

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part 1026

[Docket No. CFPB-2023-0010]

RIN 3170-AB15

Credit Card Penalty Fees (Regulation Z)

AGENCY: Consumer Financial Protection Bureau.

ACTION: Proposed rule with request for public comment.

SUMMARY: The Consumer Financial Protection Bureau (Bureau) proposes to amend Regulation Z, which implements the Truth in Lending Act (TILA), to better ensure that the late fees charged on credit card accounts are “reasonable and proportional” to the late payment as required under TILA. The proposal would adjust the safe harbor dollar amount for late fees to \$8 and eliminate a higher safe harbor dollar amount for late fees for subsequent violations of the same type; provide that the current provision that provides for annual inflation adjustments for the safe harbor dollar amounts would not apply to the late fee safe harbor amount; and provide that late fee amounts must not exceed 25 percent of the required payment.

DATES: Comments should be received on or before May 3, 2023.

ADDRESSES: You may submit comments, identified by Docket No. CFPB-2023-0010 or RIN 3170-AB15, by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments.

• *Email:* 2023-NPRM-CreditCardLateFees@cfpb.gov. Include Docket No. CFPB-2023- 0010 or RIN 3170-AB15 in the subject line of the message.

• *Mail/Hand Delivery/Courier:* Comment Intake—2023 NPRM Credit Card Late Fees, c/o Legal Division Docket Manager, Consumer Financial Protection Bureau, 1700 G Street, NW, Washington, DC 20552. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically.

Instructions: The Bureau encourages the early submission of comments. All submissions should include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. In general, comments received will be posted without change to <https://www.regulations.gov>. All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Adrien Fernandez, Counsel, Krista Ayoub and Steve Wrone, Senior Counsels, Office of Regulations, at 202-435-7700. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov.

SUPPLEMENTARY INFORMATION:

I. Summary of the Proposed Rule

The Bureau proposes to amend provisions in § 1026.52(b) and its accompanying commentary as they relate to credit card late fees.¹ Currently, under § 1026.52(b)(1), a card issuer must not impose a fee for violating the terms or other requirements of a credit card account under an open-end consumer credit plan, such as a late payment, exceeding the credit limit, or returned payments, unless the issuer has determined that the dollar amount of the fee represents a reasonable proportion of the total costs incurred by the issuer for that type of violation as set forth in § 1026.52(b)(1)(i) or complies with the safe harbor provisions set forth in § 1026.52(b)(1)(ii). Section 1026.52(b)(1)(ii) currently sets forth a safe harbor of \$30 generally for penalty fees, except that it sets forth a safe harbor of \$41 for each subsequent violation of the same type that occurs during the same billing cycle or in one of the next six billing cycles.² The Bureau is concerned that (1) the safe harbor dollar amounts for late fees currently set forth in § 1026.52(b)(1)(ii) are not reasonable and proportional to the omission or violation to which the fee relates; (2) the

¹ When amending commentary, the Office of the Federal Register (OFR) requires reprinting of certain subsections being amended in their entirety rather than providing more targeted amendatory instructions. The sections of regulatory text and commentary included in this document show the language of those sections if the Bureau adopts its changes as proposed. In addition, the Bureau is releasing an unofficial, informal redline to assist industry and other stakeholders in reviewing the changes that it proposes to make to the regulatory text and commentary of Regulation Z. This redline can be found on the Bureau's website, https://files.consumerfinance.gov/f/documents/cfpb_2023-credit-card-late-fees-proposed-rule_unofficial-redline_2023-01.pdf. If any conflicts exist between the redline and the text of Regulation Z, its commentary, or this proposed rule, the documents published in the *Federal Register* are the controlling documents.

² Although the safe harbors discussed above apply to charge card accounts, § 1026.52(b)(1)(ii) provides an additional safe harbor when a charge card account becomes seriously delinquent. Specifically, § 1026.52(b)(1)(ii)(C) provides that, when a card issuer has not received the required payment for two or more consecutive billing cycles on a charge card account that requires payment of outstanding balances in full at the end of each billing cycle, it may impose a late payment fee that does not exceed 3 percent of the delinquent balance.

current higher safe harbor threshold for late fees for subsequent violations of the same type in the same billing cycle or in one of the next six billing cycles is higher than is justified based on consumer conduct and to deter future violations and, indeed, a late fee that is too high could interfere with the consumers' ability to make future payments on the account; and (3) additional restrictions on late fees may be needed to ensure that late fees are reasonable and proportional. Because late fees are by far the most prevalent penalty fees charged by card issuers and the Bureau's current data primarily relates to late fees, the Bureau's proposed changes to the restrictions in § 1026.52(b) are limited to late fees at this time, although the Bureau seeks comments on whether the proposed amendments should apply to other penalty fees.

The proposal would amend § 1026.52(b) and its accompanying commentary to help ensure that late fees are reasonable and proportional. First, the proposal would amend § 1026.52(b)(1)(ii) to lower the safe harbor dollar amount for late fees to \$8 and to no longer apply to late fees a higher safe harbor dollar amount for subsequent violations of the same type that occur during the same billing cycle or in one of the next six billing cycles.³ Second, the proposal would provide that the current provision in § 1026.52(b)(1)(ii)(D) that provides for annual inflation adjustments for the safe harbor dollar amounts would not apply to the safe harbor amount for late fees. Third, the proposal would amend § 1026.52(b)(2)(i)(A) to provide that late fee amounts must not exceed 25 percent of the required payment; currently, late fee amounts must not exceed 100 percent. The proposal also would amend comments 7(b)(11)-4, 52(a)(1)-1.i and iv,

³ The proposal would not amend the safe harbor set forth in § 1026.52(b)(1)(ii)(C) applicable to charge card accounts.

and 60(a)(2)-5.ii to revise current examples of late fee amounts to be consistent with the proposed \$8 safe harbor late fee amount discussed above. The Bureau also solicits comment on whether card issuers should be prohibited from imposing late fees on consumers that make the required payment within 15 calendar days following the due date. In addition, the Bureau seeks comment on whether, as a condition of using the safe harbor for late fees, it may be appropriate to require card issuers to offer automatic payment options (such as for the minimum payment amount), or to provide notification of the payment due date within a certain number of days prior to the due date, or both.

The Bureau proposes one clarification that would apply to penalty fees generally. Specifically, the proposal would amend comment 52(b)(1)(i)-2.i to clarify that costs for purposes of the cost analysis provisions in § 1026.52(b)(1)(i) for determining penalty fee amounts do not include any collection costs that are incurred after an account is charged off pursuant to loan loss provisions. In addition, the Bureau solicits comment on several issues related to penalty fees generally. First, the Bureau solicits comment on whether the same or similar changes described above should be applied to other penalty fees, such as over-the-limit fees, returned-payment fees, and declined access check fees, or in the alternative, whether the Bureau should finalize the proposed safe harbor for late fees and eliminate the safe harbors for other penalty fees. Second, the Bureau solicits comment on whether instead of revising the safe harbor provisions set forth in § 1026.52(b)(1)(ii) as they apply to late fees as discussed above, the Bureau should instead eliminate the safe harbor provisions in § 1026.52(b)(1)(ii) for late fees or should instead eliminate the safe harbor for all penalty fees, including late fees, over-the-limit fees, returned-payment fees, and declined access check fees. If the safe harbor provisions were eliminated, card

issuers would need to use the cost analysis provisions set forth in § 1026.52(b)(1)(i) to determine the amount of the penalty fees (subject to the limitations in § 1026.52(b)(2)). The Bureau also solicits comment on whether, in that event, the cost analysis provisions would need to be amended and, if so, how.

II. Background

A. The CARD Act

The Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) was signed into law on May 22, 2009.⁴ The CARD Act primarily amended TILA⁵ and instituted new substantive and disclosure requirements to establish fair and transparent practices for open-end consumer credit plans. The CARD Act added TILA section 149, which provides, among other things, that the amount of any penalty fee with respect to a credit card account under an open-end consumer credit plan in connection with any omission with respect to, or violation of, the cardholder agreement, including any late payment fee or any other penalty fee or charge, must be “reasonable and proportional” to such omission or violation.⁶

At the time of its passage, the CARD Act required the Board of Governors of the Federal Reserve System (Board) to issue rules establishing standards for assessing the reasonableness and proportionality of such penalty fees.⁷ In issuing these rules, the CARD Act required the Board to consider (1) the cost incurred by the creditor from an

⁴ Pub. L. 111–24, 123 Stat. 1734 (2009).

⁵ 15 U.S.C. 1601 *et seq.*

⁶ CARD Act section 102, 123 Stat. 1740 (15 U.S.C. 1665d(a)).

⁷ CARD Act section 102, 123 Stat. 1740 (15 U.S.C. 1665d(b)).

omission or violation; (2) the deterrence of omissions or violations by the cardholder; (3) the conduct of the cardholder; and (4) such other factors deemed necessary or appropriate by the Board.⁸ The CARD Act authorized the Board to establish different standards for different types of fees and charges, as appropriate.⁹ The CARD Act also granted the Board discretion to provide an amount for any penalty fee or charge that is presumed to be reasonable and proportional to the omission or violation to which the fee or charge relates.¹⁰ As discussed in more detail below, the authority to implement TILA, including TILA section 149, transferred from the Board to the Bureau in 2011.

B. The Board's Implementing Rule

On June 29, 2010, the Board issued a final rule implementing new TILA section 149 in its Regulation Z, 12 CFR 226.52(b) (2010 Final Rule).¹¹ The Board's Regulation Z, § 226.52(b) provided that a card issuer must not impose a fee for violating the terms or other requirements of a credit card account, such as a late payment, exceeding the credit limit, or returned payments, unless the issuer has determined that the dollar amount of the fee represents a reasonable proportion of the total costs incurred by the issuer for that type of violation as set forth in § 226.52(b)(1)(i) or complies with the safe harbor provisions set forth in § 226.52(b)(1)(ii).¹² The Board set the safe harbor amounts in § 226.52(b)(1)(ii) at \$25 generally for penalty fees, except that it set forth a safe harbor of \$35 for each subsequent violation of the same type that occurs during the same billing

⁸ CARD Act section 102, 123 Stat. 1740 (15 U.S.C. 1665d(e)).

⁹ CARD Act section 102, 123 Stat. 1740 (15 U.S.C. (1665d(d)).

¹⁰ CARD Act section 102, 123 Stat. 1740 (15 U.S.C. (1665d(e)).

¹¹ 75 FR 37526 (June 29, 2010).

¹² 12 CFR 226.52(b)(1).

cycle or in one of the next six billing cycles.¹³ Although the safe harbors discussed above applied to charge card accounts, the Board's Regulation Z, § 226.52(b)(1)(ii) also provided an additional safe harbor when a charge card account becomes seriously delinquent. Specifically, § 226.52(b)(1)(ii)(C) provided that, when a card issuer has not received the required payment for two or more consecutive billing cycles on a charge card account that requires payment of outstanding balances in full at the end of each billing cycle, it may impose a late payment fee that does not exceed 3 percent of the delinquent balance.¹⁴ The Board's Regulation Z, § 226.52(b)(1)(ii)(D) provided that the safe harbor dollar amounts would be adjusted annually to the extent that changes in the Consumer Price Index (CPI) would result in an increase or decrease of \$1.¹⁵

The Board's Regulation Z, § 226.52(b)(2) also contained other restrictions on card issuers for imposing penalty fees. Specifically, § 226.52(b)(2)(i) prohibited issuers from imposing penalty fees that exceed the dollar amount associated with the violation.¹⁶ In addition, § 226.52(b)(2)(ii) prohibited issuers from imposing multiple penalty fees based on a single event or transaction.¹⁷

C. Transfer of Authority for TILA to the Bureau and the Bureau's Rule

The Board's 2010 Final Rule implementing TILA section 149 took effect on August 22, 2010.¹⁸ Nearly one year later, on July 21, 2011, the Board's rulemaking

¹³ 12 CFR 226.52(b)(1)(ii)(A) and (B).

¹⁴ 12 CFR 226.52(b)(1)(ii)(C).

¹⁵ 12 CFR 226.52(b)(1)(ii)(D).

¹⁶ 12 CFR 226.52(b)(2)(i).

¹⁷ 12 CFR 226.52(b)(2)(ii).

¹⁸ 75 FR 37526, 37526 (June 29, 2010).

authority to implement the provisions of TILA, including TILA section 149, transferred to the Bureau pursuant to sections 1061 and 1100A of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).¹⁹

On December 22, 2011, the Bureau issued an interim final rule issuing its Regulation Z, 12 CFR part 1026, to reflect its assumption of rulemaking authority over TILA.²⁰ As set forth in the interim final rule, the Bureau's Regulation Z, § 1026.52(b) contained the same restrictions on penalty fees as set forth in the Board's Regulation Z, § 226.52(b).²¹

Since then, consistent with § 1026.52(b)(1)(ii)(D), the Bureau has adjusted the dollar amounts of the safe harbor threshold amounts to reflect changes in the CPI in effect as of June 1 of that year.²² Section 1026.52(b)(1)(ii) currently sets forth a safe harbor of \$30 generally for penalty fees, except that it sets forth a safe harbor of \$41 for each subsequent violation of the same type that occur during the same billing cycle or in one of the next six billing cycles.²³

D. A Decade of the Late Fee Safe Harbor

In the wake of the Board's and the Bureau's implementation of TILA section 149, late fees represent almost all penalty fee volume on credit cards, as overlimit fees are now

¹⁹ Pub. L. 111–203, 124 Stat. 1376 (2010).

²⁰ 76 FR 79768 (Dec. 22, 2011); *see also* 81 FR 25323 (Apr. 28, 2016).

²¹ 76 FR at 79822.

²² Comment 52(b)(1)(ii)-2.

²³ *See supra* note 2 for a description of an additional safe harbor that applies to charge card accounts.

practically nonexistent and fees for returned payments account for a negligible share based on Y-14+ data collected from a group of mass market and specialized issuers.²⁴

Prior to the passage of the CARD Act in 2009, the average late fee was \$33 for issuers in the Bureau's Credit Card Database (CCDB) which includes information on the full consumer and small business credit card portfolios of large credit card lenders, covering approximately 85 percent of all credit card accounts in the U.S. between April 2008 and April 2016.²⁵ With the effective date of the safe harbor threshold amounts in 2010, the average late fee in the CCDB declined by over \$10 to \$23 in the fourth quarter of 2010.²⁶

However, from 2010 through the onset of the COVID-19 pandemic, issuers had steadily been charging consumers more in credit card late fees each year—peaking at over \$14 billion in total late fee volume for issuers contained in the Y-14+ data in 2019.²⁷ At the end of 2012, the average late fee for major issuers in the CCDB reached about \$27.²⁸ It remained at about that level until rising to \$28 in 2018 for issuers in the Y-14+,

²⁴ Bureau of Consumer Fin. Prot., *Credit Card Late Fees*, at 13 (Mar. 2022) (Late Fee Report), https://files.consumerfinance.gov/f/documents/cfpb_credit-card-late-fees_report_2022-03.pdf. See part III.C for a description of the Y-14+ data.

²⁵ Bureau of Consumer Fin. Prot., *Card Act Report*, at 23 (Oct. 2013) (2013 Report), http://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf. From 2008 to 2015, the Bureau used the CCDB to measure the amount of average late fees to include in the CARD Act reports that the Bureau releases every two years. In its 2017 report, the Bureau started using the Y-14 data to measure the amount of average late fees to include in its CARD Act reports and began using the Y-14+ data to calculate metrics including average late fee beginning with its 2019 report. See part III.C for a description of the Y-14 and Y-14+ data.

²⁶ *Id.*

²⁷ Late Fee Report, at 4.

²⁸ 2013 Report, at 23.

consistent with the first safe harbor adjustment for inflation in 2014.²⁹ In 2019, the average late fee charged by credit card issuers in the Y-14+ rose to \$31, approaching nominal pre-CARD Act levels.³⁰ The total volume of late fees assessed by issuers in the Y-14+ declined to about \$12 billion in 2020 given record-high payment rates and public and private relief efforts.³¹

E. Credit Card Issuers' Use of the Late Fee Safe Harbor

Currently, § 1026.52(b)(1)(ii) sets forth a safe harbor of \$30 generally for a late payment, except that it sets forth a safe harbor of \$41 for each subsequent late payment within the next six billing cycles. A card issuer is not required to use the cost analysis provisions in § 1026.52(b)(1)(i) to determine the amount of late fees if it complies with these safe harbor amounts.³²

An analysis of credit card agreements found no evidence of any issuers using the cost analysis provisions to charge an amount higher than the safe harbor.³³ Most large issuers have taken advantage of the increased safe harbors as adjusted for inflation by increasing their fee amounts.³⁴ Eighteen of the top 20 issuers by outstanding balances contracted a maximum late fee at or near the higher safe harbor amount of \$40 in 2020 based on analysis of the maximum late fee disclosed by an institution in agreements

²⁹ Bureau of Consumer Fin. Prot., *The Consumer Credit Card Market*, at 69 (Dec. 2019) (2019 Report), https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2019.pdf.

³⁰ Late Fee Report, at 6.

³¹ Late Fee Report, at 5; Bureau of Consumer Fin. Prot., *The Consumer Credit Card Market*, at 117 (Sept. 2021) (2021 Report), https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf.

³² See comment 52(b)(1)-1.i.A.

³³ Late Fee Report, at 14.

³⁴ *Id.*

submitted to the Bureau's Credit Card Agreement Database in the fourth quarter of that year.³⁵ Yet, the most common maximum late fee disclosed in agreements submitted to the Bureau was \$25, as driven by the practices of smaller banks and credit unions not in the top 20 issuers by asset size.³⁶ Finally, a small but growing number of issuers offer credit card products with no late fees.³⁷

Some card issuers, however, may be disincentivized to lower late fee amounts below the safe harbor, given that the industry as a whole continues to rely on late fees as a source of revenue and many consumers may not shop for credit cards based on the amount of the late fee. For banks in the Y-14+ data, late fees represented 10 percent of charges to consumers in 2020, but individual card issuers' revenue from late fees varied.³⁸ The share of late fees for individual issuers in the Y-14+ data ranged from a minimum of four percent to a maximum of 31 percent of total consumer charges in 2019. Among issuers there is a strong correlation between reliance on late fees and concentration of subprime accounts. Yet, the industry as a whole continues to rely on late fees as a source of revenue.³⁹ Given the amount of revenue that late fees generate, card issuers may not have an incentive to charge late fees lower than the safe harbor amount.

³⁵ *Id.* The Credit Card Agreement Database is available at <http://www.consumerfinance.gov/credit-cards/agreements>.

³⁶ Late Fee Report, at 14.

³⁷ *Id.* at 15.

³⁸ *Id.* at 13.

³⁹ *Id.* at 14.

In addition, many consumers may not shop for credit cards based on the amount of late fees, which also may lessen card issuers incentive to charge late fees lower than the safe harbor amount. Survey data suggest that other factors, such as rewards, annual fees, and annual percentage rate(s) (APR), drive credit card usage.⁴⁰ In addition, recent academic work⁴¹ directly observed that credit card offers highlight rewards, annual fees, and APRs more than late fees based on the position of the information and the size of the font. Only 6.06 percent of the 611,797 card offers in their data spanning from 1999 to 2007 mentioned late fees on the front page, with an average font size of 9.56. In contrast, (1) rewards were displayed on the front page 93.68 to 100 percent of the time (depending on the type of rewards) with an average font size of 12.12 to 16.56; (2) the annual fee was disclosed on the front page 78.02 percent of the time with an average font size of 13.39; and (3) APRs were displayed on the front page 27.95 percent of the time with an average font size of 13.02. The Bureau notes that the authors of the study explained that they excluded the post-2007 data “to abstract from the impact of the 2008 financial crisis and the [CARD Act] in 2009.”⁴² However, the authors also stated that “the main results are qualitatively and quantitatively very similar if we include data until 2016.”⁴³

⁴⁰ Karen Augustine, *U.S. Consumers and Credit: Rising Usage*, Mercator Advisory Group, at 40 (2018).

⁴¹ Hong Ru & Antoinette Schoar, *Do Credit Card Companies Screen for Behavioural Biases?* (Feb. 12, 2020), BIS Working Paper No. 842, <https://ssrn.com/abstract=3549532>.

⁴² *Id.* at 12.

⁴³ *Id.*

F. Consumer Impact of Late Fees

Late fees represent over one-tenth of the \$120 billion issuers charge to consumers in interest and fees, totaling over \$14 billion in 2019.⁴⁴ A small share of accounts in low credit score tiers incur a high proportion of late fees.⁴⁵ Overall, the average deep subprime account in the Y-14 data (discussed in part III.C) was charged \$138 in late fees in 2019, compared with \$11 for the average superprime account.⁴⁶ The higher incidence of late fees for accounts in lower tiers, combined with higher average charges for repeat late fees within six billing cycles of the initial late fee, drives this disparity.⁴⁷

Credit card accounts in the Y-14 data held by cardholders living in the U.S.’ poorest neighborhoods paid twice as much on average in total late fees than those in the richest areas.⁴⁸ Cardholders in majority-Black areas paid more in late fees for each card they held with major credit card issuers in 2019 than majority white areas.⁴⁹ And people in areas with the lowest rates of economic mobility paid nearly \$10 more in late fee charges per account compared to people in areas with the highest rates of economic mobility.⁵⁰

⁴⁴ Late Fee Report, at 4.

⁴⁵ *Id.* at 7.

⁴⁶ *Id.* at 8.

⁴⁷ *Id.*

⁴⁸ *Id.* at 9.

⁴⁹ *Id.* at 10.

⁵⁰ *Id.* at 11.

G. Other Consequences to Consumers of Late Payment

When a consumer does not make at least the minimum payment by the periodic statement due date, a late fee may not be the only consequence. However, the effect of a missed payment depends on cardholder conduct both prior to and after the due date.

For cardholders who typically pay their balance in full every month (so-called transactors), a late payment generally means both a late fee and new interest incurred for carrying or revolving a balance. For the cardholders who do not roll over a balance in the month before or after a late fee is assessed, the loss of a grace period⁵¹ and coinciding interest charges may pose a similar or even greater burden than the late fee itself. For cardholders who regularly revolve a balance from one month to the next, a late fee is the main financial consequence of a missed payment if the payment is made prior to the next statement due date, as the additional interest charges on the unpaid minimum amount due for a limited number of days will likely be minimal.

However, if a consumer does not make at least the minimum payment due for more than one billing cycle, non-payment may carry more severe consequences. After approximately 30 days, consumers' credit scores may decline after issuers report the delinquency to credit bureaus. A card issuer also may take actions to reprice new transactions on the account according to a penalty rate, if permitted under § 1026.55(b)(3).⁵² After 60 days, issuers may take action to reprice the entire

⁵¹ A grace period is a period within which credit extended may be repaid without incurring a finance charge due to a periodic interest rate. *See, e.g.*, § 1026.6(b)(2)(v) and comments 5(b)(2)(ii)-3.i and 54(a)(1)-2.

⁵² If a consumer does not make the required payment by the due date, § 1026.55(b)(3) permits a card issuer to take actions to reprice new transactions on the account according to a penalty rate in certain circumstances. The Bureau understands, however, that most card issuers do not take actions to reprice new transactions to the penalty rate until the consumer is more than 60 days late. 2021 Report, at 51.

outstanding balance on the account according to a penalty rate, if permitted under § 1026.55(b)(4). At any point as an account becomes more delinquent, an issuer may take steps to reduce a cardholder's credit line or suspend use of the card, limit their earning or redemption of rewards, or increase outreach to collect the outstanding debt. After 180 days of delinquency, an issuer will typically close and charge off the credit card account which may carry a large and long-term financial penalty for a consumer.

III. Summary of Rulemaking Process

A. Advance Notice of Proposed Rulemaking

On June 22, 2022, the Bureau issued an advance notice of proposed rulemaking (ANPR) seeking information from credit card issuers, consumer groups, and the public regarding credit card late fees and late payments, and card issuers' revenue and expenses.⁵³ Areas of inquiry included: (1) factors used by card issuers to set late fee amounts; (2) card issuers' costs and losses associated with late payments; (3) the deterrent effects of late fees; (4) cardholders' late payment behavior; (5) methods that card issuers use to facilitate or encourage timely payments, including automatic payment and notifications; (6) card issuers' use of the late fee safe harbor provisions in Regulation Z; and (7) card issuers' revenue and expenses related to their domestic consumer credit card operations. The Bureau received 43 comments in response to the ANPR.

Consumer group commenters generally recommended that the Bureau: (1) more closely tailor late fees to the amount of the debt owed by the cardholder, such as by establishing a sliding scale for the safe harbor amount so that late fees are proportional to

⁵³ 87 FR 38679 (June 29, 2022).

the account balance and by capping the amount of late fees that can be imposed for an account during the year; (2) require a mandatory waiting period of several days before a late fee can be assessed; (3) decline to incorporate deterrence as a factor in setting late fee rules and safe harbor amounts; (4) consider the savings to issuers of providing online-only statements in determining the costs of collecting late payments, (5) require a postal mail notification before a late fee can be imposed for an online-only account; and (6) exclude the costs of being a furnisher of information to consumer reporting agencies from the costs of collecting late payments.

Card issuers and their trade groups that commented on the ANPR generally opposed revisions to Regulation Z's safe harbor provisions related to late fees, including lowering the safe harbor amounts. Several industry trade groups asserted that although the current safe harbor amounts do not cover all the costs associated with late payments and are not as effective a deterrent as higher fees would be, they cover a significant portion of issuer costs, deter late payments, and provide legal certainty to card issuers. Card issuers and trade group commenters, however, did not provide detailed information on the type of costs, and the dollar amount of the costs, they incur to collect late payments. Card issuers and their trade groups commenters also generally opposed eliminating the safe harbor provisions and requiring card issuers to use the cost analysis provisions in § 1026.52(b)(1)(i) to determine the amount of late fees a card issuer is permitted to charge. Several industry trade group commenters asserted that reducing or eliminating the safe harbor would reduce credit access and increase the cost of credit. One trade group commenter asserted that smaller creditors and community banks, particularly those that extend credit to consumers who are trying to build or repair their

credit, have proportionately higher compliance costs and would face the most risk if the safe harbor was reduced or eliminated, limiting their ability to continue to offer credit products at the same terms. Several industry trade group commenters also asserted that because lowering the safe harbor would have a significant impact on small financial institutions, the Bureau must comply with the Small Business Regulatory Enforcement Fairness Act (SBREFA) by convening a SBREFA panel in any late fee rulemaking. Several industry trade group commenters also indicated that if the safe harbor were eliminated, the Bureau would need to provide significantly more detail and clarity around the costs included in the late fee amount calculation under § 1026.52(b)(1)(i).

B. CARD Act Consultation with Certain Federal Agencies

Consistent with the CARD Act, the Bureau consulted with the following agencies regarding rules that implement TILA section 149: (1) the Comptroller of the Currency; (2) the Board of Directors of the Federal Deposit Insurance Corporation; and (3) the National Credit Union Administration Board.⁵⁴ The Bureau also consulted with the Board and several other federal agencies, as discussed in part VII.

C. Y-14 Data Considered for This Proposal

As discussed in more detail in the section-by-section analysis in part V, the Bureau has considered data in developing this proposal that the Board collects as part of its Y-14M (Y-14) data. Since June 2012, the Board has collected these data monthly from bank holding companies with total consolidated assets exceeding \$50 billion. For this collection, surveyed financial institutions report comprehensive data on their assets

⁵⁴ 15 U.S.C. 1665d(b) and 1665d(e).

on the last business day of each calendar month. These data are used to support the Board's supervisory stress test models and provide one source of data for the Bureau's biennial report to Congress on the consumer credit card market.⁵⁵ These data contain reported information on the following four metrics used in developing this proposal:

Late Fee Income: Reported net fee income assessed for late or nonpayment accounts in a given domestic credit card portfolio by card type (e.g., general purpose or private label). This is late fee income for the Bureau's purposes, as discussed in the section-by-section analysis of § 1026.52(b)(1)(ii).

Collection Costs: Reported costs incurred to collect problem credits that include the total collection cost of delinquent, recovery, and bankrupt accounts. Issuers report these aggregate costs monthly for their domestic credit card portfolios and separately by credit card type.⁵⁶ These reported costs do not include losses and associated costs.⁵⁷

Late Fee Amount: Reported amount of the late fee charged on a particular account in a particular month.

Total Required Payments: Reported total payment amount on a particular account in a particular month, including any missed payments or fees that were required to be

⁵⁵ See Bd. of Governors. of the Fed. Rsrv. Sys., Report Forms FR Y-14M, <https://www.federalreserve.gov/apps/reportforms/reportdetail.aspx?sOoYJ+5BzDYnbIw+U9pka3sMtCMo pzoV> (for more information on the Y-14M collection). The Bureau is one of several government agencies with whom the Board shares the data. Information in the Y-14 data do not include any personal identifiers. Additionally, accounts associated with the same consumer are not linked across or within issuers. The Y-14 data also does not include transaction-level data pertaining to consumer purchases.

⁵⁶ Types include General Purpose, Private Label, Business, and Corporate cards.

⁵⁷ Issuers report projected losses, the dollar amount of charge-offs and any associated recoveries, interest expense, and loan loss provisions separately.

paid in a particular billing cycle. This typically includes the minimum payment due, past due payments, and any amount reported as over the credit limit.

The Y-14 data received by the Bureau cover the period from the middle of 2012 through September 2022 and are provided by issuers that accounted for just under 70 percent of outstanding balances on U.S. consumer credit cards as of year-end 2020. For the purposes of the analysis using these data as described in part V, the Bureau only considered account- and portfolio-level data for issuers in a given month for consumer general purpose and private label credit cards for which there existed data on late fee income, collection costs, late fee amounts, and total required payments in the Y-14 data. With respect to credit card data, the Bureau receives the complete portfolio data (including late fee income and collection costs) for all the card issuers included in the data collection. The Bureau receives only a random 40 percent subsample of account information (including late fee amounts and total required payments) reported by card issuers included in the data collection.

Collection costs in the Y-14 data include both pre-charge-off and post-charge-off collection costs. As discussed in the section-by-section analysis of § 1026.52(b)(1)(i), the Bureau proposes to amend comment 52(b)(1)(i)-2.i to clarify that costs for purposes of the cost analysis provisions in § 1026.52(b)(1)(i) for determining penalty fee amounts do not include any collection costs that are incurred after an account is charged off pursuant to loan loss provisions.

Consistent with that proposed clarification, the Bureau estimated the percentage of collection costs that may occur after charge-off so that they could be excluded from the collection costs in the Y-14 data. The Bureau notes that the most significant post-

charge-off collection costs are likely to be commissions paid to third-party debt collectors for charged-off accounts. The Bureau understands that such commission payments, made to third-party debt collection companies, would be made almost exclusively in connection with accounts that have been charged off, and represent a conservative estimate of post-charge-off collection costs, as there may be other costs associated with collections post-charge-off beyond such commission payments.

The Bureau estimated from debt collection reports the commission expenses that six major card issuers paid in 2019 and 2020, representing 91 percent of balances and 93 percent of collection costs among portfolios with positive collection expenses reported in the Y-14 data in the twelve months leading up to August 2022.⁵⁸ The methodology for estimating post-charge-off commissions considered the amount of charged-off balances and then estimated the commission on the volume of recovered balances by using the recovery and commission rates.⁵⁹ Based on these commission expenses that these six major card issuers paid in 2019 and 2020 to third-party debt collectors for charged-off accounts, the Bureau estimated that these post-charge-off costs are around 25 percent of total collection costs for these issuers; the average ratio was 27 percent in 2019 and 21

⁵⁸ As part of its review of the practices of credit card issuers for its biennial review of the consumer credit card market, the Bureau surveys several large issuers to better understand practices and trends in credit card debt collection. These data provided in response to data filing orders served as the basis of this calculation. For more information on these data, *see* 2021 Report, at 17.

⁵⁹ For example, if an issuer had a total of \$1 million in newly charged-off balances in a given year, a cumulative recovery rate for that year of five percent, and a post-charge-off commission rate of 20 percent, the Bureau would estimate the post-charge-off commission costs to be \$10,000. To calculate the post-charge-off collection costs as a share of total cost of collections, the Bureau then divided the estimated post-charge-off commission costs by the total collection costs the bank reported in the Y-14 data. For issuers who sell debt, the cost of collections calculation uses charge-off balances net of asset sales. The commission rate for each issuer is an average weighted by the share of post-charge-off balances in each tier placement (e.g., primary, secondary, and tertiary placements).

percent in 2020. In 2019, the median ratio of estimated post-charge-off commission costs to annual collection costs in the Y-14 for individual issuers was 28 percent; in 2020, it was 23 percent. Based on this data, the Bureau estimated that pre-charge-off collection costs were equal to 75 percent of the collection costs included in the Y-14 data for purposes of its analysis related to the proposed changes to the safe harbor thresholds for late fees in § 1026.52(b)(1)(ii).

As discussed in more detail in the section-by-section analysis in part V, the Bureau also considered Y-14+ data in developing this proposal. The Y-14+ data includes information from the Board's Y-14 data and a diverse group of specialized issuers.

IV. Legal Authority

A. Section 1022 of the Dodd-Frank Act

Section 1022(b)(1) of the Dodd-Frank Act 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 the Federal consumer financial laws, and to prevent evasions thereof.”⁶⁰ Among other statutes, title X of the Dodd-Frank Act and TILA are Federal consumer financial laws.⁶¹ Accordingly, in issuing this proposed rule, the Bureau proposes to exercise its authority under Dodd-Frank Act section 1022(b)(1) to prescribe rules under TILA and title X that carry out the purposes and objectives and prevent evasion of those laws.

⁶⁰ 12 U.S.C. 5512(b)(1).

⁶¹ Dodd-Frank Act section 1002(14); codified at 12 U.S.C. 5481(14) (defining “Federal consumer financial law” to include the “enumerated consumer laws” and the provisions of title X of the Dodd-Frank Act); Dodd-Frank Act section 1002(12); codified at 12 U.S.C. 5481(12) (defining “enumerated consumer laws” to include TILA).

B. The Truth in Lending Act

As amended by the Dodd-Frank Act, TILA section 105(a)⁶² directs the Bureau to prescribe regulations to carry out the purposes of TILA, and provides that such regulations may contain additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, that, in the judgment of the Bureau, are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance. Pursuant to TILA section 102(a), a purpose of TILA is to assure a meaningful disclosure of credit terms to enable the consumer to avoid the uninformed use of credit and compare more readily the various credit terms available to the consumer. This stated purpose is tied to Congress's finding that economic stabilization would be enhanced and competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit.⁶³ Thus, strengthened competition among financial institutions is a goal of TILA, achieved through the effectuation of TILA's purposes.

As described above, the CARD Act was signed into law on May 22, 2009,⁶⁴ and the Act amended TILA⁶⁵ by adding section 149, which provides, among other things, that the amount of any penalty fee with respect to a credit card account under an open-end consumer credit plan in connection with any omission with respect to, or violation of, the

⁶² 15 U.S.C. 1604(a).

⁶³ TILA section 102(a), codified at 15 U.S.C. 1601(a).

⁶⁴ Pub. L. 111-24, 123 Stat. 1734 (2009).

⁶⁵ 15 U.S.C. 1601 *et seq.*

cardholder agreement, including any late payment fee or any other penalty fee or charge, must be “reasonable and proportional” to such omission or violation.⁶⁶

At the time of its passage, the CARD Act required the Board to issue rules establishing standards for assessing the reasonableness and proportionality of such penalty fees, with a statutory deadline of February 22, 2010 for issuing this required rule.⁶⁷ The Act also authorized the Board to establish different standards for different types of fees and charges, as appropriate.⁶⁸ The CARD Act also allowed, but did not require, the Board to issue rules to provide for a safe harbor amount for any such penalty fee that is presumed to be reasonable and proportional to such omissions or violations.⁶⁹ This grant of discretionary authority did not include a deadline. The Board issued a rule on June 29, 2010, completing the required rulemaking (now contained in the Bureau’s Regulation Z, 12 CFR 1026.52(b)(1)(i)) and adding a discretionary portion (now contained in the Bureau’s Regulation Z, 12 CFR 1026.52(b)(1)(ii)) with safe harbors.

On July 21, 2011, the Board’s rulemaking authority to implement the provisions of TILA, including TILA section 149, transferred to the Bureau pursuant to sections 1061 and 1100A of the Dodd-Frank Act.⁷⁰

For the reasons discussed in this proposal, the Bureau proposes to amend certain provisions in Regulation Z that impact the amount of late fees that card issuers can charge to carry out TILA’s purposes and proposes such additional requirements,

⁶⁶ CARD Act section 102, 123 Stat. 1740 (15 U.S.C. 1665d(a)).

⁶⁷ CARD Act section 102, 123 Stat. 1740 (15 U.S.C. 1665d(b)).

⁶⁸ CARD Act section 102, 123 Stat. 1740 (15 U.S.C. 1665d(d)).

⁶⁹ CARD Act section 102, 123 Stat. 1740 (15 U.S.C. 1665d(e)).

⁷⁰ Pub. L. 111–203, 124 Stat. 1376 (2010).

adjustments, and exceptions as, in the Bureau's judgment, may be necessary and proper to carry out the purposes of TILA, prevent circumvention or evasion thereof, or to facilitate compliance. In developing these aspects of this proposal pursuant to its authority under TILA section 105(a), the Bureau has considered the purposes of TILA, including ensuring meaningful disclosures, facilitating consumers' ability to compare credit terms, and helping consumers avoid the uninformed use of credit, and the findings of TILA, including strengthening competition among financial institutions and promoting economic stabilization.

The Bureau also has analyzed whether the current safe harbor threshold amounts for late fees are reasonable and proportional to a cardholder's omission or violation. In considering the appropriate amount, the Bureau is guided by factors including (1) the cost incurred by the creditor from an omission or violation; (2) the deterrence of omissions or violations by the cardholder; (3) the conduct of the cardholder; and (4) such other factors deemed necessary or appropriate.

V. Section-by-Section Analysis

Section 1026.7 Periodic Statement

7(b) Rules Affecting Open-End (Not Home-Secured) Plans

7(b)(11) Due Date; Late Payment Costs

Section 1026.7(b) sets forth the disclosure requirements for periodic statements that apply to open-end (not home-secured) plans. Section 1026.7(b)(11) generally requires that for a credit card account under an open-end (not home-secured) consumer credit plan, a card issuer must provide on each periodic statement: (1) the due date for a payment and the due date must be the same day of the month for each billing cycle; and

(2) the amount of any late payment fee and any increased periodic rate(s) (expressed as APRs) that may be imposed on the account as a result of a late payment.

Currently, comment 7(b)(11)-4 provides that for purposes of disclosing the amount of any late payment fee and any increased APR that may be imposed on the account as a result of a late payment under § 1026.7(b)(11), a card issuer that imposes a range of late payment fees or rates on a credit card account under an open-end (not home-secured) consumer credit plan may state the highest fee or rate along with an indication lower fees or rates could be imposed. Comment 7(b)(11)-4 also provides an example to illustrate how a card issuer may meet the standard set forth above, stating that a phrase indicating the late payment fee could be “up to \$29” complies with this standard. The proposed rule would amend comment 7(b)(11)-4 to read “up to \$8” so that the late fee amount in the example would be consistent with the proposed \$8 late fee safe harbor amount set forth in proposed § 1026.52(b)(1)(ii).

Section 1026.52 Limitations on Fees

52(a) Limitations During First Year After Account Opening

52(a)(1) General Rule

Section 1026.52(a)(1) generally provides that the total amount of fees a consumer is required to pay with respect to a credit card account under an open-end (not home-secured) consumer credit plan during the first year after account opening must not exceed 25 percent of the credit limit in effect when the account is opened. Section 1026.52(a)(2) provides that late payment fees, over-the-limit fees, and returned-payment fees; or other fees that the consumer is not required to pay with respect to the account are excluded from the fee limitation set forth in § 1026.52(a)(1).

Comment 52(a)(1)-1 provides that the 25 percent limit in § 1026.52(a)(1) applies to fees that the card issuer charges to the account as well as to fees that the card issuer requires the consumer to pay with respect to the account through other means (such as through a payment from the consumer's asset account to the card issuer or from another credit account provided by the card issuer). Comment 52(a)(1)-1 also provides four examples to illustrate the provision set forth above. The two examples in comment 52(a)(1)-1.i and iv contain late fee amounts of \$15. The proposed rule would amend the two examples in comment 52(a)(1)-1.i and iv to use a late fee amount of \$8, so that the late fee amounts in the examples are consistent with the proposed \$8 late fee safe harbor amount set forth in proposed § 1026.52(b)(1)(ii).

52(b) Limitations on Penalty Fees

52(b)(1) General Rule

Section 1026.52(b) provides that a card issuer must not impose a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan unless the issuer has determined that the dollar amount of the fee represents a reasonable proportion of the total costs incurred by the issuer for that type of violation as set forth in § 1026.52(b)(1)(i) (referred to herein as the cost analysis provisions) or complies with the safe harbor provisions set forth in § 1026.52(b)(1)(ii). It further provides that a card issuer must not impose such a fee unless the fee is consistent with certain prohibitions set forth in § 1026.52(b)(2), including a prohibition in § 1026.52(b)(2)(i)(A) on imposing a penalty fee that exceeds the dollar amount associated with the violation, which currently prohibits late fees that exceed 100 percent

of the required minimum payment.⁷¹ The commentary to § 1026.52(b) explains that penalty fees subject to its provisions include late fees, returned-payment fees, and fees for over-the-limit transactions, among others.⁷²

As discussed in the section-by-section analysis of § 1026.52(b)(1)(ii) below, the Bureau proposes to amend § 1026.52(b)(1)(ii) to lower the safe harbor dollar amount for late fees to \$8 (currently set at \$30) and to provide that the higher safe harbor dollar amount for subsequent violations of the same type that occur during the same billing cycle or in one of the next six billing cycles (currently set at \$41) does not apply to late fees.⁷³

In addition, as discussed in more detail below, the Bureau proposes to provide that the current provision in § 1026.52(b)(1)(ii)(D) that provides for annual inflation adjustments for the safe harbor dollar amounts would not apply to the safe harbor amount for late fees. Also, as discussed in the section-by-section analysis of § 1026.52(b)(2)(i) below, the Bureau proposes to amend § 1026.52(b)(2)(i)(A) to provide that late fee amounts may not exceed 25 percent of the required minimum payment.

The Bureau also proposes one clarification that would apply to penalty fees generally. Specifically, the Bureau proposes to amend comment 52(b)(1)(i)-2.i to clarify that costs for purposes of the cost analysis provisions in § 1026.52(b)(1)(i) for determining penalty fee amounts do not include any collection costs that are incurred

⁷¹ See comment 52(b)(2)(i)-1.

⁷² See comment 52(b)(1)-1.

⁷³ As discussed in the section-by-section analysis of § 1026.52(b)(1)(ii)(C) below, the Bureau is not proposing to lower or otherwise change the safe harbor amount of a late fee that card issuers may impose when a charge card account becomes seriously delinquent.

after an account is charged off pursuant to loan loss provisions.

The Bureau is not proposing to amend the lead-in text of § 1026.52(b)(1). However, for consistency with the proposed amendments to other provisions in § 1026.52(b) and for clarity, the Bureau proposes certain amendments to the commentary to § 1026.52(b) and (b)(1). Specifically, the Bureau proposes to amend comment 52(b)-1.i.A to clarify that a late payment fee or late fee is any fee imposed for a late payment and to include a cross-reference to § 1026.60(b)(9) and accompanying commentary for further guidance. The Bureau also proposes to amend comment 52(b)-2, which provides an illustrative example of how to round a penalty fee to the nearest whole dollar in compliance with the rule. The proposed amendments would reduce the dollar amounts of late fees in the example to reflect amounts that would be permissible under the Bureau's proposals to lower the late fee safe harbor amount to \$8 and to cap late fees at 25 percent of the required minimum payment. In addition, the Bureau proposes to add new comment 52(b)-5 to clarify that any dollar amount examples in the commentary to § 1026.52(b) relating to the safe harbors in § 1026.52(b)(1) are based on the original historical safe-harbor thresholds of \$25 and \$35 for penalty fees other than late fees, and on the proposed threshold of \$8 for late fees. This proposed clarification would help explain why the dollar amounts for penalty fees other than late fees are different from the ones set forth in the regulatory text in § 1026.52(b)(1)(ii)(A) and (B).

The Bureau also proposes to amend comments 52(b)(1)-1.i.B and C, which illustrate the relationship between the cost analysis provisions in § 1026.52(b)(1)(i) and the safe harbor provisions in § 1026.52(b)(1)(ii). The Bureau proposes to amend the illustrative example in comment 52(b)(1)-1.i.B to reflect a late fee amount consistent with

the proposal. In addition, because the Bureau proposes to substantially amend the safe harbor provisions for late fees, the Bureau proposes to remove references to late fees from the illustrative examples in comment 52(b)(1)-1.i.C and replace them with references to over-the-limit fees.

In addition, the Bureau proposes to amend comment 52(b)(1)-1.ii, which illustrates the relationship between the penalty fee limitations in § 1026.52(b)(1) and the prohibitions in § 1026.52(b)(2). The proposed amendments would reduce the dollar amount of a late fee in the example to reflect an amount that would be consistent with the Bureau's proposal to lower the late fee safe harbor amount.

The Bureau solicits comment on all aspects of these proposed amendments to the commentary to § 1026.52(b) and (b)(1), including comment on what additional amendments may be needed to help ensure clarity and compliance certainty.

52(b)(1)(i) Fees Based on Costs

As noted above, under the cost analysis provisions in § 1026.52(b)(1)(i), a card issuer may impose a fee for violating the terms or other requirements of an account consistent with the general rule in § 1026.52(b)(1) if the card issuer has determined that the dollar amount of the fee represents a reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation. Section 1026.52(b)(1)(i) further provides that a card issuer must reevaluate that determination at least once every 12 months and sets forth certain other requirements and conditions that apply if, as a result of the reevaluation, the card issuer determines that either a lower or higher fee represents a reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation.

The Bureau is not proposing to amend the text of § 1026.52(b)(1)(i). However, for purposes of clarity and compliance certainty, the Bureau proposes to revise comment 52(b)(1)(i)-2.i to clarify that the costs that card issuers can consider for purposes of determining the amount of a penalty fee under the cost analysis provisions in § 1026.52(b)(1)(i) do not include collection costs that are incurred after an account is charged off in accordance with loan-loss provisions.

Comment 52(b)(1)(i)-1 currently provides that card issuers may include in the costs for determining the amount of a penalty fee “the costs incurred...as a result of [the] violation.” Comment 52(b)(1)(i)-2 addresses amounts not considered costs incurred by a card issuer as a result of violations of the terms or other requirements of an account for purposes of § 1026.52(b)(1)(i). Comment 52(b)(1)(i)-2.i provides that one such amount that cannot be considered as costs incurred for purposes of § 1026.52(b)(1)(i) are losses and associated costs (including the cost of holding reserves against potential losses and the cost of funding delinquent accounts).

The Bureau proposes to amend comment 52(b)(1)(i)-2.i to clarify the “losses and associated costs” that card issuers may not consider as costs incurred for purposes of § 1026.52(b)(1)(i) include any collection costs that are incurred after an account is charged off in accordance with loan-loss provisions. The Bureau’s proposal, therefore, would make it explicit that for any collection costs that a card issuer incurs after an account has been charged off are not considered costs incurred for purposes of § 1026.52(b)(1)(i). The Bureau understands that when an account has been charged off, the card issuer has written the account off as a loss; therefore, any cost in collecting amounts owed to a card issuer that are incurred post-charge-off is related to mitigating a

loss as opposed to the cost of a violation of the account terms. As the Board noted in its 2010 Final Rule “it would be inconsistent with the purpose of the [CARD Act] to permit card issuers to begin recovering losses and associated costs through penalty fees rather than through upfront rates.”⁷⁴

The Bureau received two comments to the ANPR that indicated there may be a need to clarify that costs of collecting amounts owed to a card issuer incurred after an account is charged off are costs related to a loss and, therefore, cannot be considered as costs incurred for a violation of account terms for purposes of § 1026.52(b)(1)(i). For instance, one industry trade group commenter noted that, for example, late fees are meant to cover, among other things, the charge-off costs associated with late payments. Another industry credit union commenter similarly explained that late fees help offset the charge-off on accounts not paid by consumers. Given the two comments suggesting potential confusion, the Bureau proposes to clarify that such costs cannot be considered for purposes of § 1026.52(b)(1)(i).

The Bureau solicits comment on this proposed clarification of the commentary to § 1026.52(b)(1)(i), including comment on whether any additional clarification may be needed. The Bureau also solicits comment on whether there are other specific clarifications that should be made to the provisions of the commentary providing guidance on how to perform a cost analysis under the rule.

⁷⁴ 75 FR 37526, 37538 (June 29, 2010).

52(b)(1)(ii) Safe Harbors

Overview of Proposed Amendments to Late Fee Safe Harbor Provisions

As noted in part I, the Bureau is concerned that (1) the safe harbor dollar amounts for late fees currently set forth in § 1026.52(b)(1)(ii) are not reasonable and proportional to the omission or violation to which the fee relates; (2) the current higher safe harbor threshold for late fees for subsequent violations of the same type in the same billing cycle or in one of the next six billing cycles is higher than is justified based on consumer conduct and to deter future violations and, indeed, a late fee that is too high could interfere with the consumers' ability to make future payments on the account; and (3) additional restrictions on late fees may be needed to ensure that late fees are reasonable and proportional. To address these concerns, the Bureau proposes to amend § 1026.52(b)(1)(ii) to lower the safe harbor amounts for late fees—currently set at \$30 and \$41 for a first and subsequent violation, respectively—to a late fee amount of \$8 for the first and subsequent violations.⁷⁵ The Bureau's proposal would eliminate the higher safe harbor amount for subsequent late payment violations. As discussed below, based on analysis of available evidence and consideration of the relevant factors, the Bureau preliminarily determines that a late fee amount of \$8 for the first and subsequent violations is presumed to be reasonable and proportional to the late payment violation to which the fee relates. In addition, for the reasons discussed in the section-by-section analysis of § 1026.52(b)(1)(ii)(D), the Bureau proposes to no longer apply to the late fee

⁷⁵ As discussed in the section-by-section analysis of § 1026.52(b)(1)(ii)(C) below, the Bureau is not proposing to lower or otherwise change the safe harbor amount of a late fee that card issuers may impose when a charge card account becomes seriously delinquent.

safe harbor amount current § 1026.52(b)(1)(ii)(D) that provides for annual inflation adjustments for the safe harbor dollar amounts.

The Bureau is not proposing at this time to similarly amend the safe harbor provisions in § 1026.52(b)(1)(ii) as they apply to other types of penalty fees, including returned-payment fees, fees for over-the-limit transactions, and declined access check fees. The Bureau is limiting the proposed amendments to late fees because the \$14 billion in late fees charged in 2019 account for nearly 99 percent of all penalty fees imposed by major card issuers in the Y-14+ data⁷⁶ and, as such, pose far greater consumer protection concerns than do other penalty fees totaling less than \$0.2 billion that year. Moreover, as a result of their prevalence, late fees have produced a substantial amount of data and other evidence that prompts and forms the basis of this proposal. Further, the Bureau has determined that proposing to lower the safe harbor amounts only for late fees is consistent with its authority under TILA section 149(d), which authorizes the Bureau, in issuing rules to implement the CARD Act's penalty fee provisions, to establish "different standards for different types of fees and charges, as appropriate."⁷⁷ Nonetheless, as discussed below, the Bureau solicits comment on several issues related to penalty fees generally, including whether the safe harbor dollar amount in § 1026.52(b)(1)(ii)(A) should be similarly lowered for all penalty fees, and the higher safe harbor amount provision in § 1026.52(b)(1)(ii)(B) should be similarly eliminated for all penalty fees.

⁷⁶ Late Fee Report, at 13.

⁷⁷ 15 U.S.C. 1665d(c).

The Board's Implementing Rule and Findings

In the 2010 Final Rule implementing TILA section 149, the Board established penalty fee safe harbor amounts of \$25 for the first violation and \$35 for any additional violations of the same type that occur during the same billing cycle or in one of the next six billing cycles. In doing so, the Board indicated that it “believes that these amounts are generally consistent with the statutory factors of cost, deterrence, and consumer conduct.”⁷⁸ In interpreting TILA section 149(a), the Board found that “it appears that Congress intended the words ‘reasonable and proportional’ . . . to require that there be a reasonable and generally consistent relationship between the dollar amounts of credit card penalty fees and the violations for which those fees are imposed, while providing the Board with substantial discretion in implementing that requirement.”⁷⁹

⁷⁸ 75 FR 37526, 37527 (June 29, 2010).

⁷⁹ *Id.* at 37532.

The Board's Consideration of Costs. The cost-related data on which the Board relied was limited. Although the Board received more than 22,000 comments on its proposed rule, the Board noted that “relatively few provided any data” supporting a particular safe harbor amount.⁸⁰ While one commenter suggested the average cost of collecting late payments for credit card accounts issued by the largest issuers was \$28, the Board noted the comment “significantly overstates the fee amounts necessary to cover the costs incurred by large issuers as a result of violations,” as it included costs not incurred as a result of violations, such as the cost of funding balances that would have been charged off regardless of fees.⁸¹

Given these limitations, instead of relying on data related to the costs of collecting late payments in setting the safe harbor dollar amounts in its Regulation Z, § 226.52(b)(1)(ii)(A) and (B), the Board primarily considered the following information in setting the safe harbor dollar amounts: (1) the dollar amounts of late fees currently charged by credit card issuers; (2) the dollar amounts of late fees charged with respect to deposit accounts and consumer credit accounts other than credit cards; (3) State and local laws regulating late fees; (4) the safe harbor threshold for credit card default charges established by the United Kingdom’s Office of Fair Trading (OFT) in 2006; (5) data related to deterrence that provides evidence on whether the experience of incurring a late payment fee makes consumers less likely to pay late for a period of time; and (6) data submitted by a large credit card issuer that indicated that consumers who pay late

⁸⁰ *Id.* at 37541.

⁸¹ *Id.*

multiple times over a six-month period generally present a significantly greater credit risk to issuers than consumers who pay late a single time.

In establishing the safe harbor amounts, the Board concluded that “it is not possible based on the available information to set safe harbor amounts that precisely reflect the costs incurred by a widely diverse group of card issuers and that deter the optimal number of consumers from future violations,”⁸² and stated its belief that the safe harbor amounts established in the rule were “generally sufficient to cover issuers’ costs and to deter future violations.”⁸³ The Board further concluded that, based on the comments received in response to its proposal, the \$25 safe harbor in § 226.52(b)(1)(ii)(A) for the first violation was sufficient to cover the costs incurred by most small issuers as a result of violations.⁸⁴

With respect to late payments, the Board stated its belief that large issuers generally incur fewer collection and other costs on accounts that experience a single late payment and then pay on time for the next six billing cycles than on accounts that experience multiple late payments during that period.⁸⁵ The Board further reasoned that even if \$25 is not sufficient to offset all of the costs incurred by some large issuers as a result of a single late payment, those issuers will be able to recoup any unrecovered costs through upfront APRs and other pricing strategies.⁸⁶

⁸² *Id.* at 37544.

⁸³ *Id.*

⁸⁴ *Id.* at 37542.

⁸⁵ *Id.*

⁸⁶ *Id.*

With respect to the higher safe harbor amount in § 226.52(b)(1)(ii)(B), the Board explained its belief that when an account experiences additional violations that occur during the same billing cycle or in one of the six billing cycles following the initial violation, \$35 would generally be sufficient to cover any increase in the costs incurred by the card issuer.⁸⁷ As discussed in more detail below, the Board also explained its belief that the \$35 safe harbor amount would have a reasonable deterrent effect on additional violations⁸⁸ and was consistent with the consumer's conduct in engaging in multiple violations of the same type within six billing cycles.⁸⁹

The Board's Consideration of Deterrence. The Board did not expressly discuss how it took deterrence into account in setting the initial \$25 penalty fee amount; instead, the Board limited its discussion of that factor to the role it played in the Board's decision to set a higher safe harbor amount for any additional violation of the same type that occurred during the same billing cycle or in one of the next six billing cycles. While the Board noted that it considered deterrence in setting a higher amount generally, the Board did not have specific data justifying the \$35 amount. The Board noted that one commenter on the proposal submitted the results of applying two deterrence modeling methods to data gathered from all leading credit card issuers in the U.S. According to the commenter, these models estimated that fees of \$28 or less have relatively little deterrent effect on late payments but that higher fees are a statistically significant contributor to sustaining lower levels of delinquent behavior. While the Board questioned the

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 37543.

assumptions used to arrive at the results in these modeling methods, the Board did accept that increases in the amount of penalty fees can affect the frequency of violations.⁹⁰

With respect to the higher \$35 fee for repeat penalty fees that occur during the same billing cycle or in one of the next six billing cycles, the Board explained its belief that a higher penalty fee amount is consistent with the deterrence factor set forth in TILA 149(c)(2) insofar as—after a violation has occurred—the amount of the fee increases to deter additional violations of the same type that occur during the same billing cycle or in one of the next six billing cycles.⁹¹ The Board also explained its belief that although upfront disclosure of a penalty fee may be sufficient to deter some consumers from engaging in certain conduct, other consumers may be deterred by the imposition of the fee itself. For these consumers, the Board explained its belief “that imposition of a higher fee when multiple violations occur will have a significant deterrent effect on future violations.”⁹² The Board specifically pointed to one study of four million credit card statements, which found that a consumer who incurs a late payment fee is 40 percent less likely to incur a late payment fee during the next month compared to a consumer who was not late, although this effect depreciates approximately 10 percent each month.⁹³ Although this study indicated that the imposition of a penalty fee may cease to have a deterrent effect on future violations after four months, the Board concluded that

⁹⁰ *Id.* at 37541.

⁹¹ *Id.* at 37533.

⁹² *Id.*

⁹³ Sumit Agarwal *et al.*, *Learning in the Credit Card Market* (April 24, 2013), <https://ssrn.com/abstract=1091623> or <http://dx.doi.org/10.2139/ssrn.1091623>. The Board reviewed a 2008 version of the paper.

imposing an increased fee for additional violations of the same type that occur during the same billing cycle or in one of the next six billing cycles is consistent with the intent of the CARD Act. The Board pointed to this study as evidence indicating that, as a general matter, penalty fees may deter future violations of the account terms.⁹⁴

The Board's Consideration of Consumer Conduct. The Board also took consumer conduct into account in adopting the higher \$35 fee for repeat penalty fees that occur during the same billing cycle or in one of the next six billing cycles.⁹⁵ The Board explained its belief that “multiple violations during a relatively short period can be associated with increased costs and credit risk and reflect a more serious form of consumer conduct than a single violation.”⁹⁶ The Board noted that, based on data submitted by a large credit card issuer, consumers who pay late multiple times over a six-month period generally present a significantly greater credit risk than consumers who pay late a single time. The Board acknowledged that this data also indicates that consumers who pay late two or more times over longer periods (such as 12 or 24 months) are significantly riskier than consumers who pay late a single time. However, the Board did not explain how adding additional costs to these consumers would make them less of a credit risk or consider whether adding costs to consumers who are unable to pay could increase that risk.

The Board stated its belief that, when evaluating the conduct of consumers who have violated the terms or other requirements of an account, it is consistent with other

⁹⁴ 75 FR 37526, 37533 n.24 (June 29, 2010).

⁹⁵ The Board did not refer to consumer conduct in setting the \$25 safe harbor amount. *See id.* at 37527.

⁹⁶ *Id.*

provisions of the CARD Act to distinguish between those who repeat that conduct during the same billing cycle or in one of the next six billing cycles and those who do not.⁹⁷ Specifically, the Board noted that (1) TILA section 171(b)(4) provides that, if the APR that applies to a consumer's existing balance is increased because the account is more than 60 days delinquent, the increase must be terminated if the consumer makes the next six payments on time; and (2) TILA section 148 provides that, when an APR is increased based on the credit risk of the consumer or other factors, the card issuer must review the account at least once every six months to assess whether those factors have changed (including whether the consumer's credit risk has declined).⁹⁸ The Board did not, however, explain why this is relevant to the question of penalty fees.

The Bureau's Proposed Amendments to the Late Fee Safe Harbor Amounts

The safe harbor provisions in § 1026.52(b)(1)(ii) currently provide that a card issuer may impose a fee for violating the terms or other requirements of an account if the dollar amount of the fee does not exceed \$30, as set forth in § 1026.52(b)(1)(ii)(A), or \$41 for a violation of the same type that occurs during the same billing cycle or one of the next six billing cycles, as set forth in § 1026.52(b)(1)(ii)(B). In addition, § 1026.52(b)(1)(ii)(C) provides a special safe harbor that applies when a charge card account becomes seriously delinquent. Under that provision, when a card issuer has not received the required payment for two or more consecutive billing cycles on a charge card account that requires payment of outstanding balances in full at the end of each

⁹⁷ *Id.* at 37534.

⁹⁸ *Id.*

billing cycle, the issuer may impose a late payment fee that does not exceed 3 percent of the delinquent balance.

The Bureau proposes to amend § 1026.52(b)(1)(ii) to provide that a card issuer may impose a fee for a late payment on an account under the safe harbor if the dollar amount of the fee does not exceed \$8.⁹⁹ The Bureau is further proposing to amend § 1026.52(b)(1)(ii) to provide that other than a fee for a late payment, a card issuer may impose a fee for violating the terms or other requirements of an account if the dollar amount of the fee does not exceed the safe harbor amounts in § 1026.52(b)(1)(ii)(A), or (B), as applicable. As such, the proposed \$8 safe harbor amount for late fees would be a single fee amount; it would apply regardless of whether the fee is imposed for a first or subsequent violation. However, for all other penalty fees, card issuers could still charge amounts not exceeding the amounts in § 1026.52(b)(1)(ii)(A) and (B).

In addition, under the proposal, charge card issuers could still impose a fee pursuant to § 1026.52(b)(1)(ii)(C) when a charge card account becomes seriously delinquent as defined in the rule. The Bureau recognizes that the fee described in § 1026.52(b)(1)(ii)(C) is a form of late fee but, for the reasons discussed below, is not proposing to lower the safe harbor amount under this special provision for charge cards. However, as discussed in the section-by-section analysis of § 1026.52(b)(1)(ii)(C) below, the Bureau proposes to revise this provision for clarity to provide that a card issuer may impose a fee not exceeding 3 percent of the delinquent balance on a charge card account that requires payment of outstanding balances in full at the end of each billing cycle if the

⁹⁹ As discussed in more detail below, there is one proposed exception related to charge card accounts as described in current § 1026.52(b)(1)(ii)(C).

card issuer has not received the required payment for two or more consecutive billing cycles, notwithstanding the safe harbor late fee amount in proposed § 1026.52(b)(1)(ii). The Bureau emphasizes that the proposed \$8 safe harbor late fee amount in proposed § 1026.52(b)(1)(ii) would still apply to fees imposed on a charge card account for late payments not meeting the description in § 1026.52(b)(1)(ii)(C).

After analyzing available evidence and considering the applicable statutory factors, the Bureau preliminarily determines that a late fee amount of \$8 for the first and subsequent late payments is presumed to be reasonable and proportional to the late payment violation to which the fee relates.

The Bureau's Analysis of Data and Consideration of Statutory Factors

Costs. The Bureau has analyzed the Y-14 data and other information in considering the factor of the costs of a late payment violation to the card issuer. Based on that analysis, the Bureau has preliminarily determined that a late fee safe harbor amount of \$8 for the first and subsequent violations would cover most issuers' costs from late payments while providing card issuers with compliance certainty and administrative simplicity and, therefore, reduce their compliance costs and burden. The Bureau requests comments on this preliminary determination, data used, or any alternatives to either.

In considering the costs of late payments to card issuers, the Bureau has taken into account only those (estimated) costs that card issuers are permitted to take into account for purposes of determining the amount of a late fee under the cost analysis provisions in § 1026.52(b)(1)(i) and related commentary, including the proposed clarification to comment 52(b)(1)(i)-2.i. As provided in the commentary to § 1026.52(b)(1)(i), such costs for late fees (1) include the costs associated with the collection of late payments,

such as the costs associated with notifying consumers of delinquencies and resolving delinquencies (including the establishment of workout and temporary hardship arrangements); and (2) exclude losses and associated costs (including the cost of holding reserves against potential losses and the cost of funding delinquent accounts). As discussed in the section-by-section analysis of § 1026.52(b)(1)(i), the Bureau proposes to clarify that costs for purposes of the cost analysis provisions in § 1026.52(b)(1)(i) for determining penalty fee amounts do not include any collection costs that are incurred after an account is charged off pursuant to loan loss provisions. The Bureau preliminarily finds that considering pre-charge-off collection costs as the “costs” of a late payment is consistent with Congress’ intent to: (1) allow card issuers generally to use late fees to pass on to consumers the costs issuers incur to collect late payments or missed payments; (2) ensure that those costs are spread among consumers and that no individual consumer bears an unreasonable or disproportionate share; and (3) prevent card issuers from recovering losses and associated costs through late fees rather than through upfront rates.

As discussed in part III.C, the reported collection costs in the Y-14 data (1) include costs incurred to collect problem credits that includes the total collection cost of delinquent, recovery, and bankrupt accounts, and (2) do not include losses and associated costs. The Bureau concludes that the collection costs data in the Y-14 are consistent with the costs included for the cost analysis provisions in § 1026.52(b)(1)(i) except that the collection costs in the Y-14 data include post-charge-off collection costs. As discussed in part III.C, the Bureau has estimated that approximately 75 percent of collection costs incurred by card issuers are incurred pre-charge-off. Thus, as discussed in part III.C, the Bureau’s estimate of pre-charge-off collection costs is based on only 75 percent of the

collection costs in the Y-14 data for purposes of its analysis related to the proposed changes to the safe harbor thresholds in § 1026.52(b)(1)(ii), as discussed in more detail below.

In developing the proposed late fee safe harbor amount, the Bureau carefully considered several sources of data and other information to determine the amount that would cover a reasonable and proportional amount of card issuers' pre-charge-off collection costs. As discussed in part III.C, and described in detail below, the Bureau reviewed and analyzed major issuers' late fee income, collection costs, late fee amounts, and required payment information contained in the Y-14 data, a source that was not available when the Board set the initial safe harbor amounts in 2010. That analysis indicates that late fees generally generate revenue that is multiple times higher than issuers' collection costs. The Bureau also reviewed issuers' stated late fee amounts in card agreements that issuers are required by the CARD Act to submit quarterly to the Bureau. Based on this data, the Bureau expects that even if late fees were reduced to one-fifth of current levels (implying late fees of \$8 or less), most issuers would recover pre-charge-off collection costs.

To estimate the fee income to collection cost ratio, the Bureau used the late fee income data and 75 percent of the collection costs contained in the Y-14 data (referred to below as "estimated pre-charge-off collection costs").¹⁰⁰ Using the Y-14 data, the Bureau analyzed monthly late fee income and estimated pre-charge-off collection costs

¹⁰⁰ For additional information and data related to this late fee income to collection cost ratio, see Bureau of Consumer Fin. Prot., *Credit Card Late Fees: Revenue and Collection Costs at Large Bank Holding Companies*, (Jan. 2023) (Revenue-Cost Report), https://files.consumerfinance.gov/f/documents/cfpb_credit-card-late-fees-revenue-and-collection-costs-at-large-bank-holding-companies_2023-01.pdf.

for the consumer segments of major issuers' credit card portfolios, namely the consumer general purpose and private label portfolios. For the 16 consumer portfolios with continuous cost data for the first three quarters of 2022 (adding up to about 73 percent of total consumer credit card balances at the end of September 2022), total late fee income in the first three quarters added up to \$4.46 billion, while total collection costs added up to \$1.19 billion with pre-charge-off collection costs estimated to be \$896 million.

In reviewing the monthly data, the Bureau observed that late payments exhibit seasonal patterns. The Bureau also considered that there may be a delay between when a late fee was assessed and when the issuer incurs substantial collection costs associated with the account. For these reasons, the Bureau compared each month's late fee income for a particular portfolio to the portfolio's average estimated pre-charge-off collection costs for that month, where that estimate was based on estimated pre-charge-off collection costs that occurred two through six months later.¹⁰¹ The Bureau developed monthly estimates of this late fee income-to-cost ratio for each year from 2013 up to early 2022. The analysis showed that an average of this ratio across issuers and market segments, weighted by the number of accounts reported in the Y-14 data, has been fairly stable since early 2019 (and was higher before 2019). As shown in Figure 1 below, late fee income has always been higher than three times subsequent estimated pre-charge-off

¹⁰¹ For example, if an issuer were to report late fee income of \$15 million in January for a portfolio and total collection costs for that portfolio of \$20 million in March through July, the Bureau estimated \$15 million in pre-charge-off collection costs in March through July and calculated an average monthly collection cost of \$3 million for purposes of this analysis—resulting in a ratio of late fee income of \$15 million to collection cost of \$3 million for this portfolio for the month of January. The Bureau found that its preliminary findings based on the weighted average of this ratio across issuers and market segments as discussed in the analysis below are robust to shifting, expanding, or shortening the time period of delay in collection costs as they relate to late fee income.

collection costs, and more than four times as high in all but five pandemic months (May 2020 and February-May 2021, coinciding with pandemic stimulus payments, when there was a reduction in late fee income without a corresponding decline in average collection costs in subsequent months). Since August 2021, late fee income has exceeded the relevant estimated pre-charge-off costs more than fivefold, which resembles the period before the pandemic.

Figure 1: Ratio of late fee income to future collection costs



Based on this analysis, the Bureau expects that the average issuer would recover pre-charge-off collection costs even if late fees were reduced to one-fifth of their current level. All but one issuer among those in the Y-14 data (representing the majority of balances in the credit card market) disclosed late fees “up to” \$40 or \$41 (the current maximum safe harbor amount) in their most recent card agreements submitted to the Bureau. Given the finding that, in the most recent data, late fee income is greater than five times estimated pre-charge-off costs, the Bureau expects that an \$8 late fee would still recover the average issuer’s pre-charge-off collection costs, as that fee represents one-fifth of the maximum late fee amount, which is necessarily greater than average fee income per late payment.

The Bureau also notes that average late fees are lower than the disclosed maximum late fees. As discussed in part II.D, in 2019, the average late fee charged by

issuers in the Y-14+ data was \$31.¹⁰² Reasoning that the average late fees are lower than the current maximum safe harbor of \$41 and yet still generate late fee income that is again more than five times the ensuing (estimated) pre-charge-off collection costs since August 2021, the Bureau preliminarily concludes that \$8 is likely to recover the average issuer's pre-charge-off collection costs. Because the proposed safe harbor, if adopted, could be used by card issuers generally, and is not tailored to any particular type of issuers or consumers, the Bureau preliminarily finds that is appropriate to consider average issuers' pre-charge-off collection costs in determining the late fee safe harbor amount. The Bureau also preliminarily finds that establishing a generally applicable safe harbor will facilitate compliance by issuers and increase consistency and predictability for consumers.

The Bureau acknowledges that not all issuers in the Y-14 data face the average pre-charge-off collection costs. By using estimates of pre-charge-off collection costs per paid incident using the Y-14 data from September 2021 to August 2022, the Bureau estimates that fewer than four of the 12 card issuers in the Y-14 data have estimated pre-charge-off collection costs that are significantly higher than one-fifth of their late fee income. For these issuers, the proposed \$8 safe harbor amount may not have been enough to fully recover estimated pre-charge-off collection costs, such that the benefits of

¹⁰² Late Fee Report, at 6. To gain further insights into how the average late fee compares to the disclosed maximum late fee in the agreements, the Bureau analyzed a 40 percent random subsample of tradelines of Y-14 data from 2019 to observe the incidence of late fees and the fee amounts assessed. The Bureau observed that the average late fees have been lower than the amounts in the card agreements for several reasons, including (1) some late fees did not occur within six months of an earlier late fee and thus are set at the lower safe harbor amount; and (2) some late fees reflect the current limitation in § 1026.52(b)(2)(i)(A) and related commentary that prohibits late fees from exceeding the minimum payment amount that is due. The Bureau also observed that some late fees are imposed but later reversed and that some late fees are charged to accounts that never make another payment.

using the cost analysis provisions may outweigh the administrative simplicity of using the safe harbor. While the most recent data suggest that the proposed safe harbor amount would cover pre-charge-off collection costs for most issuers, the Bureau recognizes that some issuers may choose to determine the late fee amount using the cost analysis provisions in § 1026.52(b)(1)(i), rather than using the proposed \$8 safe harbor amount, if \$8 is insufficient to recover their pre-charge-off collection costs.¹⁰³

The Bureau recognizes that the analysis above is based on data from the largest issuers, and may not be representative of smaller issuers, who do not report to the Y-14 collection. As discussed above, the Bureau did not receive specific cost data in response to its request in the ANPR for data on card issuers' pre-charge-off collection costs, including data on pre-charge-off collection costs incurred by smaller issuers. Although the Bureau does not have data equivalent to the Y-14 data for smaller issuers' pre-charge-off collection costs, it has no reason to expect that smaller issuers exhibit substantially higher pre-charge-off collection costs than larger issuers. On the other hand, the Bureau expects that the proposed \$8 amount would have a proportionately smaller impact on smaller issuers' late fee income, due to smaller issuers' having lower late fee amounts. In 2020, the average late fee for issuers in the Y-14+ data was \$31.¹⁰⁴ The Bureau collects card agreements from many more smaller issuers than issuers for which the Bureau has financial data. Based on a review of those agreements from over 500 credit card issuers,

¹⁰³ The Bureau estimates from the same data that a \$5 safe harbor amount would drive half of the market represented in the Y-14 data to use the cost analysis provisions in § 1026.52(b)(1)(i) to determine the late fee amount and that a \$4 safe harbor amount would do so for eight issuers holding around three-quarters of the represented issuers' outstanding balances.

¹⁰⁴ 2021 Report, at 55.

each outside the top 20 by outstanding credit card loans and having more than 10,000 credit card accounts, the Bureau established that smaller issuers charged smaller late fees in 2020 than larger issuers, with a modal maximum disclosed late fee for smaller issuers of \$25.¹⁰⁵ The Bureau solicits comment on this analysis and the potential impact on smaller issuers of the proposed \$8 safe harbor amount, including whether smaller issuers can provide data or evidence related to the cost of collecting late payments. The Bureau also solicits comment on whether the pre-charge-off collection costs for smaller issuers differ from such costs for larger issuers, and if so, how the costs differ.

The Bureau notes that the analysis based on the Y-14 data discussed above does not take into account any potential changes in consumer behavior in response to the proposed change in the late fee safe harbor amount. In particular, the discussion does not take into account the possibility that reduced late fees will lead to more late payments. However, as discussed below, the Bureau's analysis of Y-14 data and other information suggests that the proposed \$8 safe harbor amount for the first and subsequent late payments would still have a deterrent effect on late payments. The Bureau also expects that any increase in the frequency of late payments, as a result of the reduced late fee safe harbor amount, would increase both fee income and collection costs. Even if more consumers pay late because of the decreased amount, the increased number of late payments are unlikely to be more costly, on average, to administer and collect than the current number of late payments. Therefore, the Bureau expects that collection costs to card issuers would not increase by more than fee income. The Bureau seeks comment

¹⁰⁵ Late Fee Report, at 14.

specifically as to this analysis, including data or evidence as to whether reduced fees would affect the frequency of late payments or collection costs.

The Bureau does not expect the proposal to cap late fees at 25 percent of the required minimum periodic payment due, discussed in the section-by-section analysis of § 1026.52(b)(2)(i), to materially change the late fee income issuers can collect overall when the issuer is using the proposed \$8 safe harbor amount. The cap would require issuers to impose late fees lower than the proposed \$8 safe harbor amount only when the minimum periodic payment due is \$32 or less. Nonetheless, as discussed in more detail in the section-by-section analysis of § 1026.52(b)(2)(i), the instances where 25 percent of the minimum payment may be less than the proposed \$8 safe harbor do not appear to be frequent. The Y-14 data from October 2021 to September 2022 shows that for those months in which an account was late, only 7.7 percent of those accounts had a minimum payment of less than \$32.¹⁰⁶

The Bureau notes that the Y-14 data discussed above on which the Bureau relied in considering card issuers' pre-charge-off collection costs are far richer and more extensive than the data on which the Board relied when it established the penalty fee safe harbor amounts in its 2010 Final Rule. This is due in large part to the Bureau's access to nearly a decade's worth of Y-14 data—a data source that did not exist when the Board was developing its rule. In contrast, as discussed above, the data and other information

¹⁰⁶ For more information on the distribution of minimum payments for late accounts in the Y-14 data, *see* Figure 3 and related discussion in the section-by-section analysis of § 1026.52(b)(2)(i). However, issuers could adjust how they determine minimum payments such that the 25 percent limitation on late fees would only affect those accounts with balances of less than \$32, whose minimum payment will always be less than \$32 as the minimum payment can never exceed the statement balance. Based on the Y-14 data between October 2021 and September 2022, for those months in which an account was late, only 2.1 percent of accounts had balances of less than \$32.

on which the Board relied was limited, as systematic reporting of card issuers' collection costs was not available and relatively few commenters on the Board's proposal provided any data on collection costs in response to the Board's request for such data, with some providing data that the Board found unreliable.

Similarly, the Bureau did not receive specific cost data in response to its request in the ANPR for data on card issuers' pre-charge-off collection costs, including costs associated with notifying (other than through periodic statements) cardholders of delinquencies and resolving delinquencies (including the establishment of workout and temporary hardship arrangements) prior to charge-off, including payments to third-party debt collectors. In general, card issuers and their trade groups provided information on card issuers' late fee pricing structures, individually or industry-wide, and further provided high-level explanations for those pricing structures, including recovering collection costs, risk management, and the effects of the safe harbor provisions themselves. In a joint comment, for example, several trade groups asserted that the similarity of late fees across issuers is a predictable response to the benefits of legal certainty granted under the law. These trade groups further asserted that the safe harbor allows issuers to recover some (though not all) of the costs associated with late payments and encourages on-time payments, while also providing issuers with compliance certainty. These trade groups, however, did not provide data on issuers' pre-charge-off collection costs. Neither did any other commenters.

One credit union trade group provided estimates of the hourly labor costs of collecting late payments, based on the average salary of a collections agent that the commenter obtained from a publicly available source. This credit union trade group

commenter did not provide estimates of what portions of those hourly labor costs are pre-charge-off and post-charge-off, nor did it provide the number of hours of labor that would be needed per late payment. As a result, it was not possible to determine the late fee cost per account based on the data provided.

The Bureau also notes the current safe harbor amounts of \$30 and \$41 are significantly higher than the pre-charge-off collection costs as shown in the Bureau's analysis. Moreover, as discussed in part II.E, most large issuers have taken advantage of the increased safe harbors as adjusted for inflation by increasing their fee amounts.¹⁰⁷ Eighteen of the top 20 issuers by outstanding balances contracted for a maximum late fee at or within 10 percent of the higher safe harbor amount in 2020.¹⁰⁸ Although card issuers generally do not impose late fees at the highest contracted-for amount, issuers have steadily been charging consumers more in credit card late fees each year,¹⁰⁹ with the average late fee imposed increasing in amount from \$23 at the end of 2010 to \$31 in 2019.¹¹⁰

The Bureau is thus concerned that credit card late fee amounts imposed pursuant to the current safe harbor amounts—which, as adjusted for inflation, were established in 2010 based on limited data available at the time—far exceed card issuers' actual pre-charge-off collection costs resulting from late payment violations and thus are not reasonable and proportional. In considering the costs of such violations to issuers, the

¹⁰⁷ Late Fee Report, at 14.

¹⁰⁸ *Id.*

¹⁰⁹ As noted above, the one exception to this trend is a brief period during the pandemic when there was a drop in card issuers' late fee income corresponding with government stimulus payments.

¹¹⁰ Late Fee Report, at 6. *See also* 2013 Report, at 23.

Bureau has analyzed available data sources and other information, including Y-14 data extending back several years, as discussed above. The Bureau recognizes that the costs of collecting late payments will vary from issuer to issuer and that a late fee safe harbor amount of \$8 may not cover all of those costs for all issuers. The Bureau notes, however, that TILA section 149(e) authorizes the Bureau to issue rules to provide, for any penalty fee or charge, a safe harbor amount that is presumed to be reasonable and proportional to the omission or violation to which the fee or charge relates.

The Bureau also considered cost as one of the factors in making that determination. The Act, however, does not require the Bureau to establish a late fee safe harbor amount that covers the costs for all issuers or the entire costs of the omission or violation in all instances. Moreover, the Bureau is concerned that setting a higher safe harbor amount for late fees in order to cover the pre-charge-off collection costs of all card issuers could result in an amount that exceeds the costs for most card issuers. As discussed in part II.E, the Bureau is concerned that card issuers may have a disincentive to charge a lower fee amount than the safe harbor amount, even if their average collection costs are less than the safe harbor amount, given the industry's reliance on late fees as a source of revenue and that many consumers may not shop for credit cards based on the amount of the late fee.

In addition, because the Bureau anticipates that most card issuers would use the proposed \$8 late fee safe harbor threshold amount, the proposed safe harbor provisions in § 1026.52(b)(1)(ii) would continue to save costs for most card issuers, by continuing to save them the administrative burden and complexity of using the cost analysis provisions in § 1026.52(b)(1)(i) to determine the late fee amount. As discussed above, in

considering the appropriate safe harbor amount for late fees, the Bureau is guided by the factors in TILA section 149(c), which provides that the Bureau can consider such other factors that the Bureau deems necessary or appropriate. The Bureau preliminarily finds that it is both necessary and appropriate, when considering the portion of card issuers' pre-charge-off costs that a late fee safe harbor amount would cover, to take into account the cost savings from compliance certainty and administrative simplicity accorded by a safe harbor. The Bureau also preliminarily finds that a late fee safe harbor amount of \$8 for the first and subsequent late payments strikes the appropriate balance of these considerations. The Bureau seeks comment on all aspects of the analysis above, including data or other information to support why the \$8 amount is or is not sufficient to cover card issuers' pre-charge-off costs. The Bureau also seeks specific comment on whether the data on pre-charge-off collection costs discussed above accurately reflect the costs that card issuers incur as the result of a late payment violation before charge-off, including data or other information indicating whether the Bureau's analysis over- or underestimates such costs.

The Bureau further notes that if the proposed \$8 safe harbor amount is not sufficient to cover a particular card issuer's pre-charge-off costs in collecting late payments, the card issuer can charge a higher amount, if consistent with the cost analysis provisions in § 1026.52(b)(1)(i) and the requirements in § 1026.52(b)(2). Card issuers also may undertake efforts to reduce collection costs or use interest rates or other charges to recover some of the costs of collecting late payments. Building those costs into upfront rates would provide consumers greater transparency regarding the cost of using their credit card accounts.

For the foregoing reasons, the Bureau preliminarily concludes that a late fee of \$8 for the first and subsequent violations is appropriate to cover pre-charge-off costs for card issuers on average while providing issuers compliance certainty and administrative simplicity.

Deterrence. As noted above, in the 2010 Final Rule, the Board did not expressly discuss how it took deterrence into account in setting the \$25 penalty fee amount; instead, the Board limited its discussion of that factor to the role it played in the Board's decision to set a higher safe harbor amount for any additional violation of the same type that occurs during the same billing cycle or in one of the next six billing cycles.

In developing this proposal, the Bureau analyzed available data to consider the extent to which lower late fees for both the first and subsequent late payments could potentially lessen deterrence. The Bureau recognizes that late fees are a cost to consumers of paying late, and a lower late fee amount for the first or subsequent late payments might cause more consumers to pay late. The Bureau also recognizes that it does not have direct evidence on what consumers would do in response to a fee reduction similar to those contained in the proposal, and market participants did not provide data on deterrence in response to the Bureau's ANPR. The Bureau notes, however, that the Y-14 data and other information that has become available since the Board issued its 2010 Final Rule support the proposed reduction.

As discussed in more detail below, the Bureau preliminarily finds that this available evidence suggests that the proposed \$8 safe harbor amount would still have a deterrent effect on late payments. Even if the proposed \$8 safe harbor would increase the frequency of late payments by some percentage, the Bureau has preliminarily determined

that some cardholders may benefit from the proposed \$8 safe harbor threshold amount in terms of a greater ability to repay revolving debt. The Bureau also notes that card issuers have methods other than higher late fees (1) to deter late payment behavior; and (2) to facilitate timely payments, for example, automatic payment and notification within a certain number of days (e.g., five days) prior to the due date that the payment is coming due.

In making its preliminary determination that lowering late fee amounts to the proposed \$8 safe harbor amount would still have a deterrent effect on late payments, as discussed in more detail below, the Bureau considered (1) a comparison of the proposed \$8 late payment safe harbor amount to minimum payment amounts on accounts in the Y-14 data; and (2) available empirical evidence on the effects of credit card late fees on the prevalence of late payments.

The Bureau notes that whether a consumer is late in making a required payment depends in part on the consequences of paying late, including both penalty fees for late payments and other consequences such as increased interest charges and potential credit reporting consequences (as discussed in part II.G and in more detail below). From the point of view of a rational consumer faced with the decision of whether to make a minimum balance payment on time or to put off the payment until later, the decision represents a tradeoff weighing the value to the consumer of retaining the money for longer against the total costs of paying late. For the median minimum payment amount of approximately \$100 for accounts that paid late in the Y-14 data from October 2021 through September 2022, the costs of paying late are quite steep both under current late

payment fee amounts and under the proposed \$8 safe harbor amount.¹¹¹ For example, a consumer who effectively borrows a minimum payment amount of \$100 until the next due date (that is, who makes a payment one month late) and pays a \$8 late fee would be incurring an effective APR of 96 percent even ignoring other consequences. In addition, a consumer who effectively borrows a minimum payment amount of \$40 for 10 days (past due) and pays a \$8 late fee would be incurring an effective APR of 730 percent. As the median minimum due was \$39 for all cardholders between October 2021 and September 2022 in the Y-14 data,¹¹² and around half of late payers made a payment in less than 10 days past the due date, the effective APR could be higher than 730 percent for some consumers. Thus, the Bureau has preliminarily determined that the proposed \$8 late fee safe harbor amount is still a powerful deterrent to those consumers who pay attention to financial penalties.

The Bureau also has considered available empirical evidence on the effects of credit card late fees on the prevalence of late payments. In particular, the Bureau considered (1) a 2022 paper analyzing the effect of the reduction of late fee amounts that became effective as a result of the CARD Act in 2010; (2) analysis by the Bureau using Y-14 data of how the prevalence of late payments is affected by increases in late fee amounts during the six months following a violation; and (3) other empirical

¹¹¹ For more information about the distribution of minimum payment amounts for late accounts in the Y-14 data, *see* Figure 3 and related discussion in the section-by-section analysis of § 1026.52(b)(2)(i).

¹¹² For purposes of the calculations of the distribution of the minimum payment amounts in the Y-14 data, the calculations do not include account-months where a late fee was charged but the minimum due was reported to be \$0.

investigations into the correlates of late fee amounts and late fee incidence as discussed below.

In analyzing the available data, the Bureau notes a 2022 paper by Grodzicki *et al.*, containing an empirical analysis that concluded that a decrease in the late fee amount stemming from the Board's 2010 Final Rule raised the likelihood of a cardholder paying late.¹¹³ While the Bureau recognizes that this paper suggests that consumers may engage in more late payments when they are less costly to consumers, for the reasons discussed below, the Bureau does not consider this robust evidence that the proposed \$8 safe harbor late fee amount would not have a deterrent effect. The Bureau also notes the paper focused on the late fee variations resulting from the limitations on penalty fee amounts in the Board's 2010 Final Rule and thus could be confounded by other market changes coinciding with the rule going into effect. In particular, the late fee provisions in the Board's 2010 Final Rule were implemented in August 2010, as the U.S. economy was still dealing with the aftermath of the Great Recession,¹¹⁴ and thus it was difficult to attribute consumer finance statistical trends to particular events. Moreover, the Board's 2010 Final Rule affected all consumers and all issuers, so there was no suitable control group of consumers that were charged the same amount of late fees before and after the implementation of the Board's 2010 Final Rule. Thus, the 2022 paper compared consumer behavior in the year before and the year after August 2010, and the causal

¹¹³ Daniel Grodzicki, *et al.*, *Consumer Demand for Credit Card Services*, Journal of Financial Services Research (Apr. 25, 2022), <https://link.springer.com/article/10.1007/s10693-022-00381-4>.

¹¹⁴ The Great Recession began in the fourth quarter of 2007 and ended in the second quarter of 2009. *See generally* Nat'l Bureau of Econ. Res., *Business Cycle Dating Committee*, (Sept. 20, 2010), <http://www.nber.org/cycles/sept2010.html>.

attribution of an increase in late payments to a reduction of the late fee amount is hard to prove due to the general economic uncertainty around that time.

In developing this proposal, the Bureau analyzed Y-14 data from 2019, where the variation in late fees does not correspond to other big changes or differences that might plausibly affect late payment. As this proposal discusses, the current rule sets a higher late fee safe harbor amount for instances where another late payment occurred over the course of the preceding six billing cycles. The Bureau conducted statistical analysis to investigate whether the lower late fee amount in month seven leads to a distinct rise in late payments (Y-14 seventh-month analysis). Specifically, the Bureau estimated whether there are discontinuous jumps in late payments in the seventh month after the last late payment.¹¹⁵ This analysis focused on these potential jumps to isolate the potential impact that the lower late fee that would apply in month seven might have on late payment rates, given that month seven is generally comparable to month six other than the lower late fee amount. In a random subsample from account-level data available in 2019 from the Y-14 data, this statistical analysis did not support that the lower late fees in month seven have an effect on the late payment rate, at conventional confidence levels. In addition, as a separate observation, the Bureau observed that for consumers that incurred a higher fee for a late payment during the six months after the initial late payment, the payment of that higher late fee did not lead to a discernibly lower chance of

¹¹⁵ The Bureau observed in the Y-14 data that, consistent with the safe harbor provisions of the current rule, consumers who paid late again within the six months after a late payment paid higher late fees during those six months than they paid after the initial late fee.

late payment for a third time in the future than for those consumers whose second late fee was lower because they paid late seven or more months after their first late payment.

The Bureau acknowledges that the variation in late payments in the Y-14 seventh-month analysis discussed above is not the same as the changes that would result from the proposed rule. Nonetheless, this evidence suggests the prevalence of late payments is not highly sensitive to the level of late fees at the current order of magnitude.

An advantage of the Y-14 seventh-month analysis is that it avoids confounding factors that often are found in other studies of late fees, including the 2022 paper by Grodzicki *et al.*, discussed above. Studies that compare behaviors of consumers facing higher or lower fees (if late) with consumers in a comparison group are often fraught with multiple confounding factors that may also vary across time periods, issuers, products, or consumer behavior in each group.

The preliminary finding from the Y-14 seventh-month analysis described above is still contingent upon the fact that some consumers understand that their issuers charge lower late fees starting the seventh month after an initial violation. The Bureau recognizes that the higher late fees for subsequent late payments within the next six billing cycles might be more of a deterrent if consumers understand them better in 2022 than they did in 2019, but the Bureau has no evidence to indicate that is the case. However, this analysis is not dependent on all issuers charging the lower late fee safe harbor amount more than six months after a late payment nor the higher late fee safe harbor amount within the six billing cycles. As long as some issuers made use of the higher safe harbor, and the analysis described above shows they did, the Bureau should still have been able to detect an increase in the deterrent effect of their fee structure.

The Bureau also notes that because the Y-14 seventh-month analysis discussed above focused on a potential discrete jump in late payments more than six months after a preceding late payment, it also allowed for late payments to trend down as more time passed after a late payment. As described above, the Bureau did not see the lower late fee amount that could be charged in month seven change this downward trend.

The Bureau also has preliminarily determined that other publicly available studies on late fees suggest that the proposed \$8 safe harbor amount would still have a deterrent effect on late payments. Empirical investigations into the correlates of late fee amounts¹¹⁶ and late fee incidence¹¹⁷ noted that late fee payment can often be avoided by small and relatively costless changes in behavior. This suggests that the lower proposed \$8 late fee safe harbor amount would still be higher than the costs of making a timely payment. The Bureau has preliminarily determined that the triggers that make cardholders avoid the current prevailing late fees also would make cardholders avoid a \$8 late fee.¹¹⁸

¹¹⁶ Nadia Massoud, *et al.*, *The Cost of Being Late? The Case of Credit Card Penalty Fees*, 7 *Journal of Financial Stability*, at 49-59 (2011).

¹¹⁷ Sumit Agarwal, *et al.*, *The Age of Reason: Financial Decisions Over the Life Cycle and Implications for Regulation*, 2 *Brookings Papers on Economic Activity*, at 51-117 (2009).

¹¹⁸ The Bureau notes that several industry commenters on the ANPR discussed a survey conducted by Argus Advisory, a TransUnion Company, in 2010. The commenters indicated that this survey demonstrates that there is a threshold which late fees must reach in order to encourage cardholders to pay on time. The commenters indicated that this survey shows that to deter a majority of cardholders from making a late payment, a fee of \$40 to \$46 would be required. The Bureau acknowledges that an order of magnitude higher fee amounts is likely to deter more consumers from paying late but finds that questions to consumers on hypothetical late payment amounts are less informative about the effects of late payment fees in practice. The Board also discussed this survey when it adopted the 2010 Final Rule and did not believe that it would be appropriate to give significant weight to the results of the survey. The Board noted: “Although surveys of this type are sometimes used to gauge the prices consumers may be willing to pay for retail products, the Board understands that their accuracy is limited even in that context. Furthermore, the Board is not aware of this type of survey being used to measure the deterrent effect of fees. Accordingly,

As discussed above, in support of applying higher late fee safe harbor amounts for the following six billing cycles after a late payment, the Board in adopting its 2010 Final Rule pointed to a 2008 study by Agarwal *et al.*, of four million credit card statements, which found that a consumer who incurs a late payment fee is 40 percent less likely to incur a late payment fee during the next month, although this effect depreciates approximately 10 percent each month.¹¹⁹

The Bureau has consulted the last available revision of the cited working paper by Agarwal *et al.*, from 2013, and has preliminarily determined that the study is of limited relevance as to whether the late fee amount impacts late payment incidence, for two reasons. First, the study considers the months following any late fee and compares them to months with no recent late payment. That comparison is not the same as comparing to months in which a payment was late, but a lower late fee (or even a \$0 late fee) was charged. Second, even if the study had compared to months where a payment was missed but no late fee was charged, that comparison still would not be relevant to the

the Board does not believe that it would be appropriate to give significant weight to the results of this survey.” 75 FR 37526, 37541 n. 43 (June 29, 2010).

Several industry commenters also argued that late fees are often used in other industries, and similar to the card market, higher fees are more effective at encouraging compliance with due dates. The commenters pointed to studies in the video rental market that showed that payment of a late fee decreases the likelihood of a late return the next month by nearly 9 percent, and the deterrent effect of late fees increases with the size of the penalty. Haselhuhn *et al.*, *The Impact of Personal Experience on Behavior: Evidence from Video-Rental Fines*, Management Science, vol. 58, No. 1 (2012). These commenters also pointed to another study on the video rental market that found that (1) paying a late fee reduces the likelihood that the next return will be late by 19 percent; (2) these effects decrease the farther out from the initial payment the customer gets. Fishman and Pope, *Punishment-Induced Deterrence: Evidence from the Video-Rental Market*, Univ. of Cal., Berkeley, Dept. of Econ. (2006). The Bureau recognizes that the results of these studies are in line with the broader literature (*see also supra* note 93) indicating that consumers learn by trial and error of personal experience, but the Bureau finds that these studies are less useful to extrapolate how many more cardholders would make a late payment on U.S. credit cards if the late fee safe harbor amount were lowered.

¹¹⁹ *See* Agarwal *et al.*, *supra* note 93.

proposal in that the proposal would reduce the safe harbor amount to \$8, not completely eliminate the late fee.

The Bureau notes that the Y-14 seventh-month analysis discussed above shows that in the surrounding months reoffending rates trend down with each month after the last late payment. The Bureau's Y-14 seventh-month analysis, however, does not show a jump in late payment rates in month seven after the last late fee, which suggests that the higher late fee amount during the prior six months is not contributing to this downward trend.

The Bureau also notes that the 2013 study by Agarwal *et al.*, discussed above did not separate the effects of the late fee itself from other possible consequences of a late payment, such as additional finance charges, a lost grace period, penalty rates, and reporting of the late payment to a credit bureau which could affect the consumer's credit score. Given these other consequences of a late payment as discussed in more detail below and in part II.G, it is not clear that the proposal's lower late fee safe harbor amount would meaningfully affect the decreased chance that consumers will pay late again after an initial late payment in ways similar to those established in this 2013 study.

As discussed above, in adopting the safe harbor amounts in its 2010 Final Rule, the Board also considered the limitations that the United Kingdom's OFT placed on credit card default charges in 2006. The Bureau notes that it is not aware of evidence suggesting that the £12 (\$21 on the day of the rule, \$13.40 in November 2022) limit the OFT imposed on default charges (including late fees) in 2006 meaningfully increased late payments in the United Kingdom (U.K.). The OFT ruled on April 5, 2006, that it would presume default charges higher than £12 unfair and challenge the company unless

exceptional business factors drove the decision for the company to charge higher fees. As fees were routinely as high as £25 (\$43.75 on the day of the rule) until that spring, this episode is the closest to what the Bureau would foresee as the outcome to its proposal: a salient reduction in late fees impacting the entire marketplace at once, letting both issuers and cardholders learn and adapt to the lower later fees. The Bureau solicits comment from the public for any relevant information on the causal effects of this U.K. fee reform on missed or late payments and longer delinquencies, especially ones leading to more costly collections than before the reform.

For the reasons discussed above, the Bureau preliminarily finds that the available evidence indicates that the proposed \$8 safe harbor amount for the first and subsequent late payments would still have a deterrent effect on late payments, although that effect may be lessened by the proposed change to some extent, and other factors may be more relevant (or may become more relevant) towards creating deterrence. Even if the proposed \$8 safe harbor increases the frequency of late payments by some percentage, for the reasons discussed below, the Bureau has preliminarily determined that some cardholders may benefit from the proposed \$8 safe harbor threshold amount. As discussed above, in considering the appropriate safe harbor amount for late fees, the Bureau is guided by the factors in TILA section 149(c), which provides that the Bureau can consider such other factors that the Bureau deems necessary or appropriate. The Bureau preliminarily finds that it is both necessary and appropriate when considering whether a late fee is reasonable and proportional to take into account the possible impact of lower late fees on cardholders' repayment behavior and finances.

For the more constrained cardholders, like subprime borrowers, who pay a disproportionate proportion of late fees, the current, higher late fee may be impacting cardholder repayment conduct—i.e., the higher late fee amount could have gone toward a payment on the account. As discussed in part VII, the Bureau estimates that reducing the safe harbor for late fees to \$8 would likely reduce late fee revenue by billions of dollars. While issuers may respond to this reduction in revenue from late fees by adjusting interest rates or other card terms to offset the lost income, the Bureau expects less than full offset, with consumers gaining in total from reduced late fees. This expected savings would benefit consumers. The money saved by cardholders on late fees may go toward repayment. The 2022 paper by Grodzicki *et al.*,¹²⁰ described above, with all the caveats noted there, found such a pattern for subprime cardholders: A decrease in late fees after the implementation of the CARD Act increased borrowing for prime borrowers but triggered repayment for subprime cardholders.¹²¹ If this prediction held true for the current proposed reform, it would imply that lowering late fees may provide some benefits to subprime consumers in terms of a greater ability to repay revolving debt. This effect might also lower issuers' losses from delinquencies, as it could subsequently

¹²⁰ *Supra* note 113.

¹²¹ Although the paper found that lower late fees may cause subprime cardholders to pay late more often, it also found that lower late fees may cause subprime cardholders to make a larger payment when they ultimately make the payment. This paper explained that this latter effect on subprime cardholders might result from the lower late fee amount lessening the need for subprime cardholders to focus on avoiding late fees and instead allowing some subprime cardholders to start to pay more attention to the high cost of their revolving debt.

reduce the likelihood and the severity of default in the population most prone to default.¹²²

As discussed above, in considering the appropriate safe harbor amount for late fees, the Bureau is guided by the factors in TILA section 149(c), which provides that the Bureau can consider such other factors that the Bureau deems necessary or appropriate. The Bureau preliminarily finds that the combined benefits of these effects are necessary and appropriate factors to take into account, along with deterrence, in determining whether a late fee safe harbor amount is reasonable and proportional. The Bureau also preliminarily finds that a late fee safe harbor amount of \$8 for the first and subsequent late payments strikes the appropriate balance of these considerations.

In addition, the Bureau notes that card issuers have methods to deter late payment behavior other than charging higher late fees. As discussed in part II.G, for cardholders who typically pay their balance in full every month (so-called transactors), a late fee is in addition to new interest incurred for carrying or revolving a balance. For these customers who do not roll over a balance in the month before or after a late fee is assessed, the loss of a grace period and coinciding interest charges may pose a similar or even greater deterrent effect than the late fee itself.

Card issuers also have other tools to deter late payment behavior, and therefore, minimize the potential frequency and cost to card issuers of late payments, such as

¹²² Even if lower late fees would decrease losses from delinquencies, issuers may still prefer higher late fees to maximize profits. As current late fee levels generally produce profits to issuers on the average late payment, the Bureau does not take the prevalence of high fees as strong evidence that lower fees would raise issuers' losses from delinquency. Even if lowering late fee amounts reduced delinquency, doing so might not be in issuers' interest: a \$1 reduction in the late fee amount might decrease delinquency losses by less than \$1 per incident, and thus lower profits.

reporting the late payment to a credit bureau which could affect the consumer's credit score, decreasing the consumer's credit line, limiting the cardholder's earning or redemption of rewards, and imposing penalty rates. After 30 or so days, card issuers typically report delinquencies to credit bureaus, which can lower the consumers' credit scores. Since the Board's 2010 Final Rule went into effect, many credit card issuers, financial institutions, and third parties have begun providing free credit scores to consumers.¹²³ Access to real-time changes in consumers' credit scores have likely increased their awareness of any decline related to late payments. Thus, the deterrent effect of any negative credit score impact is likely greater than in 2011 and further encourages payment within one billing cycle of the due date without the imposition of additional financial penalties.

Also, an issuer may take steps to reduce a cardholder's credit line and limit the cardholder's earning or redemption of rewards. If a consumer does not make the required payment by the due date, § 1026.55(b)(3) permits a card issuer to take actions to reprice new transactions on the account according to a penalty rate in certain circumstances. After 60 days, § 1026.55(b)(4) permits card issuers to take steps to reprice the entire outstanding balance on the account according to a penalty rate in certain circumstances.

The Bureau also notes that card issuers have methods to facilitate timely payments, including, for example, automatic payment and notification within a certain number of days (e.g., five days) prior to the due date that the payment is coming due.

¹²³ Bureau of Consumer Fin. Prot., *The Consumer Credit Card Market*, at 174 to 176 (Dec. 2017) (2017 Report), https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2017.pdf.

Both the availability and adoption of these methods have increased since the Board issued its 2010 Final Rule. In 2013, issuers tracking the number of consumers making payments online reported that an average of 38 percent of consumers made at least one non-automatic payment online or through automatic payment;¹²⁴ in 2020, 61 percent of active accounts made at least one non-automatic online payment online, and 18 percent of accounts made at least one automatic payment.¹²⁵ Even in the past few years, digital enrollment has grown with 80 percent of active accounts enrolled in an issuer's online portal in 2020 (a 7 percentage point increase from 2017), 64 percent enrolled in a mobile app (a 13 percentage point increase from 2017), and 56 percent receiving only e-statements (a 12 percentage point increase from 2017).¹²⁶

Indeed, in response to the ANPR, several card issuers and their trade groups noted that card issuers currently use many of these methods. One large trade group, for example, noted that issuers have developed functions such as automatic payment to help consumers avoid forgetting to make monthly payments. This commenter further asserted that automatic payment generally allows consumers to choose an amount to pay each month and a payment due date based on what best fits their financial circumstances, increasing the likelihood that consumers will be able to pay on time. A joint comment submitted by several industry trade groups stated that issuers promote on-time payments through a variety of means in addition to late fees, including multiple payment reminders sent via mail, email, or text notification depending on consumer preference. These

¹²⁴ 2013 Report, at 68.

¹²⁵ These categories are not mutually exclusive. 2021 Report, at 39.

¹²⁶ 2021 Report, at 171.

commenters further stated that one issuer reported that as of five months after rollout of its new alert system, the issuer's gross monthly late fees were 20 percent lower and the late fee incidence rate per balance had fallen by nearly 25 percent. Similarly, a large credit union trade group noted that some credit unions already have systems in place or are currently contracting with third-party vendors to offer their members convenient reminders for upcoming payment due dates via text message and email.

The Bureau expects these other consequences to decrease the likelihood of late payment not only in cases where issuers consider the deterrence effects of lower late fees to be insufficient. As discussed in part VII, issuers may offset lost revenue from lower late fees by increasing interest rates, which would indirectly make late payments more costly than without this response. Also, issuers may have less ability to charge consumers higher late fees to maximize profits and thus may be more inclined to take other, more efficient steps to deter late payments, including providing timely reminders of an upcoming due date, well-chosen due dates aligned with cardholders' cash flow, and encouraging automatic payments.

Consumer conduct. As discussed above, the Board took consumer conduct into account in adopting the higher \$35 fee for repeat late fees within six billing cycles. The Board explained its belief that “multiple violations during a relatively short period can be associated with increased costs and credit risk and reflect a more serious form of consumer conduct than a single violation.”¹²⁷

¹²⁷ 75 FR 37526, 37527 (June 29, 2010).

The Bureau has preliminarily determined that the proposed \$8 late fee safe harbor amount for the first and subsequent late payments better reflects a consideration of consumer conduct. For example, it is not clear from analysis of the Y-14 data and other relevant information that multiple violations during a relatively short period are associated with increased credit risk and reflect a more serious consumer violation. Based on the account-level Y-14 data, the Bureau estimated that only 13.6 percent of accounts incurred a late fee and then no additional payments were made on that account. In addition, for accounts that incurred a late fee, the Bureau estimates that a third of accounts paid the amount due within five days of the payment due date, half the accounts paid the amount due within 15 days of the payment due date, and three out of five accounts paid the amount due within 30 days of the payment due date.¹²⁸

In addition, the Bureau understands that the Metro 2 reporting format used by the industry for reporting information to credit bureaus does not consider a payment to be late if it is made within 30 days of the due date. Thus, for risk management purposes, the industry itself does not appear to consider the consumer's conduct in paying late to be a serious form of consumer conduct until the consumer is 30 or more days late. As discussed above, the Bureau estimates that a majority of accounts become current before card issuers even consider the consumer late for credit reporting purposes.

The Bureau also recognizes that some consumers may pay late chronically but otherwise make a payment within 30 days for a number of reasons, including cash flow issues, that do not necessarily indicate that they are at significant risk of defaulting on the

¹²⁸ For more information related to the estimates using the Y-14 data of how many days after the due date accounts that incurred a late fee paid the amount due, *see* Figure 4 and related discussion in part VII.

credit. For example, consumers may make a credit card payment after the due date from the next paycheck to smooth out expenses and avoid paying overdraft fees. The Bureau notes that a study from 2021 suggests that some consumers who are paid on a bi-weekly basis may not make the required payment by the due date but will make the required payment within 30 days after the due date from their next paycheck.¹²⁹

The Bureau also notes that card issuers have methods other than late fees to address credit risk. Specifically, card issuers may take steps to reduce a cardholder's credit line. Also, card issuers that charge an interest rate are permitted by § 1026.55(b)(3) to reprice new transactions on the account according to a penalty rate in certain circumstances. In addition, after 60 days, § 1026.55(b)(4) permits these issuers to take actions to reprice the entire outstanding balance on the account according to a penalty rate in certain circumstances.

The Bureau recognizes that card issuers do not charge interest on charge card accounts, and thus would not be able to use the interest rate charged on the account to manage credit risk. Nonetheless, current § 1026.52(b)(1)(ii)(C) permits card issuers to impose a late fee that does not exceed 3 percent of the delinquent balance on a charge card account that requires payment of outstanding balances in full at the end of each billing cycle, when a charge card issuer has not received the required payment for two or more consecutive billing cycles. As the Board noted in the 2010 Final Rule, this provision is intended to provide charge card issuers with more flexibility to charge higher

¹²⁹ Paolina C. Medina, *Side Effects of Nudging: Evidence from a Randomized Intervention in the Credit Card Market*, 34 *The Review of Financial Studies*, (May 2021), at 2580-2607, <https://doi.org/10.1093/rfs/hhaa108>.

late fees and thereby manage credit risk when an account becomes seriously delinquent, because charge card issuers do not apply an APR to the account balance and therefore cannot respond to serious delinquencies by increasing that rate.¹³⁰ The proposal would not amend the current safe harbor set forth in § 1026.52(b)(1)(ii)(C).

Consideration of all statutory factors—preliminary findings and determinations.

In considering all statutory factors, the Bureau preliminarily finds that an \$8 late fee for the first and subsequent late payments better represents a balance of issuer costs, deterrent effects, consumer conduct, as well as the benefits to issuers that result from relying on a safe harbor amount, like reduced administrative costs, and the possible beneficial effects of lower late fees on subprime cardholders' repayment behavior. Further, the Bureau preliminarily finds that this amount is supported by careful analysis of the Y-14 data. Finally, the Bureau notes that it has taken into consideration changes in the market, like automatic payment, that facilitate billing and payment, thus making it easier for card issuers to collect timely payments. For these reasons, the Bureau preliminarily determines that a late fee amount of \$8 for the first and subsequent violations is presumed to be reasonable and proportional to the late payment violation to which the fee relates.

The Bureau seeks comment on all aspects of its proposal to lower the late fee safe harbor dollar amounts in § 1026.52(b)(1)(ii) to a fee amount of \$8 for the first and subsequent violations and provide that a higher safe harbor dollar amount for penalty fees occurring within the same billing cycle or the next six billing cycles does not apply to late

¹³⁰ See generally, 75 FR 37526, 37544 (June 29, 2010).

fees. In particular, the Bureau seeks comment on whether to set a different amount and, if so, what amount and why, including any relevant data or other information. The Bureau also seeks comment on whether to retain the higher safe harbor amount and, if so, what amount and why, including any data and other information related to the deterrent effects of the higher amount or its effects on consumer conduct. Further, the Bureau seeks comment on whether and why to set a staggered late fee amount with a cap on the maximum dollar amount, such that card issuers could impose a fee of a small dollar amount every certain number of days until the cap is hit.¹³¹ The Bureau seeks comment on what small dollar amount and maximum dollar amount cap may be appropriate and why, including any relevant data or other information. The Bureau also seeks comment on whether the safe harbor threshold for late fees should be structured as a percentage of the minimum payment amount, and if so, what percentage should be used. In addition, the Bureau seeks comment on what other revisions may be appropriate to ensure that credit card late fees imposed pursuant to the safe harbor provisions are reasonable and proportional. In particular, the Bureau seeks comment on whether, as a condition of using the safe harbor for late fees, it may be appropriate to require card issuers to offer automatic payment options (such as for the minimum payment amount), or to provide notification of the payment due date within a certain number of days prior to the due date, or both.

The Bureau further seeks comment on whether and why to lower the safe harbor amounts in § 1026.52(b)(1)(ii)(A) and (B) (including whether and why to eliminate the

¹³¹ In the ANPR, the Bureau solicited comment on a staggered late fee approach but received no responsive comments.

higher safe harbor amount for subsequent violations that occur during the same billing cycle or in one of the next six billing cycles) for all other credit card penalty fees, including fees for returned payments, over-the-limit transactions, and when payment on a check that accesses a credit card account is declined. In particular, the Bureau seeks comment on what the safe harbor amounts for such fees should be, including any relevant data and information on the costs of such violations to card issuers. In the alternative, the Bureau seeks comment on whether to finalize the proposed safe harbor for late fees and eliminate the safe harbors for other penalty fees.

Proposed Amendments to § 1026.52(b)(1)(ii) Commentary

In addition to the proposed amendments to the late fee safe harbor amounts in § 1026.52(b)(1)(ii), the Bureau proposes amendments to the provision's commentary. The Bureau proposes these amendments for purposes of clarity and consistency with the proposal to lower the late fee safe harbor amount to a fee amount of \$8 for the first and subsequent violations.

Existing comment 52(b)(1)(ii)-1 explains the circumstances in which a card issuer may impose a higher penalty fee amount under § 1026.52(b)(1)(ii)(B) for a violation of the same type that occurred during the same billing cycle or one of the next six billing cycles. Because § 1026.52(b)(1)(ii)(B) would no longer apply under the Bureau's proposal to limit the late fee safe harbor amounts to a fee amount of \$8 for the first and subsequent violations, the Bureau proposes to amend comment 52(b)(1)(ii)-1.i to explain additionally that a card issuer cannot impose a late fee in excess of \$8, as provided in proposed § 1026.52(b)(1)(ii), regardless of whether the card issuer has imposed a late fee within the six previous billing cycles. The Bureau also proposes to amend the illustrative

examples in comment 52(b)(1)(ii)-1.iii.A to remove references to late fees and replace them with references to over-the-limit fees, as § 1026.52(b)(1)(ii)(B) would still apply to such fees under the Bureau's proposed amendments to § 1026.52(b)(1)(ii). In addition, the Bureau proposes to amend the illustrative examples in comments 52(b)(1)(ii)-1.iii.B and C to reflect a late fee amount of \$8, consistent with the proposed amendments to § 1026.52(b)(1)(ii), and to make minor technical changes for consistency with the proposal.

The Bureau invites comment on all aspects on these proposed amendments to the commentary to § 1026.52(b)(1)(ii), including comment on what additional amendments may be needed to help ensure clarity and compliance certainty.

Alternatives Considered

The Bureau considered several alternatives in developing the proposal to lower the safe harbor amounts for late fees. These included proposing to eliminate for late fees the safe harbor provisions in § 1026.52(b)(1)(ii) altogether, in which case card issuers could only impose late fees in amounts that issuers determine to be reasonable and proportional under the cost analysis provisions in § 1026.52(b)(1)(i). In the ANPR, the Bureau solicited comment on several questions related to facilitating use of the cost analysis provisions and to eliminating the safe harbor provisions for late fees. These included requests for comment on what information card issuers would use if they were to use the cost analysis provisions in § 1026.52(b)(1)(i) to determine the amount of late fees and what additional details the Bureau may need to provide concerning how to comply with the cost analysis provisions, beyond the detail currently provided in the commentary. In addition, the Bureau requested comment on what additional processes

and procedures, if any, the Bureau should adopt to ensure compliance if the Bureau were to require that card issuers use the cost analysis provisions to determine the amount of late fees.

No commenters expressly supported eliminating the safe harbor provisions, and most card issuer and trade group commenters expressly opposed it. No card issuers stated that they use the cost analysis provisions to determine the amount of late fees. Of the commenters opposing eliminating the safe harbor provisions, many expressed their belief that doing so could result in higher late fees or an increase in the cost of credit for consumers. In addition, a large trade group commenter expressed concern that eliminating the safe harbor provisions could increase issuers' compliance costs in determining the overall costs resulting from late payments (placing a disproportionately high burden on smaller issuers, community banks, and new entrants) and potentially result in complicated formulas to determine costs and appropriate late fees. A credit union expressed concern about increased compliance costs as well and further noted that those increased costs would be borne by credit union members. Another trade group commenter noted that before eliminating the safe harbor provisions, the Bureau would have to take into account all of the factors that the Bureau is required to consider under the CARD Act in issuing rules to establish standards for assessing whether the amount of any penalty fee is reasonable and proportional to the omission or violation to which it relates.

The Bureau seeks comment on what revisions to the cost analysis provisions in § 1026.52(b)(1)(i), if any, may be appropriate to ensure that late fee amounts determined pursuant to those provisions are reasonable and proportional and to facilitate compliance.

The Bureau also seeks comment on whether to eliminate the safe harbor provisions for late fees, rather than lowering the safe harbor amounts to a fee amount of \$8 for the first and subsequent violations as proposed. As discussed above, the Bureau anticipates that, under the proposal to lower the late fee safe harbor amount, some card issuers whose pre-charge-off collection costs are higher than \$8 would opt instead to determine their late fee amounts under the cost analysis provisions. Thus, the Bureau notes that its requests for comment on potential revisions to the cost analysis provisions are relevant to both retaining the safe harbor provisions as proposed or eliminating the safe harbor provisions for late fees.

In particular, the Bureau seeks comment on what additional guidance, if any, should be added to the commentary to § 1026.52(b)(1)(i) concerning the specific costs and other factors that card issuers may take into account in determining late fee amounts, including any relevant data or information. Such factors include those that the Bureau must consider under the CARD Act, such as deterrence and consumer conduct, in issuing rules to establish standards for assessing whether the amount of any penalty fee is reasonable and proportional to the omission or violation to which it relates.

The Bureau also seeks comment on whether and to what extent to rely on the Bureau's analysis of data related to collection costs, deterrence, and consumer conduct, as discussed above, in making any revisions to the cost analysis provisions. In addition, the Bureau seeks comment on what additional requirements related to card issuers' internal processes and procedures for calculating and documenting costs, if any, the Bureau should adopt to ensure compliance.

The Bureau also seeks comment on whether to eliminate the safe harbor for all other credit card penalty fees, including fees for returned payments, over-the-limit transactions, and fees charged when payment on a check that accesses a credit card account is declined. For such fees, the Bureau seeks particular comment on what guidance, if any, should be added to the cost analysis provisions in § 1026.52(b)(1)(i) or related commentary concerning the specific costs and other factors that card issuers may take into account in determining that fee amounts are reasonable and proportional to the costs of the specific violation, including any data or information relevant to the factors that the Bureau must consider under the CARD Act in issuing rules to establish standards for assessing whether the amount of any penalty fee is reasonable and proportional to the omission or violation to which it relates. In addition, the Bureau seeks comments on what additional requirements related to card issuers' internal processes and procedures for calculating and documenting costs, if any, the Bureau should adopt to ensure compliance.

52(b)(1)(ii)(C)

As noted above, the Bureau is not proposing to lower the safe harbor amount of a late fee that card issuers may impose under the special rule in § 1026.52(b)(1)(ii)(C) when a charge card account becomes seriously delinquent. Under the special rule, a card issuer may impose a fee of 3 percent of the delinquent balance on a charge card account that requires payment of outstanding balances in full at the end of each billing cycle if the card issuer has not received the required payment for two or more consecutive billing cycles. This provision, as discussed above, is intended to provide charge card issuers with more flexibility to charge higher late fees and thereby manage credit risk when an

account becomes seriously delinquent, because charge card issuers do not apply an APR to the account balance and therefore cannot respond to serious delinquencies by increasing that rate, as other card issuers can. For clarity, the Bureau proposes to amend the special rule to provide that card issuers may impose a fee on a charge card account in those circumstances notwithstanding the limitation on the amount of a late payment fee in proposed § 1026.52(b)(1)(ii). In addition, the Bureau proposes to amend comment 52(b)(1)(ii)-3, which provides illustrative examples of the application of § 1026.52(b)(1)(ii)(C). The proposed rule would amend these examples to use a \$8 late fee amount, consistent with the proposed changes to the late fee safe harbor amount in proposed § 1026.52(b)(1)(ii). The proposed rule also would amend a cross reference contained in comment 52(b)(1)(ii)-3.iii so that it would correctly reference paragraph i. *52(b)(1)(ii)(D)*

Section 1026.52(b)(1)(ii)(D) provides that the dollar safe harbor amounts for penalty fees set forth in § 1026.52(b)(1)(ii)(A) and (B) will be adjusted annually by the Bureau to reflect the changes in the CPI. The Board included this provision in its Regulation Z, § 226.52(b)(1)(ii)(D) as part of its 2010 Final Rule where it determined that changes in the CPI, while not a perfect substitute, would be “sufficiently similar to changes in issuers’ costs and the deterrent effect of the safe harbor amounts.”¹³² In reaching this determination, the Board rejected commentators’ arguments that the Board should adjust the safe harbor amounts as appropriate through rulemaking because the Board believed that this approach would be inefficient.¹³³

¹³² 75 FR 37526, 37543 (June 29, 2010).

¹³³ *Id.*

The Bureau proposes to no longer apply the annual adjustments to the safe harbor amount for late fees. The proposed rule would accomplish this by including the \$8 proposed late fee safe harbor amount in the lead in text to § 1026.52(b)(1)(ii), instead of including it in § 1026.52(b)(1)(ii)(A) or (B). Thus, § 1026.52(b)(1)(ii)(D), which only applies the safe harbor adjustment to the dollar safe harbor amounts in § 1026.52(b)(1)(ii)(A) and (B), would no longer apply to the late fee safe harbor amount. The Bureau proposes one technical change to the cross reference to § 1026.52(b)(1)(ii)(A) and (B) used in § 1026.52(b)(1)(ii)(D) to conform to OFR style requirements. In addition, for clarity, the proposed rule would amend the lead-in paragraph in comment 52(b)(1)(ii)-2 to indicate that the inflation adjustment in § 1026.52(b)(1)(ii)(D) does not apply to late fees. Under the proposal, § 1026.52(b)(1)(ii)(D) would continue to apply to the dollar amount safe harbor amounts that apply to other penalty fees, such as over-the-limit fees, and returned-payment fees. With respect to the dollar amount of the late fee safe harbor, the Bureau would then monitor the safe harbor amount for late fees for potential adjustments as necessary. In addition, although the Bureau's proposal is limited to late fees given available data, the Bureau also seeks comment about whether the same approach should be taken with respect to other penalty fees.

The Bureau notes that inflation adjustments, annual or otherwise, are not statutorily required. TILA section 149, however, does statutorily require that any late payment fee or any other penalty fee or charge, must be “reasonable and proportional” to such omission or violation. When the Board determined that the dollar safe harbor amounts for penalty fees should be subjected to automatic annual inflation adjustments, it

did not expressly consider the effect such adjustments may have on the reasonableness and proportionality of the late payment fee (or any other penalty fee). The Board also did not provide any other data or evidence to support these adjustments as necessary.

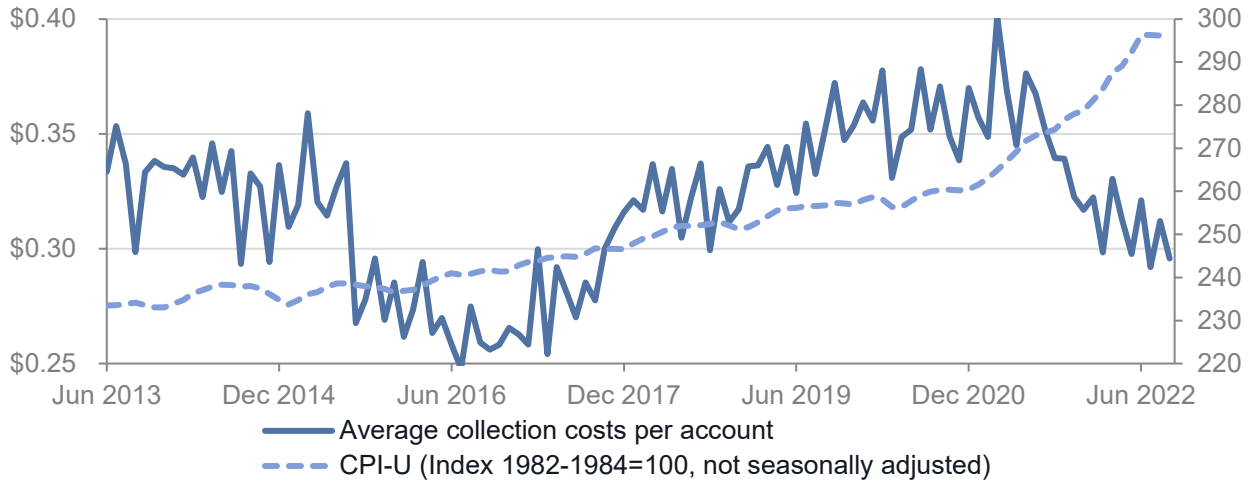
Instead, the Board summarily stated that automatic annual adjustment would be “sufficiently similar to changes in issuers’ costs and the deterrent effect of the safe harbor amounts”¹³⁴ and also considered efficiency, which is not statutorily required. The Board did not go into further details on why an automatic annual adjustment would be similar to changes in issuers’ costs and the deterrent effect of the safe harbor amounts.

The Bureau analyzed relevant data that was not available to the Board to take into consideration the statutorily mandated reasonable and proportional standard by considering the costs incurred as a result of the violation in determining whether a fee amount is reasonable and proportional. The Bureau, based on this data, has preliminarily determined that automatic adjustments based on the CPI are not necessarily reflective of how the cost of late payment to issuers changes over time and, therefore, may not reflect the “reasonable and proportional” standard in the statute. While issuers’ costs do appear to be trending up, it does not appear that they are doing so lockstep with inflation particularly when considering the month-to-month changes in inflation versus costs. Additionally, there are factors outside of inflation that may impact when issuers’ cost goes up and by how much. Figure 2 below shows monthly per-account collection costs in the Y-14 collection (for all consumer portfolios with positive costs that month, solid line) and the CPI-U price index since 2013 (dashed). Given that the costs fluctuate more

¹³⁴ *Id.*

than the price level, any overarching trend in costs is better dealt with through ad hoc adjustments when the safe harbor amounts are revisited.

Figure 2: Collection Cost and Price Index Trends (Y-14)



Thus, the Bureau has considered the cost incurred as a result of a late payment violation and has preliminarily determined that this proposal is more aligned with Congress' intent for late fees to be reasonable and proportional than the current provision which requires the Bureau to adjust for inflation regardless of what the exact changes are, if any, in actual costs incurred by the card issuer.

As noted above, the Board also briefly considered deterrence and efficiency when making the determination to implement an automatic adjustment for inflation. The Bureau has preliminarily determined that deterrence should not be the driving factor in whether the late fee safe harbor amount should be automatically adjusted according to the CPI, nor should it outweigh considerations of issuers' costs. The Bureau notes while it is possible for the deterrent effect of the safe harbor amount to be eroded year-to-year with inflation, there are three overriding considerations as to why that does not necessarily mean there should be an automatic adjustment for inflation. First, the Bureau has

preliminarily determined that it does not intend to tightly peg the deterrent effect to a specific value and recognizes there may be a range of values under which the deterrent effect would be suitable. The deterrence of the proposed safe harbor amount is sufficiently high so that the Bureau is not concerned by the lesser deterrence of a potentially eroded real value under realistic trajectories for medium-term inflation before any potential readjustment could be put in effect. Second, similar to the cost analysis above, the Bureau preliminarily finds that the deterrent effect does not move in lockstep with the CPI. Third the Bureau monitors the market so, under this proposal, the Bureau would be able to make adjustments to the safe harbor amount on an ad hoc basis based on this monitoring, at which point the Bureau would again consider the deterrent effect when promulgating a new safe harbor amount. While TILA section 149 authorizes the Bureau to consider other factors that the Bureau deems necessary and important in issuing rules to establish standards for assessing whether the amount of any penalty fee is reasonable and proportional, the Bureau has preliminarily determined that consideration of costs incurred, and the deterrent effect outweigh consideration of efficiency to help ensure that late fee amounts are reasonable and proportional.

The Bureau solicits comment on this proposal to eliminate the automatic annual adjustments to reflect changes in the CPI for the late fee safe harbor amount, including data and evidence as to why the adjustment may or may not reflect the reasonable and proportional standard. The Bureau also seeks comment on potential future monitoring or other approaches to ensure that the late fee amount is consistent with the reasonable and proportional standard. The Bureau also solicits comments on whether automatic annual adjustments to reflect changes in the CPI should be eliminated for all other penalty fees

subject to § 1026.52(b), including over-the-limit fees, returned-payment fees, and declined access check fees.

52(b)(2) Prohibited Fees

As previously discussed, a card issuer must not impose a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan unless the dollar amount of the fee is consistent with § 1026.52(b)(1) and (2). Section 1026.52(b)(2) provides certain circumstances where fees are prohibited. Specifically, § 1026.52(b)(2) prohibits (1) fees that exceed the dollar amount associated with the violation; and (2) multiple fees based on a single event or transaction.

The Bureau received comments in response to the ANPR from consumer group commenters indicating that the Bureau should prohibit the assessment of a late fee without first providing consumers with a period of time after each due date to make the required payment (a “courtesy period”). These consumer group commenters noted that courtesy periods are already utilized by financial institutions in other financial products and services. For example, these consumer group commenters indicated that mortgage loan contracts typically provide a courtesy period of 10 or 15 days after the due date during which time borrowers may make a payment without penalty.

The Bureau also received comments from multiple industry commenters indicating that they already provide consumers with a courtesy period on their credit card accounts before a late fee is assessed on an account. Other industry commenters also indicated that card issuers do not take significant action to collect late payments

immediately after the due date but instead wait to begin or otherwise increase activity surrounding collection of the late payment.

Commenters also noted when card issuers generally consider a consumer late from a risk perspective. Consumer group commenters explained that for credit reporting purposes, card issuers typically do not treat a consumer as late until payment is 30 days past due. This was additionally supported by (1) an industry commenter that noted late payments are not reported to credit bureaus until a cardholder reaches 30 days past due; and (2) another industry commenter that reported they generally do not hand off accounts to third-party debt collectors until the cardholder is continuously delinquent or has repeated late payments for a period of 2-6 months.

The Bureau also received other comments from consumer group commenters that illustrated how delays beyond consumers' control contribute to the assessment of late fees. For example, consumers who pay electronically may experience a delay in payment processing for payments made over weekends. These unintended late payments could be avoided with the implementation of a courtesy period.

In light of these comments, the Bureau is considering whether to require a courtesy period, which would prohibit late fees imposed within 15 calendar days after each payment due date and be applicable only to late fees assessed if the card issuer uses the safe harbor or alternatively, applicable to all late fees generally (regardless of whether the card issuer assesses late fees pursuant to the safe harbor amount set forth in § 1026.52(b)(1)(ii) or the cost analysis provisions set forth in § 1026.52(b)(1)(i)). The Bureau has preliminary determined that it may be appropriate that the late fee amount

essentially be \$0 during the courtesy period because, as noted above, card issuers may not incur significant costs to collect late payments immediately after a late payment violation.

Further, given that the late payments may be caused by problems with unavoidable processing delays, the implementation of a courtesy period also is consistent with considerations of consumer conduct and deterrence, since, in these circumstances, the consumer attempted to pay timely. To the extent card issuers face increased cost from this 15-day courtesy period, the Bureau also believes that issuers have options that may not have been as readily available at the time of the Board's 2010 Final Rule to encourage timely payment, like sending notifications to consumers to warn them of payment due dates or facilitating automatic payment.

The Bureau solicits comments on whether § 1026.52(b)(2) should be amended to provide for a courtesy period which would prohibit late fees imposed within 15 calendar days after each payment due date. The Bureau additionally solicits comment on whether, if a 15-day courtesy period is required, the courtesy period should be applicable only to late fees assessed if the card issuer is using the late fee safe harbor amount (in which case § 1026.52(b)(1)(ii) would be amended instead of § 1026.52(b)(2)) or alternatively, if the courtesy period should be applicable generally (regardless of whether the card issuer assesses late fees pursuant to the safe harbor amount set forth in § 1026.52(b)(1)(ii) or the cost analysis provisions set forth in § 1026.52(b)(1)(i)). The Bureau also solicits comment, as well as data, on whether a courtesy period of fewer or greater than 15 days may be appropriate.

The Bureau notes that the alternative of applying a 15-day courtesy period only to use of the safe harbor late fee amount may have certain unintended effects on the possible

late fee amounts assessed under the cost analysis provisions. To illustrate, using the Y-14 data, the Bureau estimated that a 15-day courtesy period tied to the safe harbor would cut the incidence of consumers charged the proposed \$8 safe harbor amount by as much as half.¹³⁵ This would cause card issuers who use the safe harbor amount to recover as much as half of what they would recover if a 15-day courtesy period were not required. Card issuers who use the safe harbor amount, therefore, would recover an average of \$4 in late fees per late payment. On the other hand, card issuers that opt to use the cost analysis provisions to assess late fees would not be required to provide a 15-day courtesy period. This could result in an outcome where card issuers who used the cost analysis provisions to determine the late fee amount could charge a late fee that is less than the proposed safe harbor amount, for example \$6, but still, on average, collect more in total late fees than if they charged the proposed \$8 late fee amount. In this example, they could charge \$6 on 100 percent of incidences, whereas if they used the proposed \$8 safe harbor amount, they could only charge the proposed \$8 on approximately half of the incidences. This could lead to a scenario where consumers who are subject to late fees determined by the cost analysis provisions may be assessed a lower late fee amount than the proposed \$8 late fee safe harbor amount but would be charged a late fee more frequently than consumers who are subject to the late fee safe harbor amount.

The Bureau additionally solicits comments on whether a 15-day courtesy period should apply to the other penalty fees that are subject to § 1026.52(b), including over-the-limit fees and returned-payment fees, and if so, why it would be appropriate to apply a

¹³⁵ For more information related to the estimates using the Y-14 data of how many days after the due date accounts that incurred a late fee paid the amount due, *see* Figure 4 and related discussion in part VII.

15-day courtesy period to these other penalty fees. For example, should the Bureau provide consumers with (1) 15 calendar days after the billing cycle ends to bring the balance below the credit limit to avoid being charged an over-the-limit fee; and (2) 15 calendar days after each due date to make the required periodic payment to avoid a returned-payment fee if a payment has been returned. With respect to declined access checks, is a 15-day courtesy period appropriate and if so, how should it be structured?

52(b)(2)(i) Fees that Exceed Dollar Amount Associated with Violation

Section 1026.52(b)(2)(i)(A) provides that a card issuer must not impose a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan that exceeds the dollar amount associated with the violation. For late fees, accompanying comment 52(b)(2)(i)-1 provides that the dollar amount associated with a late payment is the full amount of the required minimum periodic payment due immediately prior to assessment of the late payment. Thus, § 1026.52(b)(2)(i)(A) prohibits a card issuer from imposing a late payment fee that exceeds the full amount of the required minimum periodic payment.

In implementing TILA section 149, the Board noted that the prohibition of fees based on violations of the terms or other requirements of an account that exceed the dollar amount associated with the violation as set forth in its Regulation Z, § 226.52(b)(2)(i)(A) would be consistent with Congress' intent to prohibit penalty fees that are not reasonable and proportional to the violation.¹³⁶ The Board in its reasoning addressed issuers' concerns that when the dollar amount associated with a violation is

¹³⁶ 75 FR 37526, 37544 (June 29, 2010).

small, § 226.52(b)(2)(i)(A) could limit the penalty fee to an amount that is neither sufficient to cover the issuer's costs nor to deter future violations.¹³⁷ The Board explained that while it is possible that an issuer could incur costs as a result of a violation that exceed the dollar amount associated with that violation, this would not be the case for most violations.¹³⁸ Additionally, the Board noted that if card issuers could not recover all of their costs when a violation involves a small dollar amount, prohibiting late fees that exceed the full amount of the required minimum periodic payment would encourage them either to undertake efforts to reduce the costs incurred as a result of violations that involve small dollar amounts or to build those costs into upfront rates, which would result in greater transparency for consumers regarding the cost of using their credit card accounts.¹³⁹ Furthermore, the Board considered the deterrent effect and believed that violations involving small dollar amounts are more likely to be inadvertent and therefore the need for deterrence is less pronounced.¹⁴⁰

The Board also considered whether compliance with its Regulation Z, § 226.52(b)(2)(i)(A) would be burdensome on card issuers and concluded that it would not be overly burdensome.¹⁴¹ The Board explained that, although card issuers may incur substantial costs at the outset, because § 226.52(b)(2)(i)(A) required a mathematical

¹³⁷ *Id.* at 37545.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

determination, issuers should generally be able to program their systems to perform the determination automatically.¹⁴²

When implementing comment 52(b)(2)(i)-1, the Board clarified that the dollar amount associated with a late payment is the full amount of the required minimum periodic payment due immediately prior to the assessment of the late payment. Industry commenters had argued that the dollar amount associated with a late payment should be the outstanding balance on the account because that is the amount the issuer stands to lose if the delinquency continues and the account eventually becomes a loss.¹⁴³ However, the Board explained that relatively few delinquencies result in losses, and the violation giving rise to a late payment fee is the consumer's failure to make the required minimum periodic payment by the payment due date.

The Bureau proposes to amend § 1026.52(b)(2)(i)(A) to limit the dollar amount associated with a late payment to 25 percent of the required minimum periodic payment due immediately prior to assessment of the late payment. The Bureau also proposes to revise comment 52(b)(2)(i)-1 in the following two ways: (1) to clarify that the required minimum periodic payment due immediately prior to assessment of the late payment is the amount that the consumer is required to pay to avoid the late payment fee, including as applicable any missed payments and fees assessed from prior billing cycles; and (2) to revise several examples consistent with the proposed 25 percent limitation.

Like the Board's reasoning in the 2010 Final Rule, this proposal intends to ensure that late fees are reasonable and proportional, even late fees that are imposed when

¹⁴² *Id.*

¹⁴³ *Id.*

consumers are late in paying small minimum payments. However, the Bureau has preliminarily determined that restricting the late fee to 25 percent of the minimum payment is more consistent with Congress' intent to prohibit penalty fees that are not reasonable and proportional to the violation than the current rule that allows for a card issuer to potentially charge a late fee that is 100 percent of the minimum payment.

For example, when considering collection costs incurred by card issuers, it is likely that allowing a late fee that is 100 percent of the minimum payment is not reasonable and proportional to such costs. Generally, most card issuers do not incur collection costs that are 100 percent of the amount they are trying to collect. The Bureau has preliminarily determined that lowering the limitation on late fees to 25 percent of the minimum payment due would still likely allow card issuers to cover contingency fees paid to third-party agencies for collecting the amount of the minimum payment prior to account charge-off. The Bureau understands, based on information requests issued under order for purposes of compiling the Bureau's periodic CARD Act reports to Congress, that card issuers that contract with third-party agencies for pre-charge-off collections pay a contingency fee that is a percentage of the amount collected, which may include an amount (if collected) exceeding the minimum payment. These contingency fees can range from 9.5 percent to 23 percent, further supporting that the proposed 25 percent of minimum payment due is more reasonable and proportional than permitting 100 percent of the minimum payment.¹⁴⁴ It appears that the Board did not consider or have access to such figures when it limited the dollar amount associated with a late payment to 100

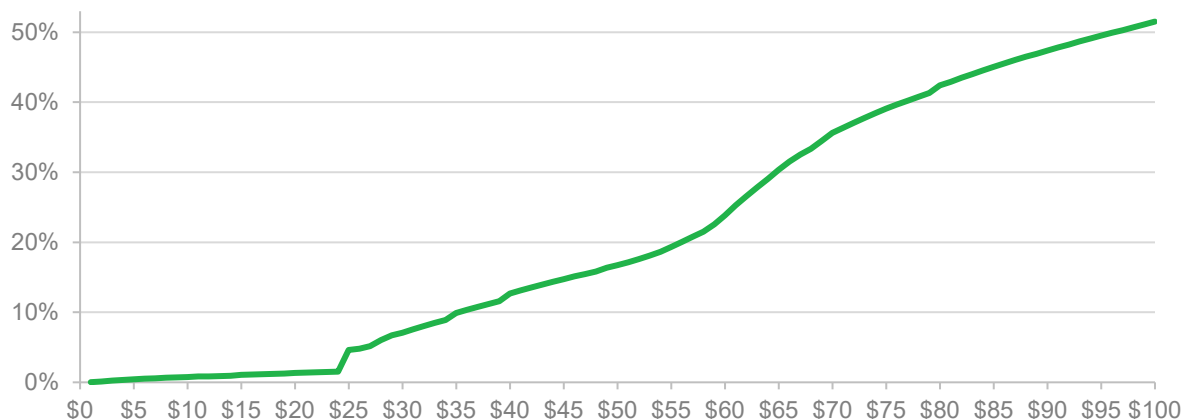
¹⁴⁴ 2021 Report, at 137.

percent of the required minimum periodic payment. With this additional data, the Bureau proposes a limitation on late fees that it has preliminarily determined is more reasonable and proportional than what was set forth in the Board's 2010 Final Rule.

The Bureau recognizes that the proposed 25 percent limitation would most likely impact the amount of the late fee a card issuer can charge when (1) the minimum payment is small, and (2) the card issuer is using the cost analysis provisions in § 1026.52(b)(1)(i) generally to set the late fee amount. Based on the distribution of minimum payments in the Y-14 data, the Bureau estimates that this may occur infrequently. Y-14 data from October 2021 to September 2022 shows that for those months in which an account was late, only 12.7 percent of accounts had a minimum payment of \$40 or less. Additionally for those months in which an account was late, at least 48.5 percent of accounts had a minimum payment above \$100. If a card issuer is using the proposed late fee safe harbor of \$8, however, the instances where 25 percent of the minimum payment may be less than the proposed \$8 safe harbor appear to be even less frequent. For instance, based on the distribution of minimum payments due in the Y-14 on a monthly basis from October 2021 to September 2022, if card issuers could only charge up to 25 percent of the minimum payment, only 7.7 percent of accounts would have been charged a late fee of less than \$8. Figure 3 plots the cumulative distribution function¹⁴⁵ of total payments due in the range of \$1 to \$100 in the account-level Y-14 data, for all months payments were late between October 2021 and September 2022.

¹⁴⁵ The values plotted vertically are the shares of account-months that paid late with minimum payments at or below the integer dollar amounts shown on the horizontal axis.

Figure 3: Distribution of Minimum Payments on Late Accounts (Y-14)



Additionally, when the dollar amount associated with the late payment is small, the Bureau recognizes that the proposal could have the potential to limit the late fee to an amount that is insufficient to cover a card issuer's costs in collecting the late payment. However, permitting a late fee that is 100 percent of the minimum payment does not appear to be reasonable and proportional to the consumer's conduct of paying late when the minimum payment is small. For instance, in situations where the dollar amount associated with the late payment is small and the card issuer is permitted to charge a late fee that is 100 percent of the minimum payment then a consumer is essentially required to pay double the amount of a missed payment in the next billing cycle in addition to the minimum payment due for that next billing cycle. This result is neither reasonable nor proportional to the consumer's conduct in paying late.

Furthermore, as the Board noted in its 2010 Final Rule and which the Bureau has preliminarily determined is still relevant here, to the extent card issuers cannot recover all of their costs through a late fee when a late payment involves a small dollar amount, the proposed limitation will likely encourage card issuers to undertake efforts to either reduce

costs incurred as a result of violations that involve small dollar amounts or to build those costs into upfront rates, which has the additional benefit of resulting in greater transparency for consumers regarding the cost of using credit card accounts. Finally, the Bureau has preliminarily determined that the Board's explanation that compliance would not be overly burdensome also remains applicable to the Bureau's proposal. The proposal would similarly require a mathematical determination that issuers should generally be able to program their systems to perform automatically.

In addition, as discussed above, the Bureau proposes to revise comment 52(b)(2)(i)-1 to clarify that the required minimum periodic payment due immediately prior to assessment of the late payment is the amount that the consumer is required to pay to avoid the late payment fee, including as applicable any missed payments and fees assessed from prior billing cycles. The Bureau understands that card issuers report two payment amounts when responding to Y-14 collection efforts, a minimum payment calculated just for that billing cycle and the total amount that is required to be paid that billing cycle which includes missed payment amounts or fees assessed. The Bureau proposes this revision to comment 52(b)(2)(i)-1 to address any potential confusion about the payment amount to which the proposed 25 percent limitation would apply.

The Bureau solicits comment on the proposed 25 percent limitation discussed above. The Bureau also solicits comment on whether the dollar amount associated with the other penalty fees covered by § 1026.52(b) should be limited to 25 percent of the dollar amount associated with the violation. For example, (1) should over-the-limit fees be limited to 25 percent of the amount of credit extended by the card issuer in excess of

the credit limit during the billing cycle in which the over-the-limit fee is imposed;¹⁴⁶ (2) should the returned-payment fee be limited to 25 percent of the amount of the required minimum periodic payment due immediately prior to the date on which the payment is returned to the card issuer;¹⁴⁷ and (3) should the declined access check fee be limited to 25 percent of the amount of the check.¹⁴⁸

52(b)(2)(ii) Multiple Fees Based on a Single Event or Transaction

Section 1026.52(b)(2)(ii) prohibits card issuers from imposing multiple penalty fees based on a single event or transaction. The Bureau is not proposing to amend the text of § 1026.52(b)(2)(ii). However, the Bureau proposes to revise comment 52(b)(2)(ii)-1 to clarify several examples illustrating this requirement. Specifically, the proposed rule would amend several examples in comment 52(b)(2)(ii)-1 to reflect a late fee amount of \$8, consistent with the proposed amendments to § 1026.52(b)(1)(ii), and to make minor technical changes for consistency with the proposal.

Section 1026.60 Credit and Charge Card Applications and Solicitations

60(a) General Rules

60(a)(2) Form of Disclosures; Tabular Format

Section 1026.60(a) provides that a card issuer must provide the disclosures set forth in § 1026.60 on or with a solicitation or an application to open a credit or charge card account. Section 1026.60(a)(2) provides certain format requirements for the

¹⁴⁶ See comment 52(b)(2)(i)-3 for an explanation of the dollar amount associated with an over-the-limit violation.

¹⁴⁷ See comment 52(b)(2)(i)-2 for an explanation of the dollar amount associated with a returned-payment violation.

¹⁴⁸ See comment 52(b)(2)(i)-4 for an explanation of the dollar amount associated with a declined access check violation.

disclosures required under § 1026.60. Section 1026.60(a)(2)(i) provides that in certain circumstances the disclosures required by § 1026.60 generally must be disclosed in a tabular format. Section 1026.60(a)(2)(ii) provides that when a tabular format is required, certain disclosures must be disclosed in the table using bold text, including any late fee amounts and any maximum limits on late fee amounts required to be disclosed under § 1026.60(b)(9). Comment 60(a)(2)-5.ii includes a late fee example to illustrate the requirement that any maximum limits on fee amounts must be disclosed in bold text. The current example assumes that a card issuer's late fee will not exceed \$35. The proposed rule would amend the example to assume that the late fee will not exceed \$8, so that the maximum late fee amount in the example would be consistent with the proposed \$8 late fee safe harbor amount set forth in proposed § 1026.52(b)(1)(ii).

Appendix G to Part 1026 - Open-End Model Forms and Clauses

Appendix G to part 1026 generally provides model or sample forms or clauses for complying with certain disclosure requirements applicable to open-end credit plans, including a credit card account under an open-end (not home-secured) consumer credit plan. The following five sample forms or clauses set forth an example of the maximum late fee amount of “Up to \$35” under the heading “Late Payment”: (1) G-10(B); (2) G-10(C); (3) G-10(E); (4) G-17(B); and (5) G-17(C). The following two sample forms set forth an example of the maximum late fee amount of “Up to \$35” under the heading “Late Payment Warning”: (1) G-18(D); and (2) G-18(F). Sample form G-21 sets forth an example of the maximum late fee amount of “Up to \$35” under the heading “Late Payment Fee.” The following two sample form or clause set forth an example of the late fee amount (\$35) a consumer may incur if the consumer does not pay the required

amount by the due date under the heading “Late Payment Warning”: (1) G-18(B); and (2) G-18(G). The following three sample forms set forth an example of the late fee amount (\$35) that the consumer was charged in the particular billing cycle under the heading “Fees”: (1) G-18(A); (2) G-18(F); and (3) G-18(G).

The Bureau solicits comment on whether the late fee amounts of \$35 in these sample forms or clauses, as applicable, should be revised to set forth late fee amounts of \$8, and whether the maximum late fee amounts of “Up to \$35” in these sample forms or clauses, as applicable, should be revised to set forth a maximum late fee amount of “Up to \$8” so that the late fee amounts and maximum late fee amounts in the examples are consistent with the proposed \$8 late fee safe harbor amount set forth in proposed § 1026.52(b)(1)(ii). The Bureau notes that the 11 forms or clauses discussed above are just samples; card issuers would need to disclose the late fee amount that they charge or the maximum late fee amount on the account, as applicable, consistent with the restrictions in § 1026.52(b).

In addition, as discussed in the section-by-section analysis of § 1026.52(b)(2)(i), the Bureau solicits comment on whether to restrict card issuers from imposing a late fee on a credit card account, unless the consumer has not made the required payment within 15 calendar days following the due date. If the Bureau were to adopt such a limitation, the Bureau solicits comment on whether the following 10 sample forms or clauses that currently disclose an example of the late fee amount (\$35) or maximum late fee amount (“Up to \$35”) that could be incurred on the account should be revised to disclose that a late fee will only be charged if the consumer does not make the required payment within 15 calendar days of the due date: (1) G-10(B); (2) G-10(C); (3) G-10(E); (4) G-17(B); (5)

G-17(C); (6) G-18(B); (7) G-18(D); (8) G-18(F),¹⁴⁹ (9) G-18(G);¹⁵⁰ and (10) G-21.¹⁵¹ If such a disclosure were required, the Bureau also solicits comment on effective ways to help ensure that consumers understand that a 15-day courtesy period only relates to the late fee, and not to other possible consequences of paying late, such as the loss of a grace period or the application of a penalty rate.

In addition, the Bureau notes that the following five sample forms also include disclosures about maximum penalty fee amounts of “Up to \$35” for over-the-limit fees¹⁵² and returned-payment fees: (1) G-10(B); (2) G-10(C); (3) G-10(E); (4) G-17(B); and (5) G-17(C). As discussed in the section-by-section analysis of § 1026.52(b)(1)(ii), the Bureau solicits comment on whether the \$8 safe harbor threshold amount that is being proposed for late fees should also apply to other penalty fees, including over-the-limit fees and returned-payment fees. If the Bureau were to adopt the \$8 safe harbor threshold amount for all penalty fees, the Bureau solicits comment on whether the Bureau should

¹⁴⁹ Sample Form G-18(F) contains two examples of late fees — one example is the maximum late fee of “Up to \$35” under the heading “Late Fee Warning” and the other example is the late fee (\$35) that was charged to the consumer in the particular billing cycle under the heading “Fees.” The Bureau solicits comment only on whether the 15-day courtesy period should be incorporated into the “Late Fee Warning” to indicate the late fee would only be charged if the consumer does not make the required payment within 15 calendar days after each due date. The 15-day courtesy period disclosure would not be appropriate for the example of the late fee under the heading “Fee.”

¹⁵⁰ Sample Form G-18(G) contains two examples of late fees — one example is the late fee of “\$35” under the heading “Late Fee Warning” and the other example is the late fee (\$35) that was charged to the consumer in the particular billing cycle under the heading “Fees.” The Bureau solicits comment only on whether the 15-day courtesy period should be incorporated into the “Late Fee Warning” to indicate the late fee would only be charged if the consumer does not make the required payment within 15 calendar days after each due date. The 15-day courtesy period disclosure would not be appropriate for the example of the late fee under the heading “Fee.”

¹⁵¹ Sample Form G-18(A) only provides an example of a late fee that has been charged on the account in that billing cycle (*see* late fee disclosed under the “Fees” heading), so a disclosure of the 15-day courtesy period would not be appropriate for this disclosure.

¹⁵² These sample forms refer to over-the-limit fees as “over-the-credit-limit fees.”

revise the maximum amount of the over-the-credit-limit fees and returned-payment fees shown on these forms to be “Up to \$8.” Moreover, in the section-by-section analysis of § 1026.52(b)(2)(i), the Bureau solicits comment on whether the 15-day courtesy period should be provided with respect to all penalty fee, including the over-the-credit-limit fees and returned-payment fees. If the Bureau were to adopt the 15-day courtesy period to all penalty fees, the Bureau solicit comment on the 15-day courtesy period should be disclosed in the five sample forms discussed above with respect to the over-the-limit fee and the returned-payment fee.

VI. Effective Date

The Bureau proposes that the final rule, if adopted, would take effect 60 days after publication in the *Federal Register*. The Bureau solicits comment on whether the Bureau should provide a mandatory compliance date that is after the effective date for the proposed changes, if adopted, to the limitations and prohibitions on late fees in § 1026.52(b)(1) and (b)(2), other than the proposed change to § 1026.52(b)(1)(ii)(D) that would provide that future inflation adjustments for safe harbor amounts do not apply to the late fee safe harbor amount. Do card issuers need additional time after the effective date to make changes to their disclosures to reflect the changes in the late fee amounts that they are charging on credit card accounts? If so, when should compliance with the proposed changes, if adopted, be mandatory?

Separately, under TILA section 105(d), Bureau regulations requiring any disclosure which differs from disclosures previously required by part A, part D, or part E

shall have an effective date of October 1 which follows by at least six months the date of promulgation subject to certain exceptions.¹⁵³

To the extent that TILA section 105(d) may apply to any proposed changes requiring disclosures, it would not necessitate the October 1 effective date for purposes of the late fee disclosure for two reasons. First, under Regulation Z, card issuers are currently required to disclose the late fees amounts, or maximum late fees amounts, as applicable, that apply to credit card accounts in certain disclosures, and the disclosure of those late fee amounts must reflect the terms of the legal obligation between the parties.¹⁵⁴ In other words, this proposal, if finalized, would not differ from the current requirement to disclose late fee amounts; instead, it would solely result in a change to the amount of the late fee disclosed for issuers using the safe harbor. Second, this change in amount applies to the safe harbor, which is an amount that card issuers may elect but are not required to use.

If the Bureau were to finalize the 15-day courtesy period on which the Bureau solicits comments as discussed in the section-by-section analysis of § 1026.52(b)(2)(i), consistent with TILA section 105(d), the Bureau solicits comment as to whether that courtesy period and potential disclosure language should have an effective date of “October 1 which follows by at least six months the date of promulgation.”¹⁵⁵

¹⁵³ 15 U.S.C. 1604(d).

¹⁵⁴ Section 1026.5(c) requires that “disclosures shall reflect the terms of the legal obligation between the parties.”

¹⁵⁵ 15 U.S.C. 1604(d).

VII. Dodd-Frank Act section 1022(b) Analysis

A. Overview

In developing this proposed rule, the Bureau has considered the proposed rule's potential benefits, costs, and impacts in accordance with section 1022(b)(2)(A) of the Consumer Financial Protection Act of 2010 (CFPA).¹⁵⁶ The Bureau requests comment on the preliminary analysis presented below and submissions of additional data that could inform the Bureau's analysis of the benefits, costs, and impacts. In developing the proposed rule, the Bureau has consulted or offered to consult with the appropriate prudential regulators and other Federal agencies, including regarding the consistency of this proposed rule with any prudential, market, or systemic objectives administered by those agencies, in accordance with section 1022(b)(2)(B) of the CFPA.¹⁵⁷ The Bureau also consulted with agencies described in TILA section 149.¹⁵⁸

B. Data Limitations and Quantification of Benefits, Costs, and Impacts

The discussion below relies on information that the Bureau has obtained from industry, other regulatory agencies, and publicly available sources, including reports published by the Bureau. These sources form the basis for the Bureau's consideration of the likely impacts of the proposed rule. The Bureau provides estimates, to the extent possible, of the potential benefits and costs to consumers and covered persons of this proposal, given available data.

¹⁵⁶ 12 U.S.C. 5512(b)(2)(A).

¹⁵⁷ 12 U.S.C. 5512(b)(2)(B).

¹⁵⁸ 15 U.S.C. 1665d(b) and 1665d(e).

Specifically, this discussion relies on the Bureau's analysis of both portfolio and account data from the Y-14 collection, as described in part III.C above. The discussion also relies on data collected directly from a diverse set of credit card issuers to support the Bureau's biennial report on the state of the consumer credit card market as required by the CARD Act.¹⁵⁹ The Bureau also consulted the academic literature, as well as public comments in response to the Board's 2010 Final Rule and the Bureau's ANPR that preceded this proposal.

The Bureau acknowledges several important limitations that prevent a full determination of benefits, costs, and impacts. Quantifying the benefits, costs, and impacts requires quantifying consumer and card issuer responses to the proposed changes, and the Bureau finds the body of knowledge on relevant behavioral responses and elasticities incomplete. In particular, the Bureau is not aware of relevant, reliable, and quantified evidence that could be used to predict how changes to late fees would affect late payments and delinquencies or the expected substitution effects across credit cards and between credit cards and other forms of credit. Similarly, the Bureau believes there is little reliable quantitative evidence available on the cost and effectiveness of steps issuers might take to facilitate timely repayment, collect efficiently, reprice any of their services, remunerate their staff, suppliers, or sources of capital differently, or enter or exit any or all segments of the credit card market. The Bureau also believes there is little relevant evidence available on the impacts the proposed changes to the late fee provisions would have on charge cards or the effects of these potential changes on other penalty

¹⁵⁹ 2021 Report, at 17.

fees. Thus, while the data and research available to the Bureau provide an important basis for understanding the likely effects of the proposal, the data and research are not sufficient to fully quantify the potential effects of the proposal for consumers and issuers. This reflects in part the fact that the effects of the proposal would depend on choices made by independent actors in response to the proposal, and the data and research available to the Bureau do not permit reliable predictions of those choices.

In light of these data limitations, the analysis below provides quantitative estimates where possible and a qualitative discussion of the proposed rule's benefits, costs, and impacts. General economic principles and the Bureau's expertise, together with the available data, provide insight into these benefits, costs, and impacts. The Bureau requests additional data or studies that could help quantify the benefits and costs to consumers and covered persons of the proposed rule.

C. Baseline for Analysis

In evaluating the proposal's benefits, costs, and impacts, the Bureau considers the impacts against a baseline in which the Bureau takes no action. This baseline includes existing regulations and the current state of the market. In particular, it assumes (1) the continuation of the existing safe harbor amounts for credit card late fees, currently \$30 generally and \$41 for each subsequent late payment occurring in one of the next six billing cycles, and (2) that these amounts would continue to be adjusted when there are changes to the CPI in accordance with the current provision in § 1026.52(b)(1)(ii)(D).

D. Potential Benefits and Costs to Consumers and Covered Persons

This section discusses the benefits and costs to consumers and covered persons of (1) the proposed amendment to § 1026.52(b)(1)(ii) to lower the safe harbor dollar amount

for late fees to \$8 and no longer apply to late fees a higher safe harbor dollar amount for subsequent violations of the same type that occur during the same billing cycle or in one of the next six billing cycles; (2) the proposed amendment to § 1026.52(b)(2)(i)(A) to provide that late fee amounts must not exceed 25 percent of the required payment; and (3) the proposal to no longer apply inflation adjustments set forth in current § 1026.52(b)(1)(ii)(D) to the safe harbor amount for late fees. The proposal would also amend certain other comments to clarify the application of the rule and make conforming adjustments. The Bureau does not separately discuss the benefits and costs of these other amendments but believes they will generally lower compliance costs for card issuers and facilitate consumer understanding of the rule. Finally, the discussion below also considers the benefits and costs of certain other alternatives to the proposed provisions on which the Bureau is seeking comment in part V.

Potential Benefits and Costs to Consumers and Covered Persons of the Proposed Late Fee Safe Harbor Changes

The Bureau proposes to amend § 1026.52(b)(1)(ii) to lower the safe harbor amounts for late fees—currently set at \$30 and \$41 for a first and subsequent violation, respectively—to a late fee amount of \$8 for the first and subsequent violations.¹⁶⁰ The Bureau’s proposal would eliminate the higher safe harbor amount for subsequent late payment violations.

¹⁶⁰ As discussed in the section-by-section analysis of § 1026.52(b)(1)(ii)(C) in part V, the Bureau is not proposing to lower or otherwise change the safe harbor amount of a late fee that card issuers may impose when a charge card account becomes seriously delinquent.

Potential Benefits and Costs to Consumers of the Proposed Late Fee Safe Harbor Changes

In general, the proposal to lower the safe harbor amount for late fees to \$8 for first and subsequent violations would benefit consumers by reducing the amount they pay through late fees. This direct benefit may be offset to the extent that card issuers raise other prices in response and potentially if consumers respond to reduced late fees in ways that harm them in the long run. The discussion below begins with the direct benefits from lower fees, then turns to the possibility that those benefits are offset through changes to other prices, and then addresses the potential effects on consumers of changes to late payment behavior.

The direct benefits to consumers could be as high as the fees saved with the \$8 fee amount on violations without or with a recent prior violation—that is, the difference between fees currently charged and the lower \$8 amount. The Bureau previously estimated that aggregate late fees assessed for issuers in the Y-14+ data were \$14 billion in 2019 and \$12 billion in 2020 and that the average late fee charged was \$31 in 2020.¹⁶¹ Thus, if fees were reduced to \$8, it would have reduced aggregate late fees charged to consumers by several billion dollars. To estimate the extent of the reduction, the Bureau examined Y-14 account-level data for the 12-month period from September 2021 to August 2022. The issuers in this sample represent an estimated 73 percent of aggregate credit card balances and reported collecting \$5.688 billion in late fees during the period, and the Bureau estimates that the collected fees would have been \$1.451 billion, or 74.6

¹⁶¹ Late Fee Report, at 4. As discussed in part III.C, the Y-14+ data includes information from the Board's Y-14 data and a diverse group of specialized issuers.

percent lower, if fees had been \$8 rather than the fees actually collected.¹⁶² The Bureau does not have data from this recent period for any issuers other than those included in the Y-14 data. Assuming that the 73 percent of balances covered by these issuers with collection costs in the Y-14 data collection most recently is representative of the fee structure and incidence of the entire market, these figures would have implied \$5.8 billion savings for consumers (not including any fees charged but not ultimately collected). However, the Y-14+ data suggest that late fee revenue per account at these Y-14 issuers is less than for other issuers. This implies a larger reduction in fee revenue at issuers excluded from the sample, meaning that \$5.8 billion is therefore likely to be an underestimate of the potential reduction in fees. If the 74.6 percent reduction in fee revenue were applied to the total estimated \$12 billion in late fees from 2020, it would imply a reduction in fee revenue of approximately \$9 billion.

The estimated benefits to consumers may be lower than this, considering that smaller issuers, which make up many of the issuers not in the Y-14 collection, currently charge lower fees on average. In 2020, the average late fee for issuers in the Y-14+ data was \$31. Based on the agreements in the Bureau's credit card agreement database, in 2020, the modal maximum disclosed late fee for smaller issuers was \$25. Specifically, cardholders of these smaller issuers who pay late would benefit less from the proposed

¹⁶² By adjusting the collected late fee revenue with how assessed fee amounts would have changed, this analysis disregards the apparent but immaterial benefits to accounts whose assessed fees are not collected (but charged off). The Bureau estimates that this affects as much as 14 percent of late fee incidents. Also, as many as 5 percent of assessed late fees are reversed in later months (within-month waivers and reversals might already be netted out in the account data the Y-14 collection collects). The analysis here applied the same cap to reversals as to the original fees, thus minimizing the overcounting of benefits.

changes to the late fee safe harbor amounts than those of major issuers charging late fees closer to the existing safe harbor threshold amounts.

Conversely, the aggregate benefit to consumers will be higher than this estimate if issuers not in the Y-14 charge more late fees than the issuers in the Y-14 data. The Bureau's Y-14+ survey suggests that large issuers outside the Y-14 charge high late fee amounts and generate more late fee revenue per outstanding balances. Smaller issuers might also have enough late payment violations to cancel out the effect of small fee amounts on saved fees per incident.¹⁶³

The benefits to consumers will be lower if issuers choose to set late fee amounts higher than the safe harbor amount by relying on cost analysis provisions in § 1026.52(b)(1)(i). Based on the available recent Y-14 data, the Bureau expects that fewer than four of the twelve covered issuers may use the cost analysis provisions to charge late fee amounts above \$8 in the near future based on their reported pre-charge-off collection costs per paid violation. The Bureau's calculations suggest that if these major issuers relied on the cost analysis provisions in § 1026.52(b)(1)(i) while the others in the Y-14 data used the safe harbor amount, it would lower the mechanical impact of the proposed safe harbor amounts by 3 percent relative to the case of all Y-14 issuers charging late fees of \$8 (from an estimated fee reduction of \$4.23 billion for these Y-14 issuers to an estimated \$4.11 billion), representing a reduction in fees collected of 72.3

¹⁶³ The Board has been calculating quarterly credit card delinquency and charge-off rates from FFIEC Call Reports. The share of delinquent loans among loans outstanding has been around 2-3 times higher at banks outside the top 100 by consolidated foreign and domestic assets following 2017. The ratio of net credit card charge-offs over the average level of loans outstanding has been around 2 times higher among banks not in the top 100 since 2017. Bd. of Governors of the Fed. Rsrv. Sys., *Charge-Off and Delinquency Rates on Loans and Leases at Commercial*. <https://www.federalreserve.gov/releases/chargeoff/default.htm> (last updated Nov. 22, 2022).

percent for these issuers.¹⁶⁴ Assuming that the 73 percent of balances covered by these issuers with collection costs in the Y-14 data collection most recently is representative of the fee structure and incidence of the entire market, these figures would have implied \$5.6 billion savings for consumers (not including any fees charged but not ultimately collected). However, as discussed above, the Y-14+ data suggest that late fee revenue per account at these Y-14 issuers is less than for other issuers. This implies a larger reduction in fee revenue at issuers excluded from the sample, meaning that \$5.6 billion is therefore likely to be an underestimate of the potential reduction in fees. If the 72.3 percent reduction in fee revenue were applied to the total estimated \$12 billion in late fees from 2020, it would imply a reduction in fee revenue of approximately \$9 billion.

While the Bureau does not have comparable data on the collection costs of smaller issuers, the lower late fee amount they typically set suggests that a smaller share of smaller issuers than large issuers are likely to use the cost analysis provisions in § 1026.52(b)(1)(i). Consumer gains when issuers use the cost analysis provisions would be even lower if the cost analysis imposes additional costs on the issuers who resort to it, and, in turn, those issuers shift these costs to their cardholders. However, the Bureau expects these administrative costs to be small relative to revenue.

The above estimates do not consider potential responses by consumers to lower late fees—in particular, the possibility that consumers are more likely to miss a payment

¹⁶⁴ This analysis assumes each issuer sets late fees for all their credit card products using only the safe harbor in § 1026.52(b)(1)(ii) or only the cost analysis provisions in § 1026.52(b)(1)(i). In practice, some issuers may use the safe harbor amount for some credit card products and the cost analysis provisions for others, which could lead the revenue impact of the proposed safe harbor amount to be different among issuers in the Y-14.

due date if the fee for doing so is reduced. If this occurs and more consumers make untimely payments, consumers could face costs for doing so, including costs like increased penalty interest rates or lower credit scores. Such a response would affect the estimates above, as well as the final incidence of the benefits and the burden. As discussed in part V above concerning deterrence, however, the available evidence (see the section-by-section analysis of § 1026.52(b)(2)(ii) in part V) leads the Bureau to expect that a \$8 late fee would still have a deterrent effect on late payments, although that effect may be lessened by the proposed change to some extent, and other factors may be more relevant (or may become more relevant) towards creating deterrence. Even with a late fee of \$8, consumers would have incentives to make their minimum payment on time to avoid the late fee and other potential consequences of paying late, such as the potential loss of the grace period, and potential credit reporting consequences. To the extent consumers are late in paying because they are inattentive to their account or because they are so cash-constrained that they are unable to make a minimum payment, the amount of the late fee may have little effect on whether they pay late. The Bureau, however, seeks comment on these potential costs to consumers, including data and information as to whether lower late fees for the first or subsequent payments may result in consumers being more likely to pay late and, if so, potential costs to consumers in terms of potential penalties or lower credit scores.

To the extent consumers who pay on time when faced with current late fees would instead rationally choose to make a late payment in response to lower late fees that would result from the proposal, those consumers would benefit from the additional flexibility that a lower late fee would afford. For such consumers, the benefit of delaying the

minimum payment past the due date, net of the perceived other financial consequences of missing the due date, must be less than their account's existing late fees but greater than the fees that would result from the proposal. Their benefit from the rule would be less than the difference between the two fees, but it would still add to the total consumer gains from the proposal. More generally, all consumers would benefit from the option value of managing a potential episode of financial distress at lower costs if and when necessary.

Since the proposal would reduce issuers' revenue from late fees, issuers may respond by adjusting interest rates or other card terms to offset the lost income. Issuer responses will affect both the sum of consumer gains and their distribution across market segments and populations. Total consumer gains will be the lowest if issuers make up for all lost revenue and any potential cost increase by raising revenue by changing other consumer prices. This full offset could manifest in higher maintenance fees, lower rewards, or higher interest on interest-paying accounts.

Offsetting price increases are most likely where markets are most competitive since, in competitive markets, any reduction in revenue is likely to drive some firms out of the market, limiting supply and driving prices up for consumers. As the recent profitability of consumer credit card businesses suggests that these markets are imperfectly competitive, the Bureau expects less than full offset, with consumers gaining in total from reduced late fees.¹⁶⁵ The same observation indicates that the market will see

¹⁶⁵ In its latest annual report on credit card profitability to Congress, the Board found that “[c]redit card earnings have almost always been higher than returns on all bank activities, and earnings patterns for 2021 were consistent with historical experience.” Bd. of Governors. of the Fed. Rsrv. Sys., *Profitability of Credit Card Operations of Depository Institutions* (July 2022), at 7, <https://www.federalreserve.gov/publications/files/ccprofit2022.pdf>. The Board also found that the quarterly average return on credit card assets (ROA) using Y-14 data was stable at around 1.10 percent

few exits and no fewer entries. The two pieces of evidence most relevant to set the Bureau's expectations for offset are an academic publication and a Bureau report that includes an analysis of the effects of the fee changes resulting from implementing the CARD Act.¹⁶⁶ The Bureau reads this evidence as tentatively suggesting less than full offset, if any.

To illustrate an upper bound of the potential offsetting effect, consider the increase in interest income required to offset lost late fee income.¹⁶⁷ As discussed above, over the last 12 months, limiting late fees to \$8 could have reduced the late fee revenue of Y-14 issuers with cost data by 72.3 percent, or \$4.11 billion, even if some issuers use the cost analysis provisions to determine the amount of the late fee as discussed above. Total interest income at the issuers with collection costs in the Y-14 data was \$71.4 billion over the same 12 months, so offsetting the lost fee revenue would require increasing interest revenue by \$4.11 billion, or 5.8 percent. This change would be less than 2 percentage points on an APR that is below 34.7 percent.¹⁶⁸

during the 2014–19 period before the pandemic, while the quarterly average credit card bank ROA using Call Report data was 1.03 percent. These measures dipped below zero early in the COVID-19 pandemic but rebounded to around 2 percent by 2021 for the Y-14. Late and other fees ranged from 7 percent to 28 percent of ROA during the 2014-2021 period. Robert Adams *et al.*, *Credit Card Profitability*, FEDS Notes, Bd. of Governors. of the Fed. Rsrv. Sys., (Sept. 9, 2022), <https://doi.org/10.17016/2380-7172.3100>.

¹⁶⁶ Sumit Agarwal *et al.*, *Regulating Consumer Financial Products: Evidence from Credit Cards*, 130 *Quarterly J. of Econ.*, at 111–164 (February 2015), <https://doi.org/10.1093/qje/qju037>; 2013 Report, at 20-37.

¹⁶⁷ The available evidence suggests that issuers compete fiercely with more salient (though not necessarily transparent) rewards and, to a lesser extent, annual or account maintenance fees. (Other types of penalty fees, such as over-the-limit or returned check fees, are subject to existing CARD Act limits, and in any case apply only in particular circumstances and generate relatively little revenue.) This leads the Bureau to estimate an interest-only response as the full-offset benchmark. *See*, for instance, the academic research cited in footnote 45, or Figure 44 of the 2013 Report, at 82.

¹⁶⁸ For data related to total interest income in the Y-14 collection, *see* Revenue-Cost Report, at 6-9.

Economic theory also suggests the potential for a pass-through of greater than what would be required to offset lost fee revenue, if the credit card market is sufficiently adversely selected on APRs.¹⁶⁹ Intuitively, if the offsetting change in APRs leads low-risk consumers to leave the pool of credit card borrowers to a greater degree than it leads higher-risk consumers to leave the pool of credit card borrowers, then the resulting change in average credit risk could lead to further increases in APRs in market equilibrium. However, the Bureau notes that existing evidence on adverse selection in the credit card market suggests that adverse selection is unlikely to be this severe. Most notably, a research paper studying the effects of the safe-harbor fee levels in the Board's 2010 Final Rule finds that this high pass-through scenario can be rejected with high statistical confidence.¹⁷⁰ Complementary academic research finds less than full pass-through of other shocks to credit card lenders' costs,¹⁷¹ and that the effects of adverse selection after the Board's 2010 Final Rule took effect were generally modest.¹⁷² Overall, the Bureau concludes that concerns about adverse selection are unlikely to alter the above analysis's upper bound of less than 2 percentage points change in APRs below 34.7 percent.

This upper bound on a full interest offset, at least on one that reprices all accounts by the same percentage points to recover all lost late fee revenue with higher finance

¹⁶⁹ Neale Mahoney & E. Glen Weyl, *Imperfect Competition in Selection Markets*, 99 *Review of Economics and Statistics*, MIT Press at 637-51 (Oct. 1, 2017), https://doi.org/10.1162/REST_a_00661.

¹⁷⁰ Agarwal *et al.*, *supra* note 166.

¹⁷¹ Tal Gross *et al.*, *The Economic Consequences of Bankruptcy Reform*, 111 (7) *American Economic Review*, 2309-41 (July 2021), <https://www.aeaweb.org/articles?id=10.1257/aer.20191311>.

¹⁷² Scott Thomas Nelson, *Essays on Household Finance and Credit Market Regulation*, Ph.D. Thesis, Massachusetts Institute of Technology, Department of Economics (2018), <https://dspace.mit.edu/handle/1721.1/118066>.

charges, suggests that any losses to credit access would be limited. However, the Bureau acknowledges that late fee revenue has been concentrated on certain market segments, suggesting that any price responses are also likely to be focused in those segments. In particular, interest rates or other charges of subprime credit cards might increase more than for other cards, and some consumers might find these cards too expensive due to higher interest rate offers. Even if this were to happen, it would not result from a higher average consumer cost of using credit cards but from greater transparency about the cards' actual expected cost of ownership.¹⁷³ Lost credit to consumers consciously declining offers because of the card's actual price becoming more salient would constitute no harm to them.

On the other hand, it is also possible that some consumers' access to credit could fall if issuers could adequately offset lost fee revenue expected from them only by increasing APRs to a point at which a particular card is not viable, for example, because the APR exceeds applicable legal limits. The Bureau seeks data and other information to help assess the likelihood of offsetting price changes and any related changes in credit access.

Any offsetting changes, like the decrease in late fees, would affect different consumers differently depending, for example, on how often they pay late and whether they carry a balance. Cardholders who never pay late will not benefit from the reduction in late fees and could pay more for their account if maintenance fees in their market segment rise in response—or if interest rates increase in response and these on-time

¹⁷³ As discussed below, however, the cost of ownership of cards could go up for some consumers and down for others, depending on their usage patterns.

cardholders also carry a balance. Frequent late payers are likely to benefit monetarily from reduced late fees, even if higher interest rates or maintenance fees offset some of the benefits. Cardholders who do not regularly carry a balance but occasionally miss a payment would benefit from the proposed changes so long as any increase in the cost of finance charges (including the result of late payments that eliminate their grace period) is smaller than the drop in fees.¹⁷⁴ Cardholders who carry a balance but rarely miss a payment are less likely to benefit on net.

Though the late fee changes most directly benefit those who make late payments, the Bureau notes that late fees are collected only from those delinquent cardholders who eventually pay at least the fee amount. Some collection costs and charge-off losses are caused by delinquent customers who do not recover before account closure and charge-off. These cardholders would not receive any of the benefits of the lower fees they are nominally assessed but do not pay in practice.¹⁷⁵ Using a subsample of Y-14 account data, the Bureau estimated that around 14 percent of late fees are assessed to accounts that never make another payment.

The Bureau understands that many American households use more than one credit card. Some of the cross-subsidies from card to card could remain within the household, and thus the range of household-wise gains and losses will be less than the gains and losses on separate credit card accounts: Some consumers will save in late fees on one of

¹⁷⁴ If a consumer pays late and loses the grace period, the consumer will pay interest on the balances. The analysis here focuses on whether the increased interest as a result of the increase in the rate to offset the reduction in late fee revenue is greater than the reduction in the late fee.

¹⁷⁵ This holds as long as the additional charged-off balance due to higher late fees does not change the amount the holder of the debt can eventually collect after charge off, including through litigation or wage garnishment. Even defaulting consumers would benefit otherwise.

their cards but might experience offsetting terms on another where they are not late. The Bureau has not quantified the magnitude of this effect as late fees are not observed in available household-level data, and available account-level data do not link cards of the same holder or their household.

As mentioned above in part II.E, consumers may not fully consider late fees when shopping for a credit card. To the extent this is true, the actual cost of using a credit card will be greater than consumers' expected cost and reducing late fees will reduce the difference between the two. Whether or not changes to other prices offset a reduction in late fee revenue, consumers may benefit if, when choosing a credit card, they have a more accurate view of the expected total costs of using the card. To the extent that some consumers become better informed about the terms of credit cards, issuers may respond by offering improved terms, which could benefit even consumers who do not shop around. In addition, consumers might benefit or incur costs from further repricing and restructuring other financial products cross-marketed by credit card issuers and their holding companies. The Bureau is not aware of data that could help quantify such effects.

Recent results in psychology and economics highlight some patterns likely to affect consumer welfare in the credit card market, depending on how accurately cardholders forecast the likelihood that they will incur late fees. A seminal theoretical study¹⁷⁶ identified and coined the term for naïveté-based discrimination, in which firms recognize that some potential consumers are prone to systematic mistakes. If this is

¹⁷⁶ Paul Heidhues & Botond Kőszegi, *Naïveté-Based Discrimination*, 132 (2) *The Quarterly Journal of Economics*, at 1019–1054 (May 2017), <https://doi.org/10.1093/qje/qjw042>.

indeed a feature of credit card markets, “naïve” and “sophisticated” consumers, using the terminology of this scholarship, could be affected by the proposed regulation differently,. Naïve consumers may mistakenly expect high fees to be unimportant to them, as they are overly optimistic about not missing a payment. Such consumers would benefit from the proposed changes to late fee amounts, which lower the cost of this mistake.

Sophisticated consumers, inasmuch they would have been cross-subsidized by naïve customers’ costly mistakes, may pay higher maintenance fees or interest or collect fewer rewards if the issuer offsets the revenue lost to naïve consumers. The Bureau considers that to the extent there are offsetting changes to card terms, some of these changes are likely but has not quantified their magnitude.

The Bureau acknowledges the possibility that consumers who were more likely to pay attention to late fees than to other consequences of paying late, like interest charges, penalty rates, credit reporting, and the loss of a grace period, might be harmed in the short run if a reduction in late fees makes it more likely that they mistakenly miss payments. The Bureau has not quantified this effect but notes that reducing late fees may increase issuer incentives to find other approaches to make the consequences of late payment salient to consumers, including reminders or warnings.

Other results in psychology and economics might suggest that the proposal might pose some harm to consumers for whom high late fees serve as a valuable commitment device without which they would have a harder time responsibly managing their credit

card debt.¹⁷⁷ To the extent that late fees benefit some consumers in this way, any harm to such consumers may be mitigated to the extent that the proposal creates additional incentives for issuers to emphasize reminders, automatic payment, and other mechanisms that maintain similar or better payment behavior, as discussed below.

The proposal may benefit consumers indirectly by making late payments less profitable to issuers and thereby increasing issuer incentives to take steps that will encourage on-time payment. Consumers may benefit from issuer practices such as more effective reminders or convenient payment options. If issuers bear no net cost from late payments, or even profit from them, then they have no incentive to take even inexpensive steps to reduce the incidence of late payments. Even with the proposed changes, issuers will not have incentives to take all steps they could that would efficiently reduce the incidence of late payment since the late fees they do charge mean they do not bear the full cost of late payments. Nonetheless, by limiting issuer revenue from violations that exceeds cost, this proposal changes issuer incentives in a way that benefits consumers.

Potential Benefits and Costs to Covered Persons of the Proposed Late Fee Safe Harbor Changes

Because the proposal would significantly reduce the aggregate value of late fees paid by consumers, the proposal would significantly reduce late fee revenue for issuers. As discussed below, issuers can mitigate these costs of the proposal to some extent by taking other measures (e.g., increasing interest rates or changing rewards), and the

¹⁷⁷ For a discussion of commitment devices most relevant to this context, see section 10.2 of John Beshears *et al.*, *Behavioral household finance*, Handbook of Behavioral Economics: Applications and Foundations, at 177-276 (2018), <https://doi.org/10.1016/bs.hesbc.2018.07.004>.

reduction in late fees could affect consumer choices or market competition in ways that may create benefits or costs to issuers.

As discussed above concerning benefits to consumers, the direct effects of reducing late fees generally to the safe harbor amount of \$8 could be, based on recent Y-14 data, to reduce issuer late fee revenue by 72.3 percent.

Issuer costs and revenue would also be affected by changes in consumer behavior in response to the reduced late fee amounts. In particular, lower late fees could make consumers more likely to make late payments. As discussed above in the section-by-section analysis of § 1026.52(b)(1)(ii) in part V, the Bureau expects that a \$8 late fee would still have a deterrent effect on late payments, although that effect may be lessened by the proposed change to some extent, and other factors may be more relevant (or may become more relevant) to creating deterrence. The Bureau also expects that any additional late payments due to the reduced late fee safe harbor amount would generate both additional fee income and additional collection costs relative to an outcome with lower fee amounts but no additional incidents. Even if more consumers pay late because of the decreased late fee amount, the cost of collecting any such additional late payments is unlikely to be greater, per incident, than the cost of collecting late payments under the existing safe harbor. Therefore, the Bureau expects that collection costs to card issuers would not increase by more than fee income derived from any additional late payments.

Besides any impact on collection costs, additional missed payments could result in additional delinquencies and ultimately increase credit losses. The Bureau is not aware of evidence showing that higher late fees will prevent consumers from eventually

defaulting on their accounts.¹⁷⁸ However, the Bureau notes that issuers can take other steps to help reduce the likelihood of consumers missing payments, which would mitigate potential costs of the proposal from increased delinquencies. For example, issuers could increase investments in payment reminders or automatic payments or provide lower-friction methods of payment or rewards for paying on time.¹⁷⁹ Issuers could also increase minimum payment amounts or adjust credit limits to reduce credit risk associated with consumers who make late payments.

As discussed above, issuers could also increase other prices in a way that would offset revenue lost from reduced late fees. In general, issuers will set the terms of credit cards to maximize profits, and it is not clear that limiting late fees will directly affect the profit-maximizing finance charge or account maintenance fee, for example. However, a reduction in late fee revenue could cause issuers to change other terms if the lost late fee revenue reduced the profitability of issuing credit cards to the point at which issuers are faced with a choice between raising new revenue by changing other card terms or exiting the market. As discussed above, such offsetting price increases are most likely where

¹⁷⁸ For some consumers, a high late fee may contribute to default by increasing their overall debt burden and making it more difficult to recover from delinquency. For example, the 2022 paper by Grodzicki *et al.*, described above in the section-by-section analysis of § 1026.52(b)(1)(ii) in part V, with all the caveats noted there, found that a decrease in late fees increases borrowing for prime borrowers but triggers repayment for subprime cardholders. This paper explained that this latter effect on subprime cardholders might result from the lower late fee amount lessening the need for subprime cardholders to focus on avoiding late fees and instead allowing some subprime cardholders to start to pay more attention to the high cost of their revolving debt.

¹⁷⁹ A joint comment submitted by several industry trade groups stated that issuers promote on-time payments through a variety of means in addition to late fees, including multiple payment reminders sent via mail, email, or text notification depending on consumer preference. These commenters further stated that one issuer reported that as of five months after rollout of its new alert system, the issuer's gross monthly late fees were 20 percent lower and the late fee incidence rate per balance had fallen by nearly 25 percent. Similarly, a large credit union trade group noted that some credit unions already have systems in place or are currently contracting with third-party vendors to offer their members convenient reminders for upcoming payment due dates via text message and email.

markets are most competitive since any reduction in revenue is likely to drive some firms out of the market, limiting supply and driving prices up for consumers. As the recent profitability of consumer credit card businesses suggests that these markets are imperfectly competitive, the Bureau expects the market to see few exits and no change in entries.¹⁸⁰

Issuers' revenue loss from the proposal could be mitigated by the ability to use the cost analysis provisions in § 1026.52(b)(1)(i) rather than setting late fees at the safe harbor amount. Any issuer with costs greater than \$8 per late payment would be able to set a higher fee using the cost analysis provisions, although doing so would likely involve some expense to conduct the relevant analysis, ensure that it complies with the existing rule's requirements and potential changes from the proposed rule, and ensure that the relevant data and analysis are documented in a way that would permit the issuer to demonstrate compliance to regulators.

Potential Benefits and Costs to Consumers and Covered Persons of Lowering the Limitation on Late Fees to 25 Percent of the Minimum Payment Due

The Bureau proposes to amend § 1026.52(b)(2)(i)(A) to limit the dollar amount associated with a late payment to 25 percent of the required minimum periodic payment due immediately before the assessment of the late fee. Currently, late fee amounts must not exceed 100 percent of the required payment.

Consumers with minimum payments smaller than four times their card's late fee amount would benefit from the proposed change by saving the difference between the

¹⁸⁰ See supra note 165.

regular late fee amount and 25 percent of their minimum payment. For issuers setting fees at the \$8 safe harbor amount, this includes cardholders with minimum payments below \$32. For a twelve-month period from October 2021 to September 2022 in the Y-14 data collection, 15.9 percent of all account-months had minimum payments below \$32, or 7.7 percent of account-months for which payments were late.¹⁸¹ Savings for these accounts at the Y-14 issuers would have been \$44 million between September 2021 and August 2022, relative to where late fees are limited to \$8 but can be up to 100 percent of the minimum payment due. Qualitatively, the benefits to consumers from this proposed limitation would be affected by the same factors described above in connection with the consumer benefits of the lower safe harbor amount, with the benefits concentrated among consumers with lower balances who are generally more likely to have low minimum payment amounts.

Similarly, this provision would decrease revenue to covered persons to the extent that they would otherwise charge a late fee greater than 25 percent of the minimum payment due. As described above, applying this limitation to 12 months of Y-14 data suggests lost revenue of \$44 million at the Y-14 issuers relative to the case in which late fees are limited to \$8 but can be up to 100 percent of the minimum payment due.

These benefits to consumers and corresponding costs to issuers will be higher for issuers that determine the late fee amount using the cost analysis provisions in § 1026.52(b)(1)(i) and impose late fee amounts higher than the safe harbor amount.

¹⁸¹ For more information on the distribution of minimum payments for late accounts in the Y-14 data, *see* Figure 3 and related discussion in the section-by-section analysis of § 1026.52(b)(2)(i) in part V.

The calculations of reduced late fees above assume no change to minimum payment amounts. The Bureau expects these benefits to consumers and costs to issuers to decrease if issuers increase minimum payment amounts, either in response to the proposed rule, as a result of market developments, or for any other reason.

The Bureau understands that late fee amounts would be more varied under this proposal than without it, as this limit on the amount of the late fee that could be charged would apply more often than under the current limit of 100 percent of the minimum payment. On the other hand, to the extent issuers take advantage of the proposed safe harbor, very few accounts would face a late fee other than \$8 due to the 25 percent limitation. In principle, if late fee amounts are less predictable, consumers could find it more challenging to plan, increasing the likelihood of mistakes. The Bureau does not expect such effects to be significant, particularly given that this limitation would affect late fee amounts only when balances and minimum payment amounts are low.

Potential Benefits and Costs to Consumers and Covered Persons from Not Applying the Annual Adjustments to the Proposed \$8 Safe Harbor Amount for Late Fees

The Bureau proposes to not apply the annual adjustments based on the level of the CPI to the proposed \$8 safe harbor amount for late fees. Instead, the Bureau would continue to monitor the market and adjust the safe harbor amount ad hoc to reflect changes to pre-charge-off collection costs and other statutory factors. The discussion below considers the effects of this change relative to a baseline in which the proposed safe harbor amount is adjusted based on the level of the CPI; however, the effects would be qualitatively similar at other safe harbor amounts.

The benefits and costs of this proposal to consumers and covered persons depend on whether future adjustments by the Bureau would be greater or less than the changes that would result from the CPI adjustments that are currently used. As discussed in the section-by-section analysis of § 1026.52(b)(1)(ii)(D) in part V and illustrated in Figure 2, trends in collection costs and the CPI do not appear to be closely related. If the safe harbor amount were to fall or to grow less rapidly through the Bureau's future ad hoc adjustments than the current CPI adjustments, then consumers would benefit from the reduced real cost of late fees, and issuers using the safe harbor amount would see lower revenue. Conversely, suppose the safe harbor amount was adjusted in the future through ad hoc adjustments by more than it would be through the current CPI adjustments. In that case, consumers could face costs from the proposed change, and issuers using the safe harbor amount would see increased revenue.

Under the proposal, it is likely that the safe harbor amount would be adjusted less frequently than under the current rule. Some consumers would benefit from the transparency and administrative ease of late fee amounts changing less often. These would be the cardholders of issuers who do not set the late fee using the cost analysis provisions in § 1026.52(b)(1)(i), because those issuers would still collect more late fee revenue under the safe harbor than their pre-charge-off collection costs. The Bureau also notes that even under CPI-based adjustments, the lower \$8 safe harbor amount combined with the requirement that adjustments are rounded to the closest \$1 means that the safe harbor amount would likely change less frequently than recently.

To the extent that some issuers experience increases in collection costs that would have been addressed through CPI-based adjustments, these issuers would retain the

option under the proposal to use the cost analysis provisions in § 1026.52(b)(1)(i) and thus recover their higher costs with higher late fee amounts. Their cardholders would still benefit from this provision if the cost increase was slower than the rise in the CPI. If it was faster, the consumer would have seen the same fee rise from this issuer determining the late fee using the cost analysis provisions in § 1026.52(b)(1)(i), irrespective of this provision.

Issuers with decreasing costs would lose out on a mechanical increase in their revenue above cost to reflect CPI adjustments unless the safe harbor amount is otherwise adjusted. As shown in Figure 2 above in part V, recent collection cost totals from the Y-14 portfolio data suggest that some issuers have been experiencing decreasing nominal collection costs even in the inflationary period of 2021-2022.

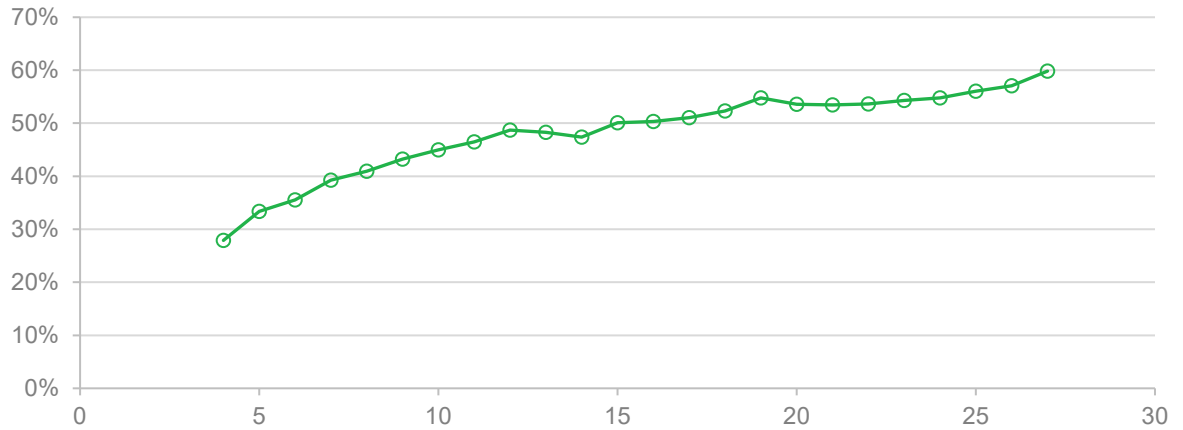
Potential Benefits and Costs to Consumers and Covered Persons of a Courtesy Period which Would Prohibit Late Fees Imposed Within 15 Calendar Days After the Payment Due Date

In part V, the Bureau solicits comment on whether § 1026.52(b)(2) should be amended to provide for a courtesy period that would prohibit late fees imposed within 15 calendar days after the payment due date. Such a courtesy period could apply only to late fees assessed if the card issuer is using the late fee safe harbor amount or, alternatively, could be applicable generally (regardless of whether the card issuer assesses late fees according to the safe harbor amount set forth in § 1026.52(b)(1)(ii) or the cost analysis provisions in § 1026.52(b)(1)(i)).

A 15-day courtesy period would most directly benefit consumers who will pay late within 15 days of the original due date. Benefits and costs to consumers generally and to covered persons will depend on market responses to offset the lost revenue.

The Bureau does not have data that directly shows how often payments are made within 15 calendar days after the due date. However, it has conducted its own analysis to estimate what fraction of missed payments is made within 15 calendar days of the original due date. In lieu of direct evidence on how many days after the due date late payments are made, this work used the Y-14 account data to count what fraction of accounts charged late fees were current by the end of a calendar month, separately by how far the due date was from the end of the month. Among accounts that paid late fees, those with due dates early in the month are more likely to be current at the end of the month. The higher share of delinquent accounts becoming current the earlier the due date was within a month partly reflects the increasing share of payments the longer time passes after the due date. The Bureau acknowledges that other factors might differ between accounts with due dates closer to the end of the month rather than earlier due dates, and those factors might confound repayment behavior. However, the monotonically increasing share of current accounts in the number of days between the due date and the month's end makes the Bureau reasonably confident in this approach approximating the survival curve of pending payments, or the cumulative distribution function of payment days after due. Figure 4 plots the aforementioned shares for due dates 4 to 27 days before the end of the calendar month on Y-14 data from October 2021 to September 2022, where a monotonic relationship might most closely approximate the survival curve of late payments being made past due.

Figure 4: Share of Late Accounts Current at End of Months by How Many Days Passed



As shown in Figure 4, this analysis concluded that in this recent 12-month period for accounts with payments due 15 days before the end of the month, about half of accounts with missed payments had become current by the end of the month, suggesting that about half of accounts with late payments become current within 15 days. The Bureau solicits comment on more direct estimates of the share of missed payments subsequently made within 15 calendar days of the original due date.

Introducing a 15-day courtesy period would likely lead to an increase in late payments, at least an increase in those made within 15 days of the due date. This would benefit some consumers directly and indirectly by permitting additional flexibility in their budget. For example, paying a few days later might enable some consumers to avoid borrowing from another source in order to make a timely payment, or might simply permit them to make the payment at a time more convenient to them. On the other hand, some consumers might be harmed by taking advantage of a courtesy period if they do not fully account for other consequences of a late payment, which typically include increased finance charges and a two-month loss of the grace period. An increase in late payments

could also increase collection costs for issuers, although those costs may be low for accounts that become current shortly after the due date.

Even consumers who genuinely save some hassle, mental or pecuniary cost by delaying payment by less than 15 calendar days might suffer harm in the long run if this leads to confusion about effective due dates on their accounts or erodes habits of prudent money management. However, the 15-day courtesy period would provide a considerable net benefit to consumers facing temporary financial distress around their original due date.

A 15-day courtesy period would, to some degree, replace existing informal, ad hoc, and inconsistent waiver and reversal policies of many issuers, making these policies more transparent and uniform. This would benefit consumers who do not ask currently for their late fees to be reversed and would potentially cost consumers who now enjoy occasional late payments at no cost, as they might bear some of the lost fee revenue offset.

Introducing a 15-day courtesy period could affect the late fees that issuers charge based on the cost analysis provisions in § 1026.52(b)(1)(i). With the courtesy period, a smaller number of delinquencies—the more serious ones—would need to generate enough late fee revenue to cover pre-charge-off collection costs. This would generally mean issuers using cost analysis provisions in § 1026.52(b)(1)(i) would charge higher late fees, increasing the relative burden on the consumers more than 15 calendar days late on a payment. The absolute burden on a consumer rises only if their issuer's collection costs are high enough that cost analysis provisions in § 1026.52(b)(1)(i) yields a late fee higher than the safe harbor with the courtesy period in place. At issuers with costs low

enough that the \$8 safe harbor amount covers pre-charge-off collection costs even when collected only on accounts more than 15 calendar days late, consumers who pay within the courtesy period benefit, and issuer revenue would fall without raising the absolute burden on longer-term delinquent cardholders.

As highlighted in part V, if the 15-day courtesy period only applies to the safe harbor, it would provide an additional incentive for issuers to use the cost analysis provisions in § 1026.52(b)(1)(i) to determine the late fee amount. Issuers with collection costs in the \$4-8 range would have the incentive to set late fees using the cost analysis provisions in § 1026.52(b)(1)(i) and charge the late fee to every late payer without regard to a courtesy period, even if their costs are somewhat less than the safe harbor amount. This could limit the number of consumers who benefit from a courtesy period by not paying a late fee compared to applying the courtesy period when the cost analysis provisions apply. However, it could also have the effect of reducing late fees for some consumers who do not take advantage of the courtesy period and whose issuers, without a courtesy period, would have set late fees at the safe harbor amount.

Potential Benefits and Costs to Consumers and Covered Persons of the Potential Alternative to Eliminate the Safe Harbor

As discussed in part V, the Bureau solicits comment on the alternative of proposing to eliminate for late fees the safe harbor provisions in § 1026.52(b)(1)(ii) altogether, in which case card issuers could only impose late fees in amounts that issuers determine to be reasonable and proportional under the cost analysis provisions in § 1026.52(b)(1)(i).

Under the alternative, each issuer would determine its own late fee amount based on its own pre-charge-off collection costs. This alternative would likely result in lower late fees for many issuers than would the \$8 safe harbor. As discussed in part V and above in this section, the data available to the Bureau suggest that many issuers have pre-charge-off collection costs that are lower than the proposed \$8 safe harbor amount. These issuers' cardholders would see even larger direct benefits than under the proposal, with issuers keeping none of their remaining fee revenue above cost.

From the Y-14 data, the Bureau estimates that the total savings for late fee-paying cardholders could have been as high as \$499 million in the September 2021-August 2022 period, comparing late fees calculated on a cost basis to the proposal's \$8 safe harbor amount (with some issuers in the Y-14 data using the cost analysis provisions to determine the late fee, as discussed above). As discussed above concerning the proposed safe harbor amount, the actual benefits to consumers, and revenue loss for issuers, would depend on several factors, including how consumers respond to lower late fee amounts and how issuers offset lost revenue. As discussed above, issuers might respond to limitations on late fees by increasing revenue collected through other terms such as interest rates or account maintenance fees, and to the extent that this alternative would lower late fees by more than the proposed safe harbor it could mean a correspondingly greater increase in the interest rate or other charges as a result of such changes. As with the estimates discussed above, the Y-14 data reflect large issuers, and the Bureau does not have equivalent data on smaller issuers' pre-charge-off collection costs but has no reason to think the benefits and costs to smaller issuers or their cardholders would be qualitatively different.

Besides the effect on fee revenue, eliminating the safe harbor would impose costs on issuers by eliminating the administrative simplicity that comes from a bright-line rule. Each issuer that charges a late fee would incur costs to conduct an analysis of pre-charge-off costs and to maintain records necessary to demonstrate that their late fees are reasonable and proportional under the cost analysis provisions.

Eliminating the safe harbor would likely result in greater variation of late fees and more uncertainty about year-to-year revisions, which could diminish consumer understanding and complicate shopping. However, to the extent that cardholders do compare late fees when they choose which credit card accounts to open, charge, or repay, at-cost late fee amounts would create some market pressure on issuers to lower costs by increasing efficiency. This welfare gain could be split between consumers and covered persons.

Potential Benefits and Costs to Consumers and Covered Persons of Changes to the Safe Harbor Provision with Respect to Other Penalty Fees

In part V, the Bureau solicits comment on whether the changes that are the same or similar to those proposed for late fees should be applied to other penalty fees, such as over-the-limit fees, returned-payment fees, and declined access check fees. In particular, the Bureau solicits comment on whether the proposed safe harbor provisions should apply to other penalty fees and whether, alternatively, if the Bureau were to eliminate the safe harbor provisions in § 1026.52(b)(1)(ii) for late fees, the Bureau should also eliminate the safe harbor for other penalty fees.

The data available to the Bureau indicate that these other penalty fees are significantly less common than late fees, generating fee revenue that is less than 1 percent

of aggregate late fee revenue. This implies that the effects on both consumers and issuers of any changes to these fees would be much smaller in aggregate than the effects of changes to the late fee provisions.

Whether adjustments to the safe harbor provision for these other penalty fees would significantly lower the fees depends on the costs associated with the incidents giving rise to these fees. The Bureau does not have data available with which it can estimate these costs. The Bureau requests data on the costs associated with the violations giving rise to these fees that could be used to better understand what penalty fee amounts issuers would be likely to set based on a cost analysis.

Assuming that the penalty fee amounts were reduced in response to a change in the safe harbor provision, the benefits would likely be greatest for consumers most likely to violate these terms of their card agreement—for example, consumers who are facing tight budgets and most likely to make a charge that causes their balance to exceed their limit or to experience a returned payment. For issuers, the cost of such a change would include lost fee revenue as well as potential costs from additional violations. Issuers could also respond by taking other steps to discourage additional violations, such as further limiting the extent to which they approve above-the-limit transactions. Such steps would involve additional costs but would mitigate any costs from additional violations.

E. Potential Specific Impacts of the Proposed Rule on Depository Institutions and Credit Unions with \$10 Billion or Less in Total Assets, As Described in Section 1026

As with other issuers, depository institutions and credit unions with \$10 billion or less in total assets would generally lose fee revenue as a result of the proposed rule. The Bureau has no reason to believe that depository institutions and credit unions with \$10

billion or less in total assets would experience effects qualitatively different from those discussed above in part VII.D. However, with respect to pre-charge-off collection costs, the Bureau recognizes that most of its analysis is based on data from the largest issuers and may not be representative of smaller issuers, who do not report to the Y-14 collection. Smaller issuers may have pre-charge-off collection costs that are higher on average than those of the issuers represented in the Y-14 data, which could mean that smaller issuers are more likely to set late fees using the cost analysis provisions in § 1026.52(b)(1)(i) rather than the safe harbor amount. On the other hand, the Bureau expects that the proposed \$8 amount would have a proportionately smaller negative impact on smaller issuers' late fee income due to smaller issuers' having lower late fee amounts. The Bureau collects card agreements from many more smaller issuers than issuers for which the Bureau has financial data. Based on a review of those agreements from over 500 credit card issuers, each outside the top 20 by outstanding credit card loans and having more than 10,000 credit card accounts, the Bureau established that smaller issuers charged smaller late fees in 2020 than larger issuers, with a modal maximum disclosed late fee for smaller issuers of \$25.¹⁸² In contrast, in 2020, the average late fee for issuers in the Y-14+ data was \$31. The Bureau specifically solicits comment on this analysis and the potential impact on smaller issuers of the proposed \$8 safe harbor amount and the other provisions of this proposed rule, including data or evidence related to smaller issuers' costs of late payments.

¹⁸² Late Fee Report, at 14.

F. Potential Specific Impacts of the Proposed Rule on Consumer Access to Credit and on Consumers in Rural Areas

The Bureau is concerned about the geographic concentration of current late fees and that areas with higher incidence of late fees tend to also be areas with higher numbers of consumers from disadvantaged groups, as summarized in part II.F above. However, the Bureau has not analyzed the incidence of late fees in rural areas specifically. Bureau research has found that consumers in rural areas are somewhat less likely than other Americans to have a credit card, and not significantly more likely than other Americans to have a credit card delinquency.¹⁸³ These findings suggest that the effects of the rule on late fees paid by rural consumers may generally be similar to those of other Americans.

On the other hand, consumers in rural areas have lower median household income, and lower median credit card balances, than consumers in non-rural areas.¹⁸⁴ Though high-income Americans have more credit cards, low-income areas have more late payments per card. This means it is unclear whether savings from the proposed rule would be larger or smaller for consumers in rural areas; however, reductions in fee amounts that are similar in dollar terms may be more meaningful on average for consumers with lower incomes, meaning that they may be more meaningful on average for consumers in rural areas.

As discussed above in part VII.D., the Bureau acknowledges that late fee revenue has been concentrated in certain market segments, suggesting that any price responses are

¹⁸³ Bureau of Consumer Fin. Prot., *Consumer Finances in Rural Appalachia*, at 12 (Sept. 1, 2022) (Appalachia Report), <https://www.consumerfinance.gov/data-research/research-reports/consumer-finances-in-rural-appalachia/>.

¹⁸⁴ *Id.* at 8, 12.

also likely to be focused in those segments. In particular, interest rates or other terms of subprime or regionally prevalent credit cards may increase more than for other cards, and it is possible that some consumers might find these cards too expensive due to higher interest rate offers. Even if this were to happen, it would not result from a higher expected consumer cost of using credit cards but from greater transparency about the cards' actual anticipated cost of ownership. Lost credit to consumers consciously declining offers with the actual price fully salient would constitute no harm to them.

VIII. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (SISNOSE).¹⁸⁵ The Bureau is also subject to specific additional procedures under the RFA involving convening a panel to consult with small business representatives before proposing a rule for which an IRFA is required.¹⁸⁶ As the below analysis shows, an IRFA is not required for this proposal because the proposal, if adopted, would not have a SISNOSE.

Small institutions, for the purposes of the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, are defined by the Small Business Administration. Effective December 19, 2022, depository institutions with less than \$850

¹⁸⁵ 5 U.S.C. 601 *et seq.*

¹⁸⁶ 5 U.S.C. 609.

million in total assets are determined to be small for the period used in the subsequent analysis.¹⁸⁷

The proposed rule would affect small entities that issue credit cards most directly by reducing late fee revenue from credit cards. To assess whether the proposed rule would have a significant economic effect on small entities, the Bureau considers the significance of credit card late fee revenue as a share of the total revenue of affected small entities. As discussed in part VII, the Bureau does not have data with which to precisely estimate the effect of the proposed rule on late fee revenue. The Bureau analyzes available information on total late fee revenue below because the Bureau considers total late fee revenue to be an upper bound on potential impacts of the proposal on small entities.

The Bureau estimates that there are approximately 3,780 small banks, of which approximately 498 report outstanding credit card debt on their balance sheets.¹⁸⁸ In addition, the Bureau estimates that there are approximately 4,586 small credit unions, of which approximately 2,785 report credit card assets.¹⁸⁹ Detailed information about sources of credit card revenue is not available for most small banks. However, FFIEC Call Reports include a measure of outstanding credit card debt held as assets. Revenue

¹⁸⁷ See Small Business Administration Table of Sizing Standards, <https://www.sba.gov/document/support-table-size-standards> (Dec. 19, 2022).

¹⁸⁸ These estimates and others for small banks are based on data from the quarterly Federal Financial Institutions Examination Council (FFIEC) Consolidated Reports of Condition and Income (FFIEC Call Reports), and refer to the fourth quarter of 2021, unless otherwise noted. Fed. Fin. Insts. Examination Council, Call Reports, <https://cdr.ffiec.gov/public/ManageFacsimiles.aspx> (last visited Dec. 14, 2022).

¹⁸⁹ These estimates and others for small credit unions are based on data from NCUA Call Reports, and refer to the fourth quarter of 2021, unless otherwise noted. Nat'l Credit Union Admin., *Call Report Quarterly Data*, <https://www.ncua.gov/analysis/credit-union-corporate-call-report-data/quarterly-data> (last visited Dec. 14, 2022).

for banks is reported on the FFIEC Call Reports as net-interest income plus non-interest income. Interest income is partially reported by product type. For example, all banks are required to report “all interest, fees, and similar charges levied against or associated with all extensions of credit to individuals for household, family, or other personal expenditures arising from credit cards (in domestic offices).”¹⁹⁰ The Bureau considers this interest and fee income on outstanding credit card balances as a proxy for credit card revenue.

Credit cards represent a small fraction of both assets and revenue for small banks. In terms of assets, only 13 small banks reported credit card assets at 1 percent of total assets or higher. Among the remaining small banks with asset share below 1 percent, 29 had a credit card revenue share above 1 percent of total revenue. While the Bureau does not have a precise estimate of the share of total bank credit card revenue generated by late fees, it expects this share to be well below 20 percent of total credit card revenue at most banks.¹⁹¹ Thus, for the vast majority of small banks, even a large reduction in credit card late fee revenue would represent well below 1 percent of bank revenue and, therefore, would not have a significant economic impact.

The Bureau does not have equivalent data on credit card revenue for small credit unions because credit unions are not required to separately report income from their credit card business in the NCUA Call Reports. However, NCUA Call Reports provide

¹⁹⁰ See the Board’s Micro Data Reference Manual, B485, <https://www.federalreserve.gov/apps/mdrm/data-dictionary> (last visited Dec. 14, 2022).

¹⁹¹ The Bureau has estimated that more than 10 percent of industry-wide fee and interest revenue from credit cards comes from late fees annually. Late Fee Report, at 14. The Bureau’s analysis of card agreements in the same report suggested that small issuers charge smaller late fees per incident than large ones, suggesting that reliance on late fees by small banks may be less than the industry average.

information on credit card assets as a share of total assets. Based on that information, 44.9 percent of small credit unions have more than 1 percent of their assets in credit cards.

To obtain a rough estimate of credit card revenue shares at small credit unions, the Bureau extrapolated using the relationship between credit card revenue share and credit card asset share in bank call report data. Based on bank data, the Bureau estimated that the credit card revenue share averaged between 68 percent and 102 percent of the credit card asset share for small banks in recent years.¹⁹² The Bureau notes that the fact that credit card asset shares are so much higher at credit unions than at small banks means that extrapolation from small banks should be treated with caution.

Applying these estimates to credit card assets at small credit unions would imply that credit card revenue shares are also relatively small at small credit unions. Only 268 small credit unions (about 5.8 percent of small credit unions, or about 9.6 percent of those that issue credit cards) are estimated to have credit card revenue above 4 percent of total revenue. For the remaining credit unions with estimated credit card revenue at or below 4 percent of total revenue, the estimate that late fees generally make up well under 20 percent of credit card revenue means that late fees likely represent well below 0.8 percent (20 percent of 4 percent) of revenue for these credit unions. As with small banks, the small share of revenue coming from credit cards, together with the fact that late fees

¹⁹² The Bureau performed a linear regression of credit card revenue share on credit card asset share for small banks that have any credit card assets, using cross sectional data from the fourth quarter of years 2018-2021. The slope of a regression line that crosses the origin is between 0.68 and 1.02, with an out-of-sample R^2 measure of goodness-of-fit between 0.22 and 0.55. The relationship is steeper before the pandemic, explaining more of the cross-sectional variance in the revenue share.

make up only a fraction of credit card revenue, implies that even a significant drop in late fee revenue would not have a significant economic impact for the large majority of small credit unions.

In response to the ANPR, one trade group commenter asserted that smaller creditors and community banks, particularly those that extend credit to consumers who are trying to build or repair their credit, have proportionately higher compliance costs and would face the most risk if the safe harbor was reduced or eliminated, limiting their ability to continue to offer credit products at the same terms. Several industry trade group commenters also asserted that because lowering the safe harbor would have a significant impact on small financial institutions, the Bureau must comply with the SBREFA by convening a SBREFA panel in any late fee rulemaking. However, these commenters did not provide specific data that leads the Bureau to doubt the conclusions from the analysis above. While it is possible that some small entities would experience a significant economic impact as a result of the proposed rule, the analysis shows that it would not be a substantial number of small entities.

Accordingly, the Director hereby certifies that this proposal, if adopted, would not have a significant economic impact on a substantial number of small entities. Thus, neither an IRFA nor a small business review panel is required for this proposal. The Bureau requests comment on the analysis above and requests any relevant data.

IX. Paperwork Reduction Act

The information collections contained within TILA and Regulation Z are approved under OMB Control Number 3170-0015. The current expiration date for this approval is March 31, 2023. The Bureau has determined that this proposed rule would

not impose any new information collections or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.¹⁹³

List of Subjects in 12 CFR Part 1026

Advertising, Banks, banking, Consumer protection, Credit, Credit unions, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations, Truth in lending.

Authority and Issuance

For the reasons set forth above, the Bureau proposes to amend Regulation Z, 12 CFR part 1026, as set forth below:

PART 1026—TRUTH IN LENDING (REGULATION Z)

1. The authority citation for part 1026 continues to read as follows:

Authority: 12 U.S.C. 2601, 2603-2605, 2607, 2609, 2617, 3353, 5511, 5512, 5532, 5581; 15 U.S.C. 1601 *et seq.*

Subpart G—Special Rules Applicable to Credit Card Accounts and Open-End Credit Offered to College Students

2. Section 1026.52 is amended by revising paragraphs (b)(1)(ii) and (b)(2)(i) to read as follows:

§ 1026.52 Limitation on fees.

* * * * *

(b) * * *

¹⁹³ 44 U.S.C. 3506; 5 CFR 1320.

(1) * * *

(ii) *Safe harbors.* A card issuer may impose a fee for a late payment on an account if the dollar amount of the fee does not exceed \$8. Other than a fee for a late payment, a card issuer may impose a fee for violating the terms or other requirements of an account if the dollar amount of the fee does not exceed, as applicable:

(A) \$30;

(B) \$41 if the card issuer previously imposed a fee pursuant to paragraph (b)(1)(ii)(A) of this section for a violation of the same type that occurred during the same billing cycle or one of the next six billing cycles; or

(C) Three percent of the delinquent balance on a charge card account that requires payment of outstanding balances in full at the end of each billing cycle if the card issuer has not received the required payment for two or more consecutive billing cycles, notwithstanding the limitation on the amount of a late payment fee in paragraph (b)(1)(ii) of this section.

(D) The amounts in paragraphs (b)(1)(ii)(A) and (B) of this section will be adjusted annually by the Bureau to reflect changes in the Consumer Price Index.

(2) * * *

(i) *Late payment fees that exceed 25 percent of the amount of the required minimum periodic payment or fees, other than late payment fees, that exceed dollar amount associated with violation -*

(A) *Generally.* A card issuer must not impose a fee for a late payment on a credit card account under an open-end (not home-secured) consumer credit plan that exceeds 25 percent of the amount of the required minimum periodic payment due immediately prior

to assessment of the late payment fee. For fees other than a fee for a late payment, a card issuer must not impose a fee for violating the terms or other requirements of a credit card account described in this paragraph (A) that exceeds the dollar amount associated with the violation.

* * * * *

3. In supplement I to part 1026:

a. Under **Section 1026.7 - Periodic Statement**, revise **7(b)(11) Due Date; Late Payment Costs**,

b. Under **Section 1026.52—Limitations on Fees**, revise **52(a)(1) General rule** and **52(b) Limitations on Penalty Fees**, and

c. Under **Section 1026.60 - Credit and Charge Card Applications and Solicitations**, revise **60(a)(2) Form of Disclosures; Tabular Format**.

The revisions read as follows:

Supplement I to Part 1026—Official Interpretations

Section 1026.7 - Periodic Statement

* * * * *

7(b)(11) Due Date; Late Payment Costs

1. *Informal periods affecting late payments.* Although the terms of the account agreement may provide that a card issuer may assess a late payment fee if a payment is not received by a certain date, the card issuer may have an informal policy or practice that delays the assessment of the late payment fee for payments received a brief period of time after the date upon which a card issuer has the contractual right to impose the fee. A card issuer must disclose the due date according to the legal obligation between the

parties, and need not consider the end of an informal “courtesy period” as the due date under § 1026.7(b)(11).

2. *Assessment of late payment fees.* Some State or other laws require that a certain number of days must elapse following a due date before a late payment fee may be imposed. In addition, a card issuer may be restricted by the terms of the account agreement from imposing a late payment fee until a payment is late for a certain number of days following a due date. For example, assume a payment is due on March 10 and the account agreement or State law provides that a late payment fee cannot be assessed before March 21. A card issuer must disclose the due date under the terms of the legal obligation (March 10 in this example), and not a date different than the due date, such as when the card issuer is restricted by the account agreement or State or other law from imposing a late payment fee unless a payment is late for a certain number of days following the due date (March 21 in this example). Consumers' rights under State law to avoid the imposition of late payment fees during a specified period following a due date are unaffected by the disclosure requirement. In this example, the card issuer would disclose March 10 as the due date for purposes of § 1026.7(b)(11), but could not, under State law, assess a late payment fee before March 21.

3. *Fee or rate triggered by multiple events.* If a late payment fee or penalty rate is triggered after multiple events, such as two late payments in six months, the card issuer may, but is not required to, disclose the late payment and penalty rate disclosure each month. The disclosures must be included on any periodic statement for which a late payment could trigger the late payment fee or penalty rate, such as after the consumer made one late payment in this example. For example, if a cardholder has already made

one late payment, the disclosure must be on each statement for the following five billing cycles.

4. *Range of late fees or penalty rates.* A card issuer that imposes a range of late payment fees or rates on a credit card account under an open-end (not home-secured) consumer credit plan may state the highest fee or rate along with an indication lower fees or rates could be imposed. For example, a phrase indicating the late payment fee could be “up to \$8” complies with this requirement.

5. *Penalty rate in effect.* If the highest penalty rate has previously been triggered on an account, the card issuer may, but is not required to, delete the amount of the penalty rate and the warning that the rate may be imposed for an untimely payment, as not applicable. Alternatively, the card issuer may, but is not required to, modify the language to indicate that the penalty rate has been increased due to previous late payments (if applicable).

6. *Same day each month.* The requirement that the due date be the same day each month means that the due date must generally be the same numerical date. For example, a consumer’s due date could be the 25th of every month. In contrast, a due date that is the same relative date but not numerical date each month, such as the third Tuesday of the month, generally would not comply with this requirement. However, a consumer’s due date may be the last day of each month, even though that date will not be the same numerical date. For example, if a consumer’s due date is the last day of each month, it will fall on February 28th (or February 29th in a leap year) and on August 31st.

7. *Change in due date.* A creditor may adjust a consumer’s due date from time to time provided that the new due date will be the same numerical date each month on an

ongoing basis. For example, a creditor may choose to honor a consumer's request to change from a due date that is the 20th of each month to the 5th of each month, or may choose to change a consumer's due date from time to time for operational reasons. See comment 2(a)(4)-3 for guidance on transitional billing cycles.

8. *Billing cycles longer than one month.* The requirement that the due date be the same day each month does not prohibit billing cycles that are two or three months, provided that the due date for each billing cycle is on the same numerical date of the month. For example, a creditor that establishes two-month billing cycles could send a consumer periodic statements disclosing due dates of January 25, March 25, and May 25.

9. *Payment due date when the creditor does not accept or receive payments by mail.* If the due date in a given month falls on a day on which the creditor does not receive or accept payments by mail and the creditor is required to treat a payment received the next business day as timely pursuant to § 1026.10(d), the creditor must disclose the due date according to the legal obligation between the parties, not the date as of which the creditor is permitted to treat the payment as late. For example, assume that the consumer's due date is the 4th of every month, and the creditor does not accept or receive payments by mail on Thursday, July 4. Pursuant to § 1026.10(d), the creditor may not treat a mailed payment received on the following business day, Friday, July 5, as late for any purpose. The creditor must nonetheless disclose July 4 as the due date on the periodic statement and may not disclose a July 5 due date.

* * * * *

Section 1026.52—Limitations on Fees

52(a) Limitations during first year after account opening.

52(a)(1) General rule

1. *Application.* The 25 percent limit in § 1026.52(a)(1) applies to fees that the card issuer charges to the account as well as to fees that the card issuer requires the consumer to pay with respect to the account through other means (such as through a payment from the consumer's asset account, including a prepaid account as defined in § 1026.61, to the card issuer or from another credit account provided by the card issuer).

For example:

i. Assume that, under the terms of a credit card account, a consumer is required to pay \$120 in fees for the issuance or availability of credit at account opening. The consumer is also required to pay a cash advance fee that is equal to five percent of the cash advance and a late payment fee of \$8 if the required minimum periodic payment is not received by the payment due date (which is the twenty-fifth of the month). At account opening on January 1 of year one, the credit limit for the account is \$500. Section 1026.52(a)(1) permits the card issuer to charge to the account the \$120 in fees for the issuance or availability of credit at account opening. On February 1 of year one, the consumer uses the account for a \$100 cash advance. Section 1026.52(a)(1) permits the card issuer to charge a \$5 cash-advance fee to the account. On March 26 of year one, the card issuer has not received the consumer's required minimum periodic payment. Section 1026.52(a)(2) permits the card issuer to charge a \$8 late payment fee to the account. On July 15 of year one, the consumer uses the account for a \$50 cash advance. Section 1026.52(a)(1) does not permit the card issuer to charge a \$2.50 cash advance fee

to the account. Furthermore, § 1026.52(a)(1) prohibits the card issuer from collecting the \$2.50 cash advance fee from the consumer by other means.

ii. Assume that, under the terms of a credit card account, a consumer is required to pay \$125 in fees for the issuance or availability of credit during the first year after account opening. At account opening on January 1 of year one, the credit limit for the account is \$500. Section 1026.52(a)(1) permits the card issuer to charge the \$125 in fees to the account. However, § 1026.52(a)(1) prohibits the card issuer from requiring the consumer to make payments to the card issuer for additional non-exempt fees with respect to the account during the first year after account opening. Section 1026.52(a)(1) also prohibits the card issuer from requiring the consumer to open a separate credit account with the card issuer to fund the payment of additional non-exempt fees during the first year after the credit card account is opened.

iii. Assume that a consumer opens a prepaid account accessed by a prepaid card on January 1 of year one and opens a covered separate credit feature accessible by a hybrid prepaid-credit card as defined by § 1026.61 that is a credit card account under an open-end (not home-secured) consumer credit plan on March 1 of year one. Assume that, under the terms of the covered separate credit feature accessible by the hybrid prepaid-credit card, a consumer is required to pay \$50 in fees for the issuance or availability of credit at account opening. At credit account opening on March 1 of year one, the credit limit for the account is \$200. Section 1026.52(a)(1) permits the card issuer to charge the \$50 in fees to the credit account. However, § 1026.52(a)(1) prohibits the card issuer from requiring the consumer to make payments to the card issuer for additional non-exempt fees with respect to the credit account during the first year after account opening. Section

1026.52(a)(1) also prohibits the card issuer from requiring the consumer to open an additional credit feature with the card issuer to fund the payment of additional non-exempt fees during the first year after the covered separate credit feature is opened.

iv. Assume that a consumer opens a prepaid account accessed by a prepaid card on January 1 of year one and opens a covered separate credit feature accessible by a hybrid prepaid-credit card as defined in § 1026.61 that is a credit card account under an open-end (not home-secured) consumer credit plan on March 1 of year one. Assume that, under the terms of the covered separate credit feature accessible by the hybrid prepaid-credit card, a consumer is required to pay \$120 in fees for the issuance or availability of credit at account opening. The consumer is also required to pay a cash advance fee that is equal to 5 percent of any cash advance and a late payment fee of \$8 if the required minimum periodic payment is not received by the payment due date (which is the 25th of the month). At credit account opening on March 1 of year one, the credit limit for the account is \$500. Section 1026.52(a)(1) permits the card issuer to charge to the account the \$120 in fees for the issuance or availability of credit at account opening. On April 1 of year one, the consumer uses the account for a \$100 cash advance. Section 1026.52(a)(1) permits the card issuer to charge a \$5 cash advance fee to the account. On April 26 of year one, the card issuer has not received the consumer's required minimum periodic payment. Section 1026.52(a)(2) permits the card issuer to charge a \$8 late payment fee to the account. On July 15 of year one, the consumer uses the account for a \$50 cash advance. Section 1026.52(a)(1) does not permit the card issuer to charge a \$2.50 cash advance fee to the account, because the total amount of non-exempt fees reached the 25 percent limit with the \$5 cash advance fee on April 1 (the \$8 late fee on

April 26 is exempt pursuant to § 1026.52(a)(2)(i)). Furthermore, § 1026.52(a)(1) prohibits the card issuer from collecting the \$2.50 cash advance fee from the consumer by other means.

2. Fees that exceed 25 percent limit. A card issuer that charges a fee to a credit card account that exceeds the 25 percent limit complies with § 1026.52(a)(1) if the card issuer waives or removes the fee and any associated interest charges or credits the account for an amount equal to the fee and any associated interest charges within a reasonable amount of time but no later than the end of the billing cycle following the billing cycle during which the fee was charged. For example, assuming the facts in the example in comment 52(a)(1)-1.i above, the card issuer complies with § 1026.52(a)(1) if the card issuer charged the \$2.50 cash advance fee to the account on July 15 of year one but waived or removed the fee or credited the account for \$2.50 (plus any interest charges on that \$2.50) at the end of the billing cycle.

3. Changes in credit limit during first year.

i. Increases in credit limit. If a card issuer increases the credit limit during the first year after the account is opened, § 1026.52(a)(1) does not permit the card issuer to require the consumer to pay additional fees that would otherwise be prohibited (such as a fee for increasing the credit limit). For example, assume that, at account opening on January 1, the credit limit for a credit card account is \$400 and the consumer is required to pay \$100 in fees for the issuance or availability of credit. On July 1, the card issuer increases the credit limit for the account to \$600. Section 1026.52(a)(1) does not permit the card issuer to require the consumer to pay additional fees based on the increased credit limit.

ii. *Decreases in credit limit.* If a card issuer decreases the credit limit during the first year after the account is opened, § 1026.52(a)(1) requires the card issuer to waive or remove any fees charged to the account that exceed 25 percent of the reduced credit limit or to credit the account for an amount equal to any fees the consumer was required to pay with respect to the account that exceed 25 percent of the reduced credit limit within a reasonable amount of time but no later than the end of the billing cycle following the billing cycle during which the credit limit was reduced. For example, assume that, at account opening on January 1, the credit limit for a credit card account is \$1,000 and the consumer is required to pay \$250 in fees for the issuance or availability of credit. The billing cycles for the account begin on the first day of the month and end on the last day of the month. On July 30, the card issuer decreases the credit limit for the account to \$600. Section 1026.52(a)(1) requires the card issuer to waive or remove \$100 in fees from the account or to credit the account for an amount equal to \$100 within a reasonable amount of time but no later than August 31.

4. *Date on which account may first be used by consumer to engage in transactions.*

i. *Methods of compliance.* For purposes of § 1026.52(a)(1), an account is considered open no earlier than the date on which the account may first be used by the consumer to engage in transactions. A card issuer may consider an account open for purposes of § 1026.52(a)(1) on any of the following dates:

A. The date the account is first used by the consumer for a transaction (such as when an account is established in connection with financing the purchase of goods or services).

B. The date the consumer complies with any reasonable activation procedures imposed by the card issuer for preventing fraud or unauthorized use of a new account (such as requiring the consumer to provide information that verifies his or her identity), provided that the account may be used for transactions on that date.

C. The date that is seven days after the card issuer mails or delivers to the consumer account-opening disclosures that comply with § 1026.6, provided that the consumer may use the account for transactions after complying with any reasonable activation procedures imposed by the card issuer for preventing fraud or unauthorized use of the new account (such as requiring the consumer to provide information that verifies his or her identity). If a card issuer has reasonable procedures designed to ensure that account-opening disclosures that comply with § 1026.6 are mailed or delivered to consumers no later than a certain number of days after the card issuer establishes the account, the card issuer may add that number of days to the seven-day period for purposes of determining the date on which the account was opened.

ii. *Examples.* A. Assume that, on July 1 of year one, a credit card account under an open-end (not home-secured) consumer credit plan is established in connection with financing the purchase of goods or services and a \$500 transaction is charged to the account by the consumer. The card issuer may consider the account open on July 1 of year one for purposes of § 1026.52(a)(1). Accordingly, § 1026.52(a)(1) ceases to apply to the account on July 1 of year two.

B. Assume that, on July 1 of year one, a card issuer approves a consumer's application for a credit card account under an open-end (not home-secured) consumer credit plan and establishes the account on its internal systems. On July 5, the card issuer

mails or delivers to the consumer account-opening disclosures that comply with § 1026.6. If the consumer may use the account for transactions on the date the consumer complies with any reasonable procedures imposed by the card issuer for preventing fraud or unauthorized use, the card issuer may consider the account open on July 12 of year one for purposes of § 1026.52(a)(1). Accordingly, § 1026.52(a)(1) ceases to apply to the account on July 12 of year two.

C. Same facts as in paragraph B above except that the card issuer has adopted reasonable procedures designed to ensure that account-opening disclosures that comply with § 1026.6 are mailed or delivered to consumers no later than three days after an account is established on its systems. If the consumer may use the account for transactions on the date the consumer complies with any reasonable procedures imposed by the card issuer for preventing fraud or unauthorized use, the card issuer may consider the account open on July 11 of year one for purposes of § 1026.52(a)(1). Accordingly, § 1026.52(a)(1) ceases to apply to the account on July 11 of year two. However, if the consumer uses the account for a transaction or complies with the card issuer's reasonable procedures for preventing fraud or unauthorized use on July 8 of year one, the card issuer may, at its option, consider the account open on that date for purposes of § 1026.52(a)(1) and § 1026.52(a)(1) therefore ceases to apply to the account on July 8 of year two.

* * * * *

52(b) Limitations on Penalty Fees

1. *Fees for violating the account terms or other requirements.* For purposes of § 1026.52(b), a fee includes any charge imposed by a card issuer based on an act or omission that violates the terms of the account or any other requirements imposed by the

card issuer with respect to the account, other than charges attributable to periodic interest rates. Accordingly, for purposes of § 1026.52(b), a fee does not include charges attributable to an increase in an annual percentage rate based on an act or omission that violates the terms or other requirements of an account.

i. The following are examples of fees that are subject to the limitations in § 1026.52(b) or are prohibited by § 1026.52(b):

A. Late payment fees and any other fees imposed by a card issuer if an account becomes delinquent or if a payment is not received by a particular date. A late payment fee or late fee is any fee imposed for a late payment. *See* § 1026.60(b)(9) and accompanying commentary.

B. Returned payment fees and any other fees imposed by a card issuer if a payment received via check, automated clearing house, or other payment method is returned.

C. Any fee or charge for an over-the-limit transaction as defined in § 1026.56(a), to the extent the imposition of such a fee or charge is permitted by § 1026.56.

D. Any fee imposed by a card issuer if payment on a check that accesses a credit card account is declined.

E. Any fee or charge for a transaction that the card issuer declines to authorize. *See* § 1026.52(b)(2)(i)(B).

F. Any fee imposed by a card issuer based on account inactivity (including the consumer's failure to use the account for a particular number or dollar amount of transactions or a particular type of transaction). *See* § 1026.52(b)(2)(i)(B).

G. Any fee imposed by a card issuer based on the closure or termination of an account. *See* § 1026.52(b)(2)(i)(B).

ii. The following are examples of fees to which § 1026.52(b) does not apply:

A. Balance transfer fees.

B. Cash advance fees.

C. Foreign transaction fees.

D. Annual fees and other fees for the issuance or availability of credit described in § 1026.60(b)(2), except to the extent that such fees are based on account inactivity. *See* § 1026.52(b)(2)(i)(B).

E. Fees for insurance described in § 1026.4(b)(7) or debt cancellation or debt suspension coverage described in § 1026.4(b)(10) written in connection with a credit transaction, provided that such fees are not imposed as a result of a violation of the account terms or other requirements of an account.

F. Fees for making an expedited payment (to the extent permitted by § 1026.10(e)).

G. Fees for optional services (such as travel insurance).

H. Fees for reissuing a lost or stolen card.

2. *Rounding to nearest whole dollar.* A card issuer may round any fee that complies with § 1026.52(b) to the nearest whole dollar. For example, if § 1026.52(b) permits a card issuer to impose a late payment fee of \$5.50, the card issuer may round that amount up to the nearest whole dollar and impose a late payment fee of \$6. However, if the late payment fee permitted by § 1026.52(b) were \$5.49, the card issuer

would not be permitted to round that amount up to \$6, although the card issuer could round that amount down and impose a late payment fee of \$5.

3. Fees in connection with covered separate credit features accessible by hybrid prepaid-credit cards. With regard to a covered separate credit feature and an asset feature on a prepaid account that are both accessible by a hybrid prepaid-credit card as defined in § 1026.61 where the credit feature is a credit card account under an open-end (not home-secured) consumer credit plan, § 1026.52(b) applies to any fee for violating the terms or other requirements of the credit feature, regardless of whether those fees are imposed on the credit feature or on the asset feature of the prepaid account. For example, assume that a late fee will be imposed by the card issuer if the covered separate credit feature becomes delinquent or if a payment is not received by a particular date. This fee is subject to § 1026.52(b) regardless of whether the fee is imposed on the asset feature of the prepaid account or on the separate credit feature.

4. Fees imposed on the asset feature of a prepaid account that are not charges imposed as part of the plan. Section 1026.52(b) does not apply to any fee or charge imposed on the asset feature of the prepaid account that is not a charge imposed as part of the plan under § 1026.6(b)(3). *See* § 1026.6(b)(3)(iii)(D) and (E) and related commentary regarding fees imposed on the asset feature prepaid account that are not charges imposed as part of the plan under § 1026.6(b)(3) with respect to covered separate credit features accessible by hybrid prepaid-credit cards and non-covered separate credit features as those terms are defined in § 1026.61.

5. Examples. Any dollar amount examples in the commentary to § 1026.52(b) relating to the safe harbors in § 1026.52(b)(1) are based on the original historical safe-

harbor thresholds of \$25 and \$35 for penalty fees other than late fees, and on the threshold of \$8 for late fees.

52(b)(1) General Rule

1. *Relationship between § 1026.52(b)(1)(i), (b)(1)(ii), and (b)(2).*

i. *Relationship between § 1026.52(b)(1)(i) and (b)(1)(ii).* A card issuer may impose a fee for violating the terms or other requirements of an account pursuant to either § 1026.52(b)(1)(i) or (b)(1)(ii).

A. A card issuer that complies with the safe harbors in § 1026.52(b)(1)(ii) is not required to determine that its fees represent a reasonable proportion of the total costs incurred by the card issuer as a result of a type of violation under § 1026.52(b)(1)(i).

B. A card issuer may impose a fee for one type of violation pursuant to § 1026.52(b)(1)(i) and may impose a fee for a different type of violation pursuant to § 1026.52(b)(1)(ii). For example, a card issuer may impose a late payment fee of \$9 based on a cost determination pursuant to § 1026.52(b)(1)(i) but impose returned payment and over-the-limit fees of \$25 or \$35 pursuant to the safe harbors in § 1026.52(b)(1)(ii).

C. A card issuer that previously based the amount of a penalty fee for a particular type of violation on a cost determination pursuant to § 1026.52(b)(1)(i) may begin to impose a penalty fee for that type of violation that is consistent with § 1026.52(b)(1)(ii) at any time (subject to the notice requirements in § 1026.9), provided that the first fee imposed pursuant to § 1026.52(b)(1)(ii) is consistent with § 1026.52(b)(1)(ii)(A). For example, assume that consistent with § 1026.56, a consumer has affirmatively consented to the payment of transactions that exceed the credit limit. A transaction occurs on

January 15 that causes the account balance to exceed the credit limit and, based on a cost determination pursuant to § 1026.52(b)(1)(i), the card issuer imposes a \$30 over-the-limit fee. The consumer's next monthly payment brings the account balance below the credit limit. On July 15, another transaction causes the account balance to exceed the credit limit. The card issuer may impose another \$30 over-the-limit fee pursuant to § 1026.52(b)(1)(i) or may impose a \$25 over-the-limit fee pursuant to § 1026.52(b)(1)(ii)(A). However, the card issuer may not impose a \$35 over-the-limit fee pursuant to § 1026.52(b)(1)(ii)(B). If the card issuer imposes a \$25 fee pursuant to § 1026.52(b)(1)(ii)(A) for the July 15 over-the-limit transaction and on September 15 another transaction causes the account balance to exceed the credit limit, the card issuer may impose a \$35 fee for the September 15 over-the-limit transaction pursuant to § 1026.52(b)(1)(ii)(B).

ii. *Relationship between § 1026.52(b)(1) and (b)(2).* Section 1026.52(b)(1) does not permit a card issuer to impose a fee that is inconsistent with the prohibitions in § 1026.52(b)(2). For example, if § 1026.52(b)(2)(i) prohibits the card issuer from imposing a late payment fee that exceeds \$7, § 1026.52(b)(1)(ii) does not permit the card issuer to impose a higher late payment fee.

52(b)(1)(i) Fees Based on Costs

1. *Costs incurred as a result of violations.* Section 1026.52(b)(1)(i) does not require a card issuer to base a fee on the costs incurred as a result of a specific violation of the terms or other requirements of an account. Instead, for purposes of § 1026.52(b)(1)(i), a card issuer must have determined that a fee for violating the terms or other requirements of an account represents a reasonable proportion of the costs

incurred by the card issuer as a result of that type of violation. A card issuer may make a single determination for all of its credit card portfolios or may make separate determinations for each portfolio. The factors relevant to this determination include:

i. The number of violations of a particular type experienced by the card issuer during a prior period of reasonable length (for example, a period of twelve months).

ii. The costs incurred by the card issuer during that period as a result of those violations.

iii. At the card issuer's option, the number of fees imposed by the card issuer as a result of those violations during that period that the card issuer reasonably estimates it will be unable to collect. *See* comment 52(b)(1)(i)-5.

iv. At the card issuer's option, reasonable estimates for an upcoming period of changes in the number of violations of that type, the resulting costs, and the number of fees that the card issuer will be unable to collect. *See* illustrative examples in comments 52(b)(1)(i)-6 through -9.

2. *Amounts excluded from cost analysis.* The following amounts are not costs incurred by a card issuer as a result of violations of the terms or other requirements of an account for purposes of § 1026.52(b)(1)(i):

i. Losses and associated costs (including the cost of holding reserves against potential losses, the cost of funding delinquent accounts, and any collection costs that are incurred after an account is charged off in accordance with loan-loss provisions).

ii. Costs associated with evaluating whether consumers who have not violated the terms or other requirements of an account are likely to do so in the future (such as the costs associated with underwriting new accounts). However, once a violation of the

terms or other requirements of an account has occurred, the costs associated with preventing additional violations for a reasonable period of time are costs incurred by a card issuer as a result of violations of the terms or other requirements of an account for purposes of § 1026.52(b)(1)(i).

3. *Third-party charges.* As a general matter, amounts charged to the card issuer by a third party as a result of a violation of the terms or other requirements of an account are costs incurred by the card issuer for purposes of § 1026.52(b)(1)(i). For example, if a card issuer is charged a specific amount by a third party for each returned payment, that amount is a cost incurred by the card issuer as a result of returned payments. However, if the amount is charged to the card issuer by an affiliate or subsidiary of the card issuer, the card issuer must have determined that the charge represents a reasonable proportion of the costs incurred by the affiliate or subsidiary as a result of the type of violation. For example, if an affiliate of a card issuer provides collection services to the card issuer on delinquent accounts, the card issuer must have determined that the amounts charged to the card issuer by the affiliate for such services represent a reasonable proportion of the costs incurred by the affiliate as a result of late payments.

4. *Amounts charged by other card issuers.* The fact that a card issuer's fees for violating the terms or other requirements of an account are comparable to fees assessed by other card issuers does not satisfy the requirements of § 1026.52(b)(1)(i).

5. *Uncollected fees.* For purposes of § 1026.52(b)(1)(i), a card issuer may consider fees that it is unable to collect when determining the appropriate fee amount. Fees that the card issuer is unable to collect include fees imposed on accounts that have been charged off by the card issuer, fees that have been discharged in bankruptcy, and

fees that the card issuer is required to waive in order to comply with a legal requirement (such as a requirement imposed by 12 CFR part 1026 or 50 U.S.C. app. 527). However, fees that the card issuer chooses not to impose or chooses not to collect (such as fees the card issuer chooses to waive at the request of the consumer or under a workout or temporary hardship arrangement) are not relevant for purposes of this determination. *See* illustrative examples in comments 52(b)(2)(i)-6 through -9.

6. *Late payment fees.*

i. *Costs incurred as a result of late payments.* For purposes of § 1026.52(b)(1)(i), the costs incurred by a card issuer as a result of late payments include the costs associated with the collection of late payments, such as the costs associated with notifying consumers of delinquencies and resolving delinquencies (including the establishment of workout and temporary hardship arrangements).

ii. *Examples.* A. *Late payment fee based on past delinquencies and costs.*

Assume that, during year one, a card issuer experienced 1 million delinquencies and incurred \$26 million in costs as a result of those delinquencies. For purposes of § 1026.52(b)(1)(i), a \$26 late payment fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of late payments during year two.

B. *Adjustment based on fees card issuer is unable to collect.* Same facts as above except that the card issuer imposed a late payment fee for each of the 1 million delinquencies experienced during year one but was unable to collect 25% of those fees (in other words, the card issuer was unable to collect 250,000 fees, leaving a total of 750,000 late payments for which the card issuer did collect or could have collected a fee). For purposes of § 1026.52(b)(2)(i), a late payment fee of \$35 would represent a

reasonable proportion of the total costs incurred by the card issuer as a result of late payments during year two.

C. Adjustment based on reasonable estimate of future changes. Same facts as paragraphs A and B above except the card issuer reasonably estimates that—based on past delinquency rates and other factors relevant to potential delinquency rates for year two—it will experience a 2% decrease in delinquencies during year two (in other words, 20,000 fewer delinquencies for a total of 980,000). The card issuer also reasonably estimates that it will be unable to collect the same percentage of fees (25%) during year two as during year one (in other words, the card issuer will be unable to collect 245,000 fees, leaving a total of 735,000 late payments for which the card issuer will be able to collect a fee). The card issuer also reasonably estimates that—based on past changes in costs incurred as a result of delinquencies and other factors relevant to potential costs for year two—it will experience a 5% increase in costs during year two (in other words, \$1.3 million in additional costs for a total of \$27.3 million). For purposes of § 1026.52(b)(1)(i), a \$37 late payment fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of late payments during year two.

7. Returned payment fees.

i. Costs incurred as a result of returned payments. For purposes of § 1026.52(b)(1)(i), the costs incurred by a card issuer as a result of returned payments include:

A. Costs associated with processing returned payments and reconciling the card issuer's systems and accounts to reflect returned payments;

B. Costs associated with investigating potential fraud with respect to returned payments; and

C. Costs associated with notifying the consumer of the returned payment and arranging for a new payment.

ii. *Examples.* A. *Returned payment fee based on past returns and costs.* Assume that, during year one, a card issuer experienced 150,000 returned payments and incurred \$3.1 million in costs as a result of those returned payments. For purposes of § 1026.52(b)(1)(i), a \$21 returned payment fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of returned payments during year two.

B. *Adjustment based on fees card issuer is unable to collect.* Same facts as above except that the card issuer imposed a returned payment fee for each of the 150,000 returned payments experienced during year one but was unable to collect 15% of those fees (in other words, the card issuer was unable to collect 22,500 fees, leaving a total of 127,500 returned payments for which the card issuer did collect or could have collected a fee). For purposes of § 1026.52(b)(2)(i), a returned payment fee of \$24 would represent a reasonable proportion of the total costs incurred by the card issuer as a result of returned payments during year two.

C. *Adjustment based on reasonable estimate of future changes.* Same facts as paragraphs A and B above except the card issuer reasonably estimates that—based on past returned payment rates and other factors relevant to potential returned payment rates for year two—it will experience a 2% increase in returned payments during year two (in other words, 3,000 additional returned payments for a total of 153,000). The card issuer

also reasonably estimates that it will be unable to collect 25% of returned payment fees during year two (in other words, the card issuer will be unable to collect 38,250 fees, leaving a total of 114,750 returned payments for which the card issuer will be able to collect a fee). The card issuer also reasonably estimates that—based on past changes in costs incurred as a result of returned payments and other factors relevant to potential costs for year two—it will experience a 1% decrease in costs during year two (in other words, a \$31,000 reduction in costs for a total of \$3.069 million). For purposes of § 1026.52(b)(1)(i), a \$27 returned payment fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of returned payments during year two.

8. *Over-the-limit fees.*

i. *Costs incurred as a result of over-the-limit transactions.* For purposes of § 1026.52(b)(1)(i), the costs incurred by a card issuer as a result of over-the-limit transactions include:

A. Costs associated with determining whether to authorize over-the-limit transactions; and

B. Costs associated with notifying the consumer that the credit limit has been exceeded and arranging for payments to reduce the balance below the credit limit.

ii. *Costs not incurred as a result of over-the-limit transactions.* For purposes of § 1026.52(b)(1)(i), costs associated with obtaining the affirmative consent of consumers to the card issuer's payment of transactions that exceed the credit limit consistent with § 1026.56 are not costs incurred by a card issuer as a result of over-the-limit transactions.

iii. *Examples. A. Over-the-limit fee based on past fees and costs.* Assume that, during year one, a card issuer authorized 600,000 over-the-limit transactions and incurred \$4.5 million in costs as a result of those over-the-limit transactions. However, because of the affirmative consent requirements in § 1026.56, the card issuer was only permitted to impose 200,000 over-the-limit fees during year one. For purposes of § 1026.52(b)(1)(i), a \$23 over-the-limit fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of over-the-limit transactions during year two.

B. Adjustment based on fees card issuer is unable to collect. Same facts as above except that the card issuer was unable to collect 30% of the 200,000 over-the-limit fees imposed during year one (in other words, the card issuer was unable to collect 60,000 fees, leaving a total of 140,000 over-the-limit transactions for which the card issuer did collect or could have collected a fee). For purposes of § 1026.52(b)(2)(i), an over-the-limit fee of \$32 would represent a reasonable proportion of the total costs incurred by the card issuer as a result of over-the-limit transactions during year two.

C. Adjustment based on reasonable estimate of future changes. Same facts as paragraphs A and B above except the card issuer reasonably estimates that—based on past over-the-limit transaction rates, the percentages of over-the-limit transactions that resulted in an over-the-limit fee in the past (consistent with § 1026.56), and factors relevant to potential changes in those rates and percentages for year two—it will authorize approximately the same number of over-the-limit transactions during year two (600,000) and impose approximately the same number of over-the-limit fees (200,000). The card issuer also reasonably estimates that it will be unable to collect the same percentage of fees (30%) during year two as during year one (in other words, the card

issuer was unable to collect 60,000 fees, leaving a total of 140,000 over-the-limit transactions for which the card issuer will be able to collect a fee). The card issuer also reasonably estimates that—based on past changes in costs incurred as a result of over-the-limit transactions and other factors relevant to potential costs for year two—it will experience a 6% decrease in costs during year two (in other words, a \$270,000 reduction in costs for a total of \$4.23 million). For purposes of § 1026.52(b)(1)(i), a \$30 over-the-limit fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of over-the-limit transactions during year two.

9. *Declined access check fees.*

i. *Costs incurred as a result of declined access checks.* For purposes of § 1026.52(b)(1)(i), the costs incurred by a card issuer as a result of declining payment on a check that accesses a credit card account include:

A. Costs associated with determining whether to decline payment on access checks;

B. Costs associated with processing declined access checks and reconciling the card issuer's systems and accounts to reflect declined access checks;

C. Costs associated with investigating potential fraud with respect to declined access checks; and

D. Costs associated with notifying the consumer and the merchant or other party that accepted the access check that payment on the check has been declined.

ii. *Example.* Assume that, during year one, a card issuer declined 100,000 access checks and incurred \$2 million in costs as a result of those declined checks. The card issuer imposed a fee for each declined access check but was unable to collect 10% of

those fees (in other words, the card issuer was unable to collect 10,000 fees, leaving a total of 90,000 declined access checks for which the card issuer did collect or could have collected a fee). For purposes of § 1026.52(b)(1)(i), a \$22 declined access check fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of declined access checks during year two.

52(b)(1)(ii) Safe Harbors

1. Multiple violations of same type.

i. Same billing cycle or next six billing cycles. A card issuer cannot impose a late fee in excess of \$8 pursuant to § 1026.52(b)(1)(ii), regardless of whether the card issuer has imposed a late fee within the six previous billing cycles. For all other penalty fees, a card issuer cannot impose a fee for a violation pursuant to § 1026.52(b)(1)(ii)(B) unless a fee has previously been imposed for the same type of violation pursuant to § 1026.52(b)(1)(ii)(A). Once a fee has been imposed for a violation pursuant to § 1026.52(b)(1)(ii)(A), the card issuer may impose a fee pursuant to § 1026.52(b)(1)(ii)(B) for any subsequent violation of the same type until that type of violation has not occurred for a period of six consecutive complete billing cycles. A fee has been imposed for purposes of § 1026.52(b)(1)(ii) even if the card issuer waives or rebates all or part of the fee.

A. Late payments. For purposes of § 1026.52(b)(1)(ii), a late payment occurs during the billing cycle in which the payment may first be treated as late consistent with the requirements of this part and the terms or other requirements of the account.

B. Returned payments. For purposes of § 1026.52(b)(1)(ii), a returned payment occurs during the billing cycle in which the payment is returned to the card issuer.

C. Transactions that exceed the credit limit. For purposes of § 1026.52(b)(1)(ii), a transaction that exceeds the credit limit for an account occurs during the billing cycle in which the transaction occurs or is authorized by the card issuer.

D. Declined access checks. For purposes of § 1026.52(b)(1)(ii), a check that accesses a credit card account is declined during the billing cycle in which the card issuer declines payment on the check.

ii. Relationship to §§ 1026.52(b)(2)(ii) and 1026.56(j)(1). If multiple violations are based on the same event or transaction such that § 1026.52(b)(2)(ii) prohibits the card issuer from imposing more than one fee, the event or transaction constitutes a single violation for purposes of § 1026.52(b)(1)(ii). Furthermore, consistent with § 1026.56(j)(1)(i), no more than one violation for exceeding an account's credit limit can occur during a single billing cycle for purposes of § 1026.52(b)(1)(ii). However, § 1026.52(b)(2)(ii) does not prohibit a card issuer from imposing fees for exceeding the credit limit in consecutive billing cycles based on the same over-the-limit transaction to the extent permitted by § 1026.56(j)(1). In these circumstances, the second and third over-the-limit fees permitted by § 1026.56(j)(1) may be imposed pursuant to § 1026.52(b)(1)(ii)(B). *See comment 52(b)(2)(ii)-1.*

iii. Examples. The following examples illustrate the application of § 1026.52(b)(1)(ii), (b)(1)(ii)(A), and (b)(1)(ii)(B) with respect to credit card accounts under an open-end (not home-secured) consumer credit plan that are not charge card accounts. For purposes of these examples, assume that the billing cycles for the account begin on the first day of the month and end on the last day of the month and that the payment due date for the account is the twenty-fifth day of the month.

A. Violations of same type (over the credit limit). Consistent with § 1026.56, the consumer has affirmatively consented to the payment of transactions that exceed the credit limit. On March 20, a transaction causes the account balance to increase to \$1,150, which exceeds the account's \$1,000 credit limit. Consistent with § 1026.52(b)(1)(ii)(A), the card issuer imposes a \$25 over-the-limit fee for the March billing cycle. The card issuer receives a \$300 payment on March 25, bringing the account below the credit limit. In order for the card issuer to impose a \$35 over-the-limit fee pursuant to § 1026.52(b)(1)(ii)(B), a second over-the-limit transaction must occur during the April, May, June, July, August, or September billing cycles.

1. Same facts as above. On April 20, a transaction causes the account balance to increase to \$1,200, which exceeds the account's \$1,000 credit limit. Consistent with § 1026.52(b)(1)(ii)(B), the card issuer may impose a \$35 over-the-limit fee for the April billing cycle. Furthermore, the card issuer may impose a \$35 over-the-limit payment fee for any over-the-limit transaction or event that triggers an over-the-limit fee that occurs during the May, June, July, August, September, or October billing cycles, subject to the limitations in § 1026.56(j)(1).

2. Same facts as in paragraph A above. The account remains below the limit from March 25 until October 20, when a transaction causes the account balance to exceed the credit limit. However, because this over-the-limit transaction did not occur during the six billing cycles following the March billing cycle, § 1026.52(b)(1)(ii) only permits the card issuer to impose an over-the-limit fee of \$25.

B. Violations of different types (late payment and over the credit limit). The credit limit for an account is \$1,000. Consistent with § 1026.56, the consumer has

affirmatively consented to the payment of transactions that exceed the credit limit. A required minimum periodic payment of \$35 is due on August 25. On August 26, a late payment has occurred because no payment has been received. Accordingly, consistent with § 1026.52(b)(1)(ii), the card issuer imposes a \$8 late payment fee on August 26. On August 30, the card issuer receives a \$35 payment. On September 10, a transaction causes the account balance to increase to \$1,150, which exceeds the account's \$1,000 credit limit. On September 11, a second transaction increases the account balance to \$1,350. On September 23, the card issuer receives the \$50 required minimum periodic payment due on September 25, which reduces the account balance to \$1,300. On September 30, the card issuer imposes a \$25 over-the-limit fee, consistent with § 1026.52(b)(1)(ii)(A). On October 26, a late payment has occurred because the \$60 required minimum periodic payment due on October 25 has not been received. Accordingly, consistent with § 1026.52(b)(1)(ii) the card issuer imposes a \$8 late payment fee on October 26.

C. Violations of different types (late payment and returned payment). A required minimum periodic payment of \$40 is due on July 25. On July 26, a late payment has occurred because no payment has been received. Accordingly, consistent with § 1026.52(b)(1)(ii), the card issuer imposes a \$8 late payment fee on July 26. On July 30, the card issuer receives a \$60 payment. A required minimum periodic payment of \$40 is due on August 25. On August 24, a \$40 payment is received. On August 27, the \$40 payment is returned to the card issuer for insufficient funds. In these circumstances, § 1026.52(b)(2)(ii) permits the card issuer to impose either a late payment fee or a returned payment fee but not both, because the late payment and the returned payment

result from the same event or transaction. Accordingly, for purposes of § 1026.52(b)(1)(ii), the event or transaction constitutes a single violation. However, if the card issuer imposes a late payment fee, § 1026.52(b)(1)(ii) permits the issuer to impose a fee of \$8. If the card issuer imposes a returned payment fee, the amount of the fee may be no more than \$25 pursuant to § 1026.52(b)(1)(ii)(A).

2. *Adjustments based on Consumer Price Index for penalty fees other than late fees.* For purposes of § 1026.52(b)(1)(ii)(A) and (b)(1)(ii)(B), the Bureau shall calculate each year price level adjusted amounts for penalty fees other than late fees using the Consumer Price Index in effect on June 1 of that year. When the cumulative change in the adjusted minimum value derived from applying the annual Consumer Price level to the current amounts in § 1026.52(b)(1)(ii)(A) and (b)(1)(ii)(B) has risen by a whole dollar, those amounts will be increased by \$1.00. Similarly, when the cumulative change in the adjusted minimum value derived from applying the annual Consumer Price level to the current amounts in § 1026.52(b)(1)(ii)(A) and (b)(1)(ii)(B) has decreased by a whole dollar, those amounts will be decreased by \$1.00. The Bureau will publish adjustments to the amounts in § 1026.52(b)(1)(ii)(A) and (b)(1)(ii)(B).

i. *Historical thresholds.*

A. Card issuers were permitted to impose a fee for violating the terms of an agreement if the fee did not exceed \$25 under § 1026.52(b)(1)(ii)(A) and \$35 under § 1026.52(b)(1)(ii)(B), through December 31, 2013.

B. Card issuers were permitted to impose a fee for violating the terms of an agreement if the fee did not exceed \$26 under § 1026.52(b)(1)(ii)(A) and \$37 under § 1026.52(b)(1)(ii)(B), through December 31, 2014.

C. Card issuers were permitted to impose a fee for violating the terms of an agreement if the fee did not exceed \$27 under § 1026.52(b)(1)(ii)(A) and \$38 under § 1026.52(b)(1)(ii)(B), through December 31, 2015.

D. Card issuers were permitted to impose a fee for violating the terms of an agreement if the fee did not exceed \$27 under § 1026.52(b)(1)(ii)(A), through December 31, 2016. Card issuers were permitted to impose a fee for violating the terms of an agreement if the fee did not exceed \$37 under § 1026.52(b)(1)(ii)(B), through June 26, 2016, and \$38 under § 1026.52(b)(1)(ii)(B) from June 27, 2016, through December 31, 2016.

E. Card issuers were permitted to impose a fee for violating the terms of an agreement if the fee did not exceed \$27 under § 1026.52(b)(1)(ii)(A) and \$38 under § 1026.52(b)(1)(ii)(B), through December 31, 2017.

F. Card issuers were permitted to impose a fee for violating the terms of an agreement if the fee did not exceed \$27 under § 1026.52(b)(1)(ii)(A) and \$38 under § 1026.52(b)(1)(ii)(B), through December 31, 2018.

G. Card issuers were permitted to impose a fee for violating the terms of an agreement if the fee did not exceed \$28 under § 1026.52(b)(1)(ii)(A) and \$39 under § 1026.52(b)(1)(ii)(B), through December 31, 2019.

H. Card issuers were permitted to impose a fee for violating the terms of an agreement if the fee did not exceed \$29 under § 1026.52(b)(1)(ii)(A) and \$40 under § 1026.52(b)(1)(ii)(B), through December 31, 2020.

I. Card issuers were permitted to impose a fee for violating the terms of an agreement if the fee did not exceed \$29 under § 1026.52(b)(1)(ii)(A) and \$40 under § 1026.52(b)(1)(ii)(B), through December 31, 2021.

3. *Delinquent balance for charge card accounts.* Section 1026.52(b)(1)(ii)(C) provides that, when a charge card issuer that requires payment of outstanding balances in full at the end of each billing cycle has not received the required payment for two or more consecutive billing cycles, the card issuer may impose a late payment fee that does not exceed three percent of the delinquent balance. For purposes of § 1026.52(b)(1)(ii)(C), the delinquent balance is any previously billed amount that remains unpaid at the time the late payment fee is imposed pursuant to § 1026.52(b)(1)(ii)(C). Consistent with § 1026.52(b)(2)(ii), a charge card issuer that imposes a fee pursuant to § 1026.52(b)(1)(ii)(C) with respect to a late payment may not impose a fee pursuant to § 1026.52(b)(1)(ii)(B) with respect to the same late payment. The following examples illustrate the application of § 1026.52(b)(1)(ii)(C):

i. Assume that a charge card issuer requires payment of outstanding balances in full at the end of each billing cycle and that the billing cycles for the account begin on the first day of the month and end on the last day of the month. At the end of the June billing cycle, the account has a balance of \$1,000. On July 5, the card issuer provides a periodic statement disclosing the \$1,000 balance consistent with § 1026.7. During the July billing cycle, the account is used for \$292 in transactions, increasing the balance to \$1,292. At the end of the July billing cycle, no payment has been received and the card issuer imposes a \$8 late payment fee consistent with § 1026.52(b)(1)(ii). On August 5, the card issuer provides a periodic statement disclosing the \$1,300 balance consistent with

§ 1026.7. During the August billing cycle, the account is used for \$200 in transactions, increasing the balance to \$1,500. At the end of the August billing cycle, no payment has been received. Consistent with § 1026.52(b)(1)(ii)(C), the card issuer may impose a late payment fee of \$39, which is 3% of the \$1,300 balance that was due at the end of the August billing cycle. Section 1026.52(b)(1)(ii)(C) does not permit the card issuer to include the \$200 in transactions that occurred during the August billing cycle.

ii. Same facts as above except that, on August 25, a \$100 payment is received. Consistent with § 1026.52(b)(1)(ii)(C), the card issuer may impose a late payment fee of \$36, which is 3% of the unpaid portion of the \$1,300 balance that was due at the end of the August billing cycle (\$1,200).

iii. Same facts as in paragraph i above except that, on August 25, a \$200 payment is received. Consistent with § 1026.52(b)(1)(ii)(C), the card issuer may impose a late payment fee of \$33, which is 3% of the unpaid portion of the \$1,300 balance that was due at the end of the August billing cycle (\$1,100). In the alternative, the card issuer may impose a late payment fee of \$8 consistent with § 1026.52(b)(1)(ii). However, § 1026.52(b)(2)(ii) prohibits the card issuer from imposing both fees.

52(b)(2) Prohibited fees

1. *Relationship to § 1026.52(b)(1)*. A card issuer does not comply with § 1026.52(b) if it imposes a fee that is inconsistent with the prohibitions in § 1026.52(b)(2). Thus, the prohibitions in § 1026.52(b)(2) apply even if a fee is consistent with § 1026.52(b)(1)(i) or (b)(1)(ii). For example, even if a card issuer has determined for purposes of § 1026.52(b)(1)(i) that a \$27 fee represents a reasonable proportion of the total costs incurred by the card issuer as a result of a particular type of

violation, § 1026.52(b)(2)(i) prohibits the card issuer from imposing that fee if the dollar amount associated with the violation is less than \$27. Similarly, even if § 1026.52(b)(1)(ii) permits a card issuer to impose a \$25 fee, § 1026.52(b)(2)(i) prohibits the card issuer from imposing that fee if the dollar amount associated with the violation is less than \$25.

52(b)(2)(i) Late Payment Fees that Exceed 25 Percent of the Amount of the Required Minimum Periodic Payment or Fees, other than Late Payment Fees, that Exceed Dollar Amount Associated with Violation

1. *Late payment fees.* Section 1026.52(b)(2)(i) provides that a card issuer must not impose a fee for a late payment on a credit card account under an open-end (not home-secured) consumer credit plan that exceeds 25 percent of the amount of the required minimum periodic payment due immediately prior to assessment of the late payment fee. The required minimum periodic payment due immediately prior to the assessment of the late payment fee is the amount that the consumer is required to pay to avoid the late payment fee, including, as applicable, any missed payments and fees assessed from prior billing cycles. For example:

i. Assume that a \$20 required minimum periodic payment is due on September 25. The card issuer does not receive any payment on or before September 25. On September 26, the card issuer imposes a late payment fee. For purposes of § 1026.52(b)(2)(i), the dollar amount associated with the late payment is twenty-five percent of the amount of the required minimum periodic payment due on September 25 (\$5). Thus, under § 1026.52(b)(2)(i)(A), the amount of that fee cannot exceed \$5 (even if a higher fee would be permitted under § 1026.52(b)(1)).

ii. Same facts as above except that, on September 25, the card issuer receives a \$10 payment. No further payments are received. On September 26, the card issuer imposes a late payment fee. For purposes of § 1026.52(b)(2)(i), the dollar amount associated with the late payment is twenty-five percent of the full amount of the required minimum periodic payment due on September 25 (\$5), rather than twenty-five percent of the unpaid portion of that payment (\$2.50). Thus, under § 1026.52(b)(2)(i)(A), the amount of the late payment fee cannot exceed \$5 (even if a higher fee would be permitted under § 1026.52(b)(1)).

iii. Assume that a \$20 required minimum periodic payment is due on October 28 and the billing cycle for the account closes on October 31. The card issuer does not receive any payment on or before November 3. On November 3, the card issuer determines that the required minimum periodic payment due on November 28 is \$50. On November 5, the card issuer imposes a late payment fee. For purposes of § 1026.52(b)(2)(i), the dollar amount associated with the late payment is twenty-five percent of the amount of the required minimum periodic payment due on October 28 (\$5), rather than the amount of the required minimum periodic payment due on November 28 (\$50). Thus, under § 1026.52(b)(2)(i)(A), the amount of that fee cannot exceed \$5 (even if a higher fee would be permitted under § 1026.52(b)(1)).

2. *Returned payment fees.* For purposes of § 1026.52(b)(2)(i), the dollar amount associated with a returned payment is the amount of the required minimum periodic payment due immediately prior to the date on which the payment is returned to the card issuer. Thus, § 1026.52(b)(2)(i)(A) prohibits a card issuer from imposing a returned payment fee that exceeds the amount of that required minimum periodic payment.

However, if a payment has been returned and is submitted again for payment by the card issuer, there is no additional dollar amount associated with a subsequent return of that payment and § 1026.52(b)(2)(i)(B) prohibits the card issuer from imposing an additional returned payment fee. For example:

i. Assume that the billing cycles for an account begin on the first day of the month and end on the last day of the month and that the payment due date is the twenty-fifth day of the month. A minimum payment of \$15 is due on March 25. The card issuer receives a check for \$100 on March 23, which is returned to the card issuer for insufficient funds on March 26. For purposes of § 1026.52(b)(2)(i), the dollar amount associated with the returned payment is the amount of the required minimum periodic payment due on March 25 (\$15). Thus, § 1026.52(b)(2)(i)(A) prohibits the card issuer from imposing a returned payment fee that exceeds \$15 (even if a higher fee would be permitted under § 1026.52(b)(1)). Furthermore, § 1026.52(b)(2)(ii) prohibits the card issuer from assessing both a late payment fee and a returned payment fee in these circumstances. *See* comment 52(b)(2)(ii)-1.

ii. Same facts as above except that the card issuer receives the \$100 check on March 31 and the check is returned for insufficient funds on April 2. The minimum payment due on April 25 is \$30. For purposes of § 1026.52(b)(2)(i), the dollar amount associated with the returned payment is the amount of the required minimum periodic payment due on March 25 (\$15), rather than the amount of the required minimum periodic payment due on April 25 (\$30). Thus, § 1026.52(b)(2)(i)(A) prohibits the card issuer from imposing a returned payment fee that exceeds \$15 (even if a higher fee would be permitted under § 1026.52(b)(1)). Furthermore, § 1026.52(b)(2)(ii) prohibits the card

issuer from assessing both a late payment fee and a returned payment fee in these circumstances. *See* comment 52(b)(2)(ii)-1.

iii. Same facts as paragraph i above except that, on March 28, the card issuer presents the \$100 check for payment a second time. On April 1, the check is again returned for insufficient funds. Section 1026.52(b)(2)(i)(B) prohibits the card issuer from imposing a returned payment fee based on the return of the payment on April 1.

iv. Assume that the billing cycles for an account begin on the first day of the month and end on the last day of the month and that the payment due date is the twenty-fifth day of the month. A minimum payment of \$15 is due on August 25. The card issuer receives a check for \$15 on August 23, which is not returned. The card issuer receives a check for \$50 on September 5, which is returned to the card issuer for insufficient funds on September 7. Section 1026.52(b)(2)(i)(B) does not prohibit the card issuer from imposing a returned payment fee in these circumstances. Instead, for purposes of § 1026.52(b)(2)(i), the dollar amount associated with the returned payment is the amount of the required minimum periodic payment due on August 25 (\$15). Thus, § 1026.52(b)(2)(i)(A) prohibits the card issuer from imposing a returned payment fee that exceeds \$15 (even if a higher fee would be permitted under § 1026.52(b)(1)).

3. *Over-the-limit fees.* For purposes of § 1026.52(b)(2)(i), the dollar amount associated with extensions of credit in excess of the credit limit for an account is the total amount of credit extended by the card issuer in excess of the credit limit during the billing cycle in which the over-the-limit fee is imposed. Thus, § 1026.52(b)(2)(i)(A) prohibits a card issuer from imposing an over-the-limit fee that exceeds that amount. Nothing in § 1026.52(b) permits a card issuer to impose an over-the-limit fee if

imposition of the fee is inconsistent with § 1026.56. The following examples illustrate the application of § 1026.52(b)(2)(i)(A) to over-the-limit fees:

i. Assume that the billing cycles for a credit card account with a credit limit of \$5,000 begin on the first day of the month and end on the last day of the month. Assume also that, consistent with § 1026.56, the consumer has affirmatively consented to the payment of transactions that exceed the credit limit. On March 1, the account has a \$4,950 balance. On March 6, a \$60 transaction is charged to the account, increasing the balance to \$5,010. On March 25, a \$5 transaction is charged to the account, increasing the balance to \$5,015. On the last day of the billing cycle (March 31), the card issuer imposes an over-the-limit fee. For purposes of § 1026.52(b)(2)(i), the dollar amount associated with the extensions of credit in excess of the credit limit is the total amount of credit extended by the card issuer in excess of the credit limit during the March billing cycle (\$15). Thus, § 1026.52(b)(2)(i)(A) prohibits the card issuer from imposing an over-the-limit fee that exceeds \$15 (even if a higher fee would be permitted under § 1026.52(b)(1)).

ii. Same facts as above except that, on March 26, the card issuer receives a payment of \$20, reducing the balance below the credit limit to \$4,995. Nevertheless, for purposes of § 1026.52(b)(2)(i), the dollar amount associated with the extensions of credit in excess of the credit limit is the total amount of credit extended by the card issuer in excess of the credit limit during the March billing cycle (\$15). Thus, consistent with § 1026.52(b)(2)(i)(A), the card issuer may impose an over-the-limit fee of \$15.

4. *Declined access check fees.* For purposes of § 1026.52(b)(2)(i), the dollar amount associated with declining payment on a check that accesses a credit card account

is the amount of the check. Thus, when a check that accesses a credit card account is declined, § 1026.52(b)(2)(i)(A) prohibits a card issuer from imposing a fee that exceeds the amount of that check. For example, assume that a check that accesses a credit card account is used as payment for a \$50 transaction, but payment on the check is declined by the card issuer because the transaction would have exceeded the credit limit for the account. For purposes of § 1026.52(b)(2)(i), the dollar amount associated with the declined check is the amount of the check (\$50). Thus, § 1026.52(b)(2)(i)(A) prohibits the card issuer from imposing a fee that exceeds \$50. However, the amount of this fee must also comply with § 1026.52(b)(1)(i) or (b)(1)(ii).

5. *Inactivity fees.* Section 1026.52(b)(2)(i)(B)(2) prohibits a card issuer from imposing a fee with respect to a credit card account under an open-end (not home-secured) consumer credit plan based on inactivity on that account (including the consumer's failure to use the account for a particular number or dollar amount of transactions or a particular type of transaction). For example, § 1026.52(b)(2)(i)(B)(2) prohibits a card issuer from imposing a \$50 fee when a credit card account under an open-end (not home-secured) consumer credit plan is not used for at least \$2,000 in purchases over the course of a year. Similarly, § 1026.52(b)(2)(i)(B)(2) prohibits a card issuer from imposing a \$50 annual fee on all accounts of a particular type but waiving the fee on any account that is used for at least \$2,000 in purchases over the course of a year if the card issuer promotes the waiver or rebate of the annual fee for purposes of § 1026.55(e). However, if the card issuer does not promote the waiver or rebate of the annual fee for purposes of § 1026.55(e), § 1026.52(b)(2)(i)(B)(2) does not prohibit a card issuer from considering account activity along with other factors when deciding whether

to waive or rebate annual fees on individual accounts (such as in response to a consumer's request).

6. *Closed account fees.* Section 1026.52(b)(2)(i)(B)(3) prohibits a card issuer from imposing a fee based on the closure or termination of an account. For example, § 1026.52(b)(2)(i)(B)(3) prohibits a card issuer from:

i. Imposing a one-time fee to consumers who close their accounts.

ii. Imposing a periodic fee (such as an annual fee, a monthly maintenance fee, or a closed account fee) after an account is closed or terminated if that fee was not imposed prior to closure or termination. This prohibition applies even if the fee was disclosed prior to closure or termination. *See also* comment 55(d)-1.

iii. Increasing a periodic fee (such as an annual fee or a monthly maintenance fee) after an account is closed or terminated. However, a card issuer is not prohibited from continuing to impose a periodic fee that was imposed before the account was closed or terminated.

7. *Declined transaction fees.* Section 1026.52(b)(2)(i)(B)(1) states that card issuers must not impose a fee when there is no dollar amount associated with the violation, such as for transactions that the card issuer declines to authorize. With regard to a covered separate credit feature and an asset feature on a prepaid account that are both accessible by a hybrid prepaid-credit card as defined in § 1026.61 where the credit feature is a credit card account under an open-end (not home-secured) consumer credit plan, § 1026.52(b)(2)(i)(B)(1) prohibits a card issuer from imposing declined transaction fees in connection with the credit feature, regardless of whether the declined transaction fee is imposed on the credit feature or on the asset feature of the prepaid account. For

example, if the prepaid card attempts to access credit from the covered separate credit feature accessible by the hybrid prepaid-credit card and the transaction is declined, § 1026.52(b)(2)(i)(B)(I) prohibits the card issuer from imposing a declined transaction fee, regardless of whether the fee is imposed on the credit feature or on the asset feature of the prepaid account. Fees imposed for declining a transaction that would have only accessed the asset feature of the prepaid account and would not have accessed the covered separate credit feature accessible by the hybrid prepaid-credit are not covered by § 1026.52(b)(2)(i)(B)(I).

52(b)(2)(ii) Multiple Fees Based on a Single Event or Transaction

1. *Single event or transaction.* Section 1026.52(b)(2)(ii) prohibits a card issuer from imposing more than one fee for violating the terms or other requirements of an account based on a single event or transaction. If § 1026.56(j)(1) permits a card issuer to impose fees for exceeding the credit limit in consecutive billing cycles based on the same over-the-limit transaction, those fees are not based on a single event or transaction for purposes of § 1026.52(b)(2)(ii). The following examples illustrate the application of § 1026.52(b)(2)(ii). Assume for purposes of these examples that the billing cycles for a credit card account begin on the first day of the month and end on the last day of the month and that the payment due date for the account is the twenty-fifth day of the month.

i. Assume that the required minimum periodic payment due on March 25 is \$35. On March 26, the card issuer has not received any payment and imposes a late payment fee. Consistent with § 1026.52(b)(1)(ii) and (b)(2)(i), the card issuer may impose an \$8 late payment fee on March 26. However, § 1026.52(b)(2)(ii) prohibits the card issuer

from imposing an additional late payment fee if the \$35 minimum payment has not been received by a subsequent date (such as March 31).

A. On April 3, the card issuer provides a periodic statement disclosing that a \$70 required minimum periodic payment is due on April 25. This minimum payment includes the \$35 minimum payment due on March 25 and the \$8 late payment fee imposed on March 26. On April 20, the card issuer receives a \$35 payment. No additional payments are received during the April billing cycle. Section 1026.52(b)(2)(ii) does not prohibit the card issuer from imposing a late payment fee based on the consumer's failure to make the \$70 required minimum periodic payment on or before April 25. Accordingly, consistent with § 1026.52(b)(1)(ii) and (b)(2)(i), the card issuer may impose an \$8 late payment fee on April 26.

B. On April 3, the card issuer provides a periodic statement disclosing that a \$35 required minimum periodic payment is due on April 25. This minimum payment does not include the \$35 minimum payment due on March 25 or the \$8 late payment fee imposed on March 26. On April 20, the card issuer receives a \$35 payment. No additional payments are received during the April billing cycle. Because the card issuer has received the required minimum periodic payment due on April 25 and because § 1026.52(b)(2)(ii) prohibits the card issuer from imposing a second late payment fee based on the consumer's failure to make the \$35 minimum payment due on March 25, the card issuer cannot impose a late payment fee in these circumstances.

ii. Assume that the required minimum periodic payment due on March 25 is \$35.

A. On March 25, the card issuer receives a check for \$50, but the check is returned for insufficient funds on March 27. Consistent with § 1026.52(b)(1)(ii),

(b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a late payment fee of \$8 or a returned payment fee of \$25. However, § 1026.52(b)(2)(ii) prohibits the card issuer from imposing both fees because those fees would be based on a single event or transaction.

B. Same facts as paragraph ii.A. above except that that card issuer receives the \$50 check on March 27 and the check is returned for insufficient funds on March 29. Consistent with § 1026.52(b)(1)(ii), (b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a late payment fee of \$8 or a returned payment fee of \$25. However, § 1026.52(b)(2)(ii) prohibits the card issuer from imposing both fees because those fees would be based on a single event or transaction. If no payment is received on or before the next payment due date (April 25), § 1026.52(b)(2)(ii) does not prohibit the card issuer from imposing a late payment fee.

iii. Assume that the required minimum periodic payment due on July 25 is \$30. On July 10, the card issuer receives a \$50 payment, which is not returned. On July 20, the card issuer receives a \$100 payment, which is returned for insufficient funds on July 24. Consistent with § 1026.52(b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a returned payment fee of \$25. Nothing in § 1026.52(b)(2)(ii) prohibits the imposition of this fee.

iv. Assume that the credit limit for an account is \$1,000 and that, consistent with § 1026.56, the consumer has affirmatively consented to the payment of transactions that exceed the credit limit. On March 31, the balance on the account is \$970 and the card issuer has not received the \$35 required minimum periodic payment due on March 25. On that same date (March 31), a \$70 transaction is charged to the account, which increases the balance to \$1,040. Consistent with § 1026.52(b)(1)(ii), (b)(1)(ii)(A) and

(b)(2)(i)(A), the card issuer may impose a late payment fee of \$8 and an over-the-limit fee of \$25. Section 1026.52(b)(2)(ii) does not prohibit the imposition of both fees because those fees are based on different events or transactions. No additional transactions are charged to the account during the March, April, or May billing cycles. If the account balance remains more than \$35 above the credit limit on April 26, the card issuer may impose an over-the-limit fee of \$35 pursuant to § 1026.52(b)(1)(ii)(B), to the extent consistent with § 1026.56(j)(1). Furthermore, if the account balance remains more than \$35 above the credit limit on May 26, the card issuer may again impose an over-the-limit fee of \$35 pursuant to § 1026.52(b)(1)(ii)(B), to the extent consistent with § 1026.56(j)(1). Thereafter, § 1026.56(j)(1) does not permit the card issuer to impose additional over-the-limit fees unless another over-the-limit transaction occurs. However, if an over-the-limit transaction occurs during the six billing cycles following the May billing cycle, the card issuer may impose an over-the-limit fee of \$35 pursuant to § 1026.52(b)(1)(ii)(B).

v. Assume that the credit limit for an account is \$5,000 and that, consistent with § 1026.56, the consumer has affirmatively consented to the payment of transactions that exceed the credit limit. On July 23, the balance on the account is \$4,950. On July 24, the card issuer receives the \$100 required minimum periodic payment due on July 25, reducing the balance to \$4,850. On July 26, a \$75 transaction is charged to the account, which increases the balance to \$4,925. On July 27, the \$100 payment is returned for insufficient funds, increasing the balance to \$5,025. Consistent with § 1026.52(b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a returned payment fee of \$25 or an over-the-limit fee of \$25. However, § 1026.52(b)(2)(ii) prohibits the

card issuer from imposing both fees because those fees would be based on a single event or transaction.

vi. Assume that the required minimum periodic payment due on March 25 is \$50. On March 20, the card issuer receives a check for \$50, but the check is returned for insufficient funds on March 22. Consistent with § 1026.52(b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a returned payment fee of \$25. On March 25, the card issuer receives a second check for \$50, but the check is returned for insufficient funds on March 27. Consistent with § 1026.52(b)(1)(ii), (b)(1)(ii)(A), (b)(1)(ii)(B), and (b)(2)(i)(A), the card issuer may impose a late payment fee of \$8 or a returned payment fee of \$35. However, § 1026.52(b)(2)(ii) prohibits the card issuer from imposing both fees because those fees would be based on a single event or transaction.

vii. Assume that the required minimum periodic payment due on February 25 is \$100. On February 25, the card issuer receives a check for \$100. On March 3, the card issuer provides a periodic statement disclosing that a \$120 required minimum periodic payment is due on March 25. On March 4, the \$100 check is returned to the card issuer for insufficient funds. Consistent with § 1026.52(b)(1)(ii), (b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a late payment fee of \$8 or a returned payment fee of \$25 with respect to the \$100 payment. However, § 1026.52(b)(2)(ii) prohibits the card issuer from imposing both fees because those fees would be based on a single event or transaction. On March 20, the card issuer receives a \$120 check, which is not returned. No additional payments are received during the March billing cycle. Because the card issuer has received the required minimum periodic payment due on March 25 and because § 1026.52(b)(2)(ii) prohibits the card issuer from imposing a second fee based on

the \$100 payment that was returned for insufficient funds, the card issuer cannot impose a late payment fee in these circumstances.

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Section 1026.60 - Credit and Charge Card Applications and Solicitations

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60(a)(2) Form of Disclosures; Tabular Format

1. *Location of table.*

i. *General.* Except for disclosures given electronically, disclosures in § 1026.60(b) that are required to be provided in a table must be prominently located on or with the application or solicitation. Disclosures are deemed to be prominently located, for example, if the disclosures are on the same page as an application or solicitation reply form. If the disclosures appear elsewhere, they are deemed to be prominently located if the application or solicitation reply form contains a clear and conspicuous reference to the location of the disclosures and indicates that they contain rate, fee, and other cost information, as applicable.

ii. *Electronic disclosures.* If the table is provided electronically, the table must be provided in close proximity to the application or solicitation. Card issuers have flexibility in satisfying this requirement. Methods card issuers could use to satisfy the requirement include, but are not limited to, the following examples (whatever method is used, a card issuer need not confirm that the consumer has read the disclosures):

A. The disclosures could automatically appear on the screen when the application or reply form appears;

B. The disclosures could be located on the same Web page as the application or reply form (whether or not they appear on the initial screen), if the application or reply form contains a clear and conspicuous reference to the location of the disclosures and indicates that the disclosures contain rate, fee, and other cost information, as applicable;

C. Card issuers could provide a link to the electronic disclosures on or with the application (or reply form) as long as consumers cannot bypass the disclosures before submitting the application or reply form. The link would take the consumer to the disclosures, but the consumer need not be required to scroll completely through the disclosures; or

D. The disclosures could be located on the same Web page as the application or reply form without necessarily appearing on the initial screen, immediately preceding the button that the consumer will click to submit the application or reply.

2. *Multiple accounts.* If a tabular format is required to be used, card issuers offering several types of accounts may disclose the various terms for the accounts in a single table or may provide a separate table for each account.

3. *Information permitted in the table.* See the commentary to § 1026.60(b), (d), and (e)(1) for guidance on additional information permitted in the table.

4. *Deletion of inapplicable disclosures.* Generally, disclosures need only be given as applicable. Card issuers may, therefore, omit inapplicable headings and their corresponding boxes in the table. For example, if no foreign transaction fee is imposed on the account, the heading *Foreign transaction* and disclosure may be deleted from the table, or the disclosure form may contain the heading *Foreign transaction* and a

disclosure showing *none*. There is an exception for the grace period disclosure; even if no grace period exists, that fact must be stated.

5. Highlighting of annual percentage rates and fee amounts.

i. *In general.* See Samples G-10(B) and G-10(C) for guidance on providing the disclosures described in § 1026.60(a)(2)(iv) in bold text. Other annual percentage rates or fee amounts disclosed in the table may not be in bold text. Samples G-10(B) and G-10(C) also provide guidance to issuers on how to disclose the rates and fees described in § 1026.60(a)(2)(iv) in a clear and conspicuous manner, by including these rates and fees generally as the first text in the applicable rows of the table so that the highlighted rates and fees generally are aligned vertically in the table.

ii. *Maximum limits on fees.* Section 1026.60(a)(2)(iv) provides that any maximum limits on fee amounts must be disclosed in bold text. For example, assume that consistent with § 1026.52(b)(1)(ii), a card issuer's late payment fee will not exceed \$8. The maximum limit of \$8 for the late payment fee must be highlighted in bold. Similarly, assume an issuer will charge a cash advance fee of \$5 or 3 percent of the cash advance transaction amount, whichever is greater, but the fee will not exceed \$100. The maximum limit of \$100 for the cash advance fee must be highlighted in bold.

iii. *Periodic fees.* Section 1026.60(a)(2)(iv) provides that any periodic fee disclosed pursuant to § 1026.60(b)(2) that is not an annualized amount must not be disclosed in bold. For example, if an issuer imposes a \$10 monthly maintenance fee for a card account, the issuer must disclose in the table that there is a \$10 monthly maintenance fee, and that the fee is \$120 on an annual basis. In this example, the \$10 fee disclosure would not be disclosed in bold, but the \$120 annualized amount must be disclosed in

bold. In addition, if an issuer must disclose any annual fee in the table, the amount of the annual fee must be disclosed in bold.

6. *Form of disclosures.* Whether disclosures must be in electronic form depends upon the following:

i. If a consumer accesses a credit card application or solicitation electronically (other than as described under ii. below), such as online at a home computer, the card issuer must provide the disclosures in electronic form (such as with the application or solicitation on its Web site) in order to meet the requirement to provide disclosures in a timely manner on or with the application or solicitation. If the issuer instead mailed paper disclosures to the consumer, this requirement would not be met.

ii. In contrast, if a consumer is physically present in the card issuer's office, and accesses a credit card application or solicitation electronically, such as via a terminal or kiosk (or if the consumer uses a terminal or kiosk located on the premises of an affiliate or third party that has arranged with the card issuer to provide applications or solicitations to consumers), the issuer may provide disclosures in either electronic or paper form, provided the issuer complies with the timing and delivery (“on or with”) requirements of the regulation.

7. *Terminology.* Section 1026.60(a)(2)(i) generally requires that the headings, content, and format of the tabular disclosures be substantially similar, but need not be identical, to the applicable tables in appendix G-10 to part 1026; but *see* § 1026.5(a)(2) for terminology requirements applicable to § 1026.60 disclosures.

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Rohit Chopra,

Director, Consumer Financial Protection Bureau.