered persons. Nor would the considered alternatives have any impact on consumers' access to consumer financial products or services. Rather, the alternatives discussed would potentially affect the total amount of money in the Civil Penalty Fund that is available for victim payments or for consumer education and financial literacy programs, as well as the allocation of funds between various groups of consumers or between payments to victims and funding for consumer education and financial literacy.

Those alternatives discussed in the proposal that would alter the cost of administering the Fund, either directly or indirectly, could potentially alter the total amount available for payments to victims and for consumer education and financial literacy programs. For example, under the Final Rule, victims' compensable harm is, in some cases, equal to their out-of-pocket losses. This notice seeks comment on whether victims' compensable harm in those circumstances should instead be whatever amount of harm the Fund Administrator concludes is practicable to determine given the facts of the particular case. Such discretion regarding the method of determination could make it more (or less) costly to administer victim payments, and with expenses paid from the Fund, could leave less (or more) money for other payments. Similarly, this notice seeks comment on whether the Bureau should pay victims a share of the civil penalties collected for the particular violations that harmed them, rather than the amount of their uncompensated harm. Calculating the amounts that victims would receive under that alternative

could be less costly than calculating the amounts that victims will receive under the Final Rule, and accordingly could reduce the overall cost of administering the Fund. As a final example, under the Final Rule, when there are not enough funds available to provide full compensation to all eligible victims who have uncompensated harm, the Fund Administrator will prioritize allocations to classes of victims from the most recent six-month period. If the Bureau instead allocated funds among all classes of eligible victims, or prioritized allocations to classes of victims from older six-month periods, that could increase the costs of administering the fund and thereby impact the amounts available for payments to victims or for funding for consumer education or financial literacy.

Rather than impact overall distributions from the Fund, most of the alternatives discussed in this proposal would alter the allocation of funds among various groups of consumers, either as payments to victims or as funding for consumer education or financial literacy programs. In the absence of specific cases to analyze (since by definition, future cases have yet to be administered), this analysis cannot assess precise changes to the allocation: instead, it assesses broader categories of changes. For example, amendments that would allow the Bureau to make payments to a broader category of victims, (*e.g.*, victims of types of “activities” for which civil penalties have been imposed under the Federal consumer financial laws, even if no enforcement action identified those specific “activities” as violations and imposed civil penalties for them) would possibly transfer some funds among consumers: specifically, from victims in cases where to the Bureau has imposed civil penalties to consumers in this broader category of victims.

Amendments that would alter the amounts of the payments that any group of victims would receive could leave other victims with more or less compensation from the Fund, assuming the overall level of money in the Fund is unchanged. For example, were the Bureau to

alter the rule to pay victims a share of the civil penalties collected for the particular violations that harmed them, some consumers would receive more or less money than under the current rule. Similarly, any changes to the allocation procedures established for when sufficient funds are not available to compensate fully the uncompensated harm of all victims to whom it is practicable to make payments could alter the total payments received by various consumers. As a final example, any changes that limit the amount of funds that the Fund Administrator may allocate to consumer education and financial literacy programs would shift potential benefits from consumers who benefit from these programs to other consumers.

The revisions to the Final Rule discussed in this rule would not have a unique impact on rural consumers. Since the amendments would not have any impact on covered persons, they also have no impact on insured depository institutions or insured credit unions with less than \$10 billion in assets as described in section 1026(a) of the Dodd-Frank Act.

## **VI. Regulatory Requirements**

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-profit organizations. The RFA defines a “small business” as a business that meets the size standard developed by the Small Business Administration pursuant to the Small Business Act.<sup>4</sup>

The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a

---

<sup>4</sup> 5 U.S.C. 601(3). The Bureau may establish an alternative definition after consultation with the Small Business Administration and an opportunity for public comment.

significant economic impact on a substantial number of small entities.<sup>5</sup> The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.<sup>6</sup>

The undersigned certifies that this proposed rule would not have a significant impact on a substantial number of small entities. The Final Rule and proposed alternatives set forth only what Civil Penalty Fund payments the Bureau will make to victims and the procedures for allocating funds for such payments and for consumer education and financial literacy programs. The rule would not impose any substantive requirements on any small entities.

## **VII. Paperwork Reduction Act**

The Bureau has determined that neither the Final Rule nor any of the alternatives proposed in this notice of proposed rulemaking imposes any new recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would constitute collections of information requiring approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Comments on this determination may be submitted to the Bureau as instructed in the “ADDRESSES” section of this notice and to the attention of the Paperwork Reduction Act Officer.

### **List of Subjects in 12 CFR Part 1075**

Administrative practice and procedure, Authority delegations, Consumer Financial Civil Penalty Fund, Consumer protection, Organization and functions.

---

<sup>5</sup> 5 U.S.C. 603–605.

<sup>6</sup> 5 U.S.C. 609.

[THIS SIGNATURE PAGE PERTAINS TO THE PROPOSED RULE TITLED  
“CONSUMER FINANCIAL CIVIL PENALTY FUND RULE”]

Dated: April 26, 2013.



---

Richard Cordray,

*Director, Bureau of Consumer Financial Protection.*