

# Executive Summary of the Credit Card Penalty Fees Final Rule

On March 5, 2024, the Consumer Financial Protection Bureau (CFPB) issued the Credit Card Penalty Fees Final Rule (final rule) amending section 1026.52(b) in Regulation Z to better ensure that late fees charged by certain card issuers are reasonable and proportional as required under the Truth in Lending Act (TILA).<sup>1</sup>

## Background

The Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) was signed into law on May 22, 2009. 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 plan connected to an omission or violation of the cardholder agreement under an open-end consumer credit plan must be “reasonable and proportional” to the omission or violation. In implementing this provision, current Regulation Z 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, such as a late payment, exceeding the credit limit, or a returned payment, 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) (so-called cost analysis provisions) or complies with the safe harbor provisions set forth in § 1026.52(b)(1)(ii). Prior to this final rule, the safe harbor for penalty fees

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<sup>1</sup> This is a Compliance Aid issued by the Consumer Financial Protection Bureau. The Bureau published a Policy Statement on Compliance Aids, available at <https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/policy-statement-compliance-aids/>, that explains the Bureau’s approach to Compliance Aids.

were generally \$30 for the initial violation and \$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. Section 1026.52(b)(1)(ii)(D) contains annual adjustment provisions applicable to the safe harbor dollar amounts for penalty fees to reflect changes to the Consumer Price Index (CPI).

On February 1, 2023, the CFPB issued a notice of proposed rulemaking. On March 5, the CFPB issued the final rule, which is available at <https://content.consumerfinance.gov/rules-policy/final-rules/credit-card-penalty-fees-final-rule/>.

## Effective date

The final rule, which is described in detail below, is effective 60 days after publication in the *Federal Register*.

## Late Fee Safe Harbor Threshold for Larger Card Issuers

For card issuers that together with their affiliates have one million or more open credit card accounts (referred to as “Larger Card Issuers”<sup>2</sup>), the final rule repeals the current safe harbor dollar amounts for late fees; adopts a late fee safe harbor amount of \$8 for the initial and subsequent violations; and eliminates the annual adjustments that reflect changes in the CPI for the \$8 late fee safe harbor amount.

## Smaller Card Issuers

Under the final rule, Smaller Card Issuers are defined as card issuers that together with their affiliates had fewer than one million “open credit card accounts” (as defined in § 1026.58(b)(6)) in the entire preceding calendar year. The “entire preceding calendar” means from January to December of the preceding calendar year. Therefore, a card issuer must have fewer than one million open credit card accounts *consistently* from January to December of the preceding calendar year to qualify as a Smaller Card Issuer. Current § 1026.58(b)(6) defines “open credit card accounts” as credit card accounts under an open-end (not home-secured) consumer credit plan that either 1) permits consumers to obtain extensions of credit on the account; or 2) have an

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<sup>2</sup> This Executive Summary uses the term “Larger Card Issuers” to refer to card issuers that are not Smaller Card Issuers as defined in § 1026.52(b)(3) and thus are card issuers that together with their affiliates have one million or more open credit card accounts.

outstanding balance on the account that has not been charged off. If an account meets either criterion, it is considered open. If an account is inactive, suspended, or closed due to new activity (although the cardholder continues to make payment to pay off the balance), the account is considered open and must be counted when determining coverage under the final rule. This broad definition generally encompasses open accounts that a card issuer keeps on-balance sheet as well as those that a card issuer may have sold or otherwise keeps off-balance sheet (except for accounts that have been charged off).

If a Smaller Card Issuer meets or exceeds the one million open credit card accounts threshold in the current calendar year, the card issuer loses its status as a Smaller Card Issuer. If such card issuer chooses to use the Regulation Z safe harbor provisions, the late fee safe harbor threshold amount of \$8 is applicable to the issuer on the 60<sup>th</sup> day after it meets or exceeds the threshold.<sup>3</sup> If the card issuer chooses not to use the safe harbor provisions, it may use the cost analysis provisions under § 1026.52(b)(2)(i), including the requirement to exclude post-charge-off collection costs. In that event, the card issuer must begin to charge the amount calculated under those provisions on the 60<sup>th</sup> day after it meets or exceeds the threshold. Such card issuer will not become a Smaller Card Issuer again until it has fewer than one million open credit card accounts in an entire preceding calendar year.

## Late Fee Safe Harbor Threshold for Smaller Card Issuers

The revisions to the Regulation Z safe harbor provisions described above with respect to Larger Card Issuers do not apply to Smaller Card Issuers. Therefore, the safe harbors in § 1026.52(b)(1)(ii)(A) and (B) will continue to apply to late fees imposed by Smaller Card Issuers. In addition, because § 1026.52(b)(1)(ii)(D) provides for the annual adjustment of the safe harbor dollar amounts for penalty fees to reflect changes to the CPI, the final rule adjusts the current safe harbor threshold amounts, and provides for safe harbor threshold amounts of \$32 for the initial violation and \$43 for each subsequent violation of the same type that occurs during the same cycle or in one of the next six billing cycles. For Smaller Card Issuers, the annual

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<sup>3</sup> Section 1026.9(c)(2)(i)(A) requires creditors to provide a consumer with a written notice of a change in term at least 45 days prior to the effective date of the change. Section 1026.9(c)(2)(v)(A) lists a reduction of any component of a finance or other charge as one of the circumstances under which a change in terms notice is not required. Because the final rule lowers the late fee safe harbor dollar amount for Larger Card Issuers, such card issuers that use the \$8 late fee safe harbor amount are not required to provide a change in terms notice to their consumers that the late fee has been lowered to \$8. However, when a card issuer becomes a Smaller Card Issuer as defined in § 1026.52(b)(3) and elects to use the late fee safe harbor as set forth in § 1026.52(b)(1)(ii)(A) and (B), the card issuer must provide the change in terms notice to their consumers at least 45 days prior to the effective date of the change, as required by § 1026.9(c)(2)(i)(A).

adjustment provisions in § 1026.52(b)(1)(ii)(D) will continue to apply to the safe harbor provisions for late fees.

## **Safe Harbor Threshold Amounts for Penalty Fees Other Than Late Fees**

In accordance with the annual adjustment provision in § 1026.52(b)(1)(ii)(D), for penalty fees other than late fees, the final rule adjusts the safe harbor threshold amounts to \$32 for the initial violation and \$43 for each subsequent violation of the same type that occurs during the same cycle or in one of the next six billing cycles. This adjustment applies to penalty fees other than late fees charged by all card issuers (i.e., both Larger Card Issuers and Smaller Card Issuers). The annual adjustment provisions in section 1026.52(b)(1)(ii)(D) will continue to apply to the safe harbor provisions for penalty fees other than late fees.

## **Post-Charge-Off Collection Costs**

The cost analysis provisions in § 1026.52(b)(1)(i) generally permit card issuers to impose a fee upon consumers for violating the terms or other requirements of a credit card account 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. The final rule makes it explicitly clear that when determining penalty fees, card issuers must not include any collection costs incurred after an account is charged-off in accordance with loan loss provisions. This clarification applies to all card issuers (i.e., both Larger Card Issuers and Smaller Card Issuers) that use the cost analysis provisions in § 1026.52(b)(1)(i) to determine penalty fee amounts to be charged to consumers.