pays a nonrefundable fee, whichever is earlier. If program disclosures cannot be provided because a consumer expresses an interest in individually negotiating loan terms that are not generally offered, disclosures reflecting those terms may be provided as soon as reasonably possible after the terms have been decided upon, but not later than the time a non-refundable fee is paid. If a consumer who has received program disclosures subsequently expresses an interest in other available variable-rate programs subject to 1026.19(b)(2), or the creditor and consumer decide on a program for which the consumer has not received disclosures, the creditor must provide appropriate disclosures as soon as reasonably possible. The creditor, of course, is permitted to give the consumer information about additional programs subject to §1026.19(b) initially.

2. *Variable-rate loan program defined.* i. Generally, if the identification, the presence or absence, or the exact value of a loan feature must be disclosed under this section, variable-rate loans that differ as to such features constitute separate loan programs. For example, separate loan programs would exist based on differences in any of the following loan features:

A. The index or other formula used to calculate interest rate adjustments.

B. The rules relating to changes in the index value, interest rate, payments, and loan balance.

C. The presence or absence of, and the amount of, rate or payment caps.

D. The presence of a demand feature.

E. The possibility of negative amortization.

F. The possibility of interest rate carryover.

G. The frequency of interest rate and payment adjustments.

H. The presence of a discount feature.

I. In addition, if a loan feature must be taken into account in preparing the disclosures required by §1026.19(b)(2)(viii), variable-rate loans that differ as to that feature constitute separate programs under §1026.19(b)(2).

ii. If, however, a representative value may be given for a loan feature or the feature need not be disclosed under §1026.19(b)(2), variable-rate loans that differ as to such features do not constitute separate loan programs. For example, separate programs would not exist based on differences in the following loan features:

A. The amount of a discount.

B. The amount of a margin.

3. *Form of program disclosures.* A creditor may provide separate program disclosure forms for each ARM program it offers or a single disclosure form that describes multiple programs. A disclosure form may consist of more than one page. For example, a creditor may attach a separate page containing the historical payment example for a particular program. A disclosure form describing more than one program need not repeat information applicable to each program that is described. For example, a form describing multiple programs may disclose the information applicable to all of the programs in one place with the various program features (such as options permitting conversion to a fixed rate) disclosed separately. The form, however, must state if any program feature that is described is available only in conjunction with certain other program features. Both the separate and multiple program disclosures may illustrate more than one loan maturity or payment amortization—for example, by including multiple payment and loan balance columns in the historical payment example. Disclosures may be inserted or printed in the *Consumer Handbook* (or a suitable substitute) as long as they are identified as the creditor's loan program disclosures.

4. *As applicable.* The disclosures required by this section need only be made as applicable. Any disclosure not relevant to a particular transaction may be eliminated. For example, if the transaction does not contain a demand feature, the disclosure required under §1026.19(b)(2)(x) need not be given. As used in this section, *payment* refers only to a payment based on the interest rate, loan balance and loan term, and does not refer to payment of other elements such as mortgage insurance premiums.

5. *Revisions.* A creditor must revise the disclosures required under this section once a year as soon as reasonably possible after the new index value becomes available. Revisions to the disclosures also are required when the loan program changes.

Paragraph 19(b)(2)(i)

1. *Change in interest rate, payment, or term.* A creditor must disclose the fact that the terms of the legal obligation permit the creditor, after consummation of the transaction, to increase (or decrease) the interest rate, payment, or term of the loan initially disclosed to the consumer. For example, the disclosures for a variable-rate program in which the interest rate and payment (but not loan term) can change might read, ''Your interest rate and payment can change yearly.'' In transactions where the term of the loan may change due to rate fluctuations, the creditor must state that fact.

Paragraph 19(b)(2)(ii)

1. *Identification of index or formula.* If a creditor ties interest rate changes to a particular index, this fact must be disclosed, along with a source of information about the index. For example, if a creditor uses the weekly average yield on U.S. Treasury Securities adjusted to a constant maturity as its

index, the disclosure might read, "Your index is the weekly average yield on U.S. Treasury Securities adjusted to a constant maturity of one year published weekly in the *Wall Street Journal.*" If no particular index is used, the creditor must briefly describe the formula used to calculate interest rate changes.

2. *Changes at creditor's discretion.* If interest rate changes are at the creditor's discretion, this fact must be disclosed. If an index is internally defined, such as by a creditor's prime rate, the creditor should either briefly describe that index or state that interest rate changes are at the creditor's discretion.

Paragraph 19(b)(2)(iii)

1. *Determination of interest rate and payment.* This provision requires an explanation of how the creditor will determine the consumer's interest rate and payment. In cases where a creditor bases its interest rate on a specific index and adjusts the index through the addition of a margin, for example, the disclosure might read, "Your interest rate is based on the index plus a margin, and your payment will be based on the interest rate, loan balance, and remaining loan term." In transactions where paying the periodic payments will not fully amortize the outstanding balance at the end of the loan term and where the final payment will equal the periodic payment plus the remaining unpaid balance, the creditor must disclose this fact. For example, the disclosure might read, "Your periodic payments will not fully amortize your loan and you will be required to make a single payment of the periodic payment plus the remaining unpaid balance at the end of the loan term." The creditor, however, need not reflect any irregular final payment in the historical example or in the disclosure of the initial and maximum rates and payments. If applicable, the creditor should also disclose that the rate and payment will be rounded.

Paragraph 19(b)(2)(iv)

1. *Current margin value and interest rate.* Because the disclosures can be prepared in advance, the interest rate and margin may be several months old when the disclosures are delivered. A statement, therefore, is required alerting consumers to the fact that they should inquire about the current margin value applied to the index and the current interest rate. For example, the disclosure might state, "Ask us for our current interest rate and margin."

Paragraph 19(b)(2)(v)

1. *Discounted and premium interest rate.* In some variable-rate transactions, creditors may set an initial interest rate that is not determined by the index or formula used to make later interest rate adjustments. Typically, this initial rate charged to consumers is lower than the rate would be if it were calculated using the index or formula. However, in some cases the initial rate may be higher. If the initial interest rate will be a discount or a premium rate, creditors must alert the consumer to this fact. For example, if a creditor discounted a consumer's initial rate, the disclosure might state, "Your initial interest rate is not based on the index used to make later adjustments." (See the commentary to §1026.17(c)(1) for a further discussion of discounted and premium variable-rate transactions.) In addition, the disclosure must suggest that consumers inquire about the amount that the program is currently discounted. For example, the disclosure might state, "Ask us for the amount our adjustable rate mortgages are currently discounted." In a transaction with a consumer buydown or with a third-party buydown that will be incorporated in the legal obligation, the creditor should disclose the program as a discounted variable-rate transaction, but need not disclose additional information regarding the buydown in its program disclosures. (See the commentary to §1026.19(b)(2)(viii) for a discussion of how to reflect the discount or premium in the historical example or the maximum rate and payment disclosure).

Paragraph 19(b)(2)(vi)

1. *Frequency.* The frequency of interest rate and payment adjustments must be disclosed. If interest rate changes will be imposed more frequently or at different intervals than payment changes, a creditor must disclose the frequency and timing of both types of changes. For example, in a variable-rate transaction where interest rate changes are made monthly, but payment changes occur on an annual basis, this fact must be disclosed. In certain ARM transactions, the interval between loan closing and the initial adjustment is not known and may be different from the regular interval for adjustments. In such cases, the creditor may disclose the initial adjustment period as a range of the minimum and maximum amount of time from consummation or closing. For example, the creditor might state: "The first adjustment to your interest rate and payment will occur no sooner than 6 months and no later than 18 months after closing. Subsequent adjustments may occur once each year after the first adjustment." (See comments 19(b)(2)(viii)(A)–7 and 19(b)(2)(viii)(B)–4 for guidance on other disclosures when this alternative disclosure rule is used.)

Paragraph 19(b)(2)(vii)

1. *Rate and payment caps.* The creditor must disclose limits on changes (increases or decreases) in the interest rate or payment. If

an initial discount is not taken into account in applying overall or periodic rate limitations, that fact must be disclosed. If separate overall or periodic limitations apply to interest rate increases resulting from other events, such as the exercise of a fixed-rate conversion option or leaving the creditor's employ, those limitations must also be stated. Limitations do not include legal limits in the nature of usury or rate ceilings under state or Federal statutes or regulations. (See §1026.30 for the rule requiring that a maximum interest rate be included in certain variable-rate transactions.) The creditor need not disclose each periodic or overall rate limitation that is currently available. As an alternative, the creditor may disclose the range of the lowest and highest periodic and overall rate limitations that may be applicable to the creditor's ARM transactions. For example, the creditor might state: "The limitation on increases to your interest rate at each adjustment will be set at an amount in the following range: Between 1 and 2 percentage points at each adjustment. The limitation on increases to your interest rate over the term of the loan will be set at an amount in the following range: Between 4 and 7 percentage points above the initial interest rate." A creditor using this alternative rule must include a statement in its program disclosures suggesting that the consumer ask about the overall rate limitations currently offered for the creditor's ARM programs. (See comments 19(b)(2)(viii)(A)–6 and 19(b)(2)(viii)(B)–3 for an explanation of the additional requirements for a creditor using this alternative rule for disclosure of periodic and overall rate limitations.)

2. *Negative amortization and interest rate carryover*. A creditor must disclose, where applicable, the possibility of negative amortization. For example, the disclosure might state, "If any of your payments is not sufficient to cover the interest due, the difference will be added to your loan amount." Loans that provide for more than one way to trigger negative amortization are separate variable-rate programs requiring separate disclosures. (See the commentary to §1026.19(b)(2) for a discussion on the definition of a variable-rate loan program and the format for disclosure.) If a consumer is given the option to cap monthly payments that may result in negative amortization, the creditor must fully disclose the rules relating to the option, including the effects of exercising the option (such as negative amortization will occur and the principal loan balance will increase); however, the disclosure in §1026.19(b)(2)(viii) need not be provided.

3. *Conversion option*. If a loan program permits consumers to convert their variable-rate loans to fixed-rate loans, the creditor must disclose that the interest rate may increase if the consumer converts the loan to a fixed-rate loan. The creditor must also disclose the rules relating to the conversion feature, such as the period during which the loan may be converted, that fees may be charged at conversion, and how the fixed rate will be determined. The creditor should identify any index or other measure or formula used to determine the fixed rate and state any margin to be added. In disclosing the period during which the loan may be converted and the margin, the creditor may use information applicable to the conversion feature during the six months preceding preparation of the disclosures and state that the information is representative of conversion features recently offered by the creditor. The information may be used until the program disclosures are otherwise revised. Although the rules relating to the conversion option must be disclosed, the effect of exercising the option should not be reflected elsewhere in the disclosures, such as in the historical example or in the calculation of the initial and maximum interest rate and payments.

4. *Preferred-rate loans*. Section 1026.19(b) applies to preferred-rate loans, where the rate will increase upon the occurrence of some event, such as an employee leaving the creditor's employ, whether or not the underlying rate is fixed or variable. In these transactions, the creditor must disclose the event that would allow the creditor to increase the rate such as that the rate may increase if the employee leaves the creditor's employ. The creditor must also disclose the rules relating to termination of the preferred rate, such as that fees may be charged when the rate is changed and how the new rate will be determined.

Paragraph 19(b)(2)(viii)

1. *Historical example and initial and maximum interest rates and payments*. A creditor may disclose both the historical example and the initial and maximum interest rates and payments.

Paragraph 19(b)(2)(viii)(A)

1. *Index movement*. This section requires a creditor to provide an historical example, based on a $10,000 loan amount originating in 1977, showing how interest rate changes implemented according to the terms of the loan program would have affected payments and the loan balance at the end of each year during a 15-year period. (In all cases, the creditor need only calculate the payments and loan balance for the term of the loan. For example, in a five-year loan, a creditor would show the payments and loan balance for the five-year term, from 1977 to 1981, with a zero loan balance reflected for 1981. For the remaining ten years, 1982–1991, the creditor need only show the remaining index values, margin and interest rate and must continue to reflect all significant loan program terms such as rate limitations affecting them.)

Pursuant to this section, the creditor must provide a history of index values for the preceding 15 years. Initially, the disclosures would give the index values from 1977 to the present. Each year thereafter, the revised program disclosures should include an additional year's index value until 15 years of values are shown. If the values for an index have not been available for 15 years, a creditor need only go back as far as the values are available in giving a history and payment example. In all cases, only one index value per year need be shown. Thus, in transactions where interest rate adjustments are implemented more frequently than once per year, a creditor may assume that the interest rate and payment resulting from the index value chosen will stay in effect for the entire year for purposes of calculating the loan balance as of the end of the year and for reflecting other loan program terms. In cases where interest rate changes are at the creditor's discretion (see the commentary to §1026.19(b)(2)(ii)), the creditor must provide a history of the rates imposed for the preceding 15 years, beginning with the rates in 1977. In giving this history, the creditor need only go back as far as the creditor's rates can reasonably be determined.

2. *Selection of index values.* The historical example must reflect the method by which index values are determined under the program. If a creditor uses an average of index values or any other index formula, the history given should reflect those values. The creditor should select one date or, when an average of single values is used as an index, one period and should base the example on index values measured as of that same date or period for each year shown in the history. A date or period at any time during the year may be selected, but the same date or period must be used for each year in the historical example. For example, a creditor could use values for the first business day in July or for the first week ending in July for each of the 15 years shown in the example.

3. *Selection of margin.* For purposes of the disclosure required under §1026.19(b)(2)(viii)(A), a creditor may select a representative margin that has been used during the six months preceding preparation of the disclosures, and should disclose that the margin is one that the creditor has used recently. The margin selected may be used until a creditor revises the disclosure form.

4. *Amount of discount or premium.* For purposes of the disclosure required under §1026.19(b)(2)(viii)(A), a creditor may select a discount or premium (amount and term) that has been used during the six months preceding preparation of the disclosures, and should disclose that the discount or premium is one that the creditor has used recently. The discount or premium should be reflected in the historical example for as long as the discount or premium is in effect. A creditor may assume that a discount that would have been in effect for any part of a year was in effect for the full year for purposes of reflecting it in the historical example. For example, a 3-month discount may be treated as being in effect for the entire first year of the example; a 15-month discount may be treated as being in effect for the first two years of the example. In illustrating the effect of the discount or premium, creditors should adjust the value of the interest rate in the historical example, and should not adjust the margin or index values. For example, if during the six months preceding preparation of the disclosures the fully indexed rate would have been 10% but the first year's rate under the program was 8%, the creditor would discount the first interest rate in the historical example by 2 percentage points.

5. *Term of the loan.* In calculating the payments and loan balances in the historical example, a creditor need not base the disclosures on each term to maturity or payment amortization that it offers. Instead, disclosures for ARMs may be based upon terms to maturity or payment amortizations of 5, 15 and 30 years, as follows: ARMs with terms or amortizations from over 1 year to 10 years may be based on a 5-year term or amortization; ARMs with terms or amortizations from over 10 years to 20 years may be based on a 15-year term or amortization; and ARMs with terms or amortizations over 20 years may be based on a 30-year term or amortization. Thus, disclosures for ARMs offered with any term from over 1 year to 40 years may be based solely on terms of 5, 15 and 30 years. Of course, a creditor may always base the disclosures on the actual terms or amortizations offered. If the creditor bases the disclosures on 5-, 15- or 30-year terms or payment amortization as provided above, the term or payment amortization used in making the disclosure must be stated.

6. *Rate caps.* A creditor using the alternative rule described in comment 19(b)(2)(vii)–1 for disclosure of rate limitations must base the historical example upon the highest periodic and overall rate limitations disclosed under §1026.19(b)(2)(vii). In addition, the creditor must state the limitations used in the historical example. (See comment 19(b)(2)(viii)(B)–3 for an explanation of the use of the highest rate limitation in other disclosures.)

7. *Frequency of adjustments.* In certain transactions, creditors may use the alternative rule described in comment 19(b)(2)(vi)–1 for disclosure of the frequency of rate and payment adjustments. In such cases, the creditor may assume for purposes of the historical example that the first adjustment occurred at the end of the first full year in which the adjustment could occur. For example, in an ARM in which the first adjustment may occur between 6 and 18

months after closing and annually thereafter, the creditor may assume that the first adjustment occurred at the end of the first year in the historical example. (See comment 19(b)(2)(viii)(B)–4 for an explanation of how to compute the maximum interest rate and payment when the initial adjustment period is not known.)

Paragraph 19(b)(2)(viii)(B)

1. *Initial and maximum interest rates and payments.* The disclosure form must state the initial and maximum interest rates and payments for a $10,000 loan originated at an initial interest rate (index value plus margin adjusted by the amount of any discount or premium) in effect as of an identified month and year for the loan program disclosure. (See comment 19(b)(2)–5 on revisions to the loan program disclosure.) In calculating the maximum payment under this paragraph, a creditor should assume that the interest rate increases as rapidly as possible under the loan program, and the maximum payment disclosed should reflect the amortization of the loan during this period. Thus, in a loan with 2 percentage point annual (and 5 percentage point overall) interest rate limitations or ''caps,'' the maximum interest rate would be 5 percentage points higher than the initial interest rate disclosed. Moreover, the loan would not reach the maximum interest rate until the fourth year because of the 2 percentage point annual rate limitations, and the maximum payment disclosed would reflect the amortization of the loan during this period. If the loan program includes a discounted or premium initial interest rate, the initial interest rate should be adjusted by the amount of the discount or premium.

2. *Term of the loan.* In calculating the initial and maximum payments, the creditor need not base the disclosures on each term to maturity or payment amortization offered under the program. Instead, the creditor may follow the rules set out in comment 19(b)(2)(viii)(A)–5. If a historical example is provided under §1026.19(b)(2)(viii)(A), the terms to maturity or payment amortization used in the historical example must be used in calculating the initial and maximum payment. In addition, creditors must state the term or payment amortization used in making the disclosures under this section.

3. *Rate caps.* A creditor using the alternative rule for disclosure of interest rate limitations described in comment 19(b)(2)(vii)–1 must calculate the maximum interest rate and payment based upon the highest periodic and overall rate limitations disclosed under §1026.19(b)(2)(vii). In addition, the creditor must state the rate limitations used in calculating the maximum interest rate and payment. (See comment 19(b)(2)(viii)(A)–6 for an explanation of the use of the highest rate limitation in other disclosures.)

4. *Frequency of adjustments.* In certain transactions, a creditor may use the alternative rule for disclosure of the frequency of rate and payment adjustments described in comment 19(b)(2)(vi)–1. In such cases, the creditor must base the calculations of the initial and maximum rates and payments upon the earliest possible first adjustment disclosed under §1026.19(b)(2)(vi). (See comment 19(b)(2)(viii)(A)–7 for an explanation of how to disclose the historical example when the initial adjustment period is not known.)

5. *Periodic payment statement.* The statement that the periodic payment may increase or decrease substantially may be satisfied by the disclosure in paragraph 19(b)(2)(vi) if it states for example, ''your monthly payment can increase or decrease substantially based on annual changes in the interest rate.''

Paragraph 19(b)(2)(ix)

1. *Calculation of payments.* A creditor is required to include a statement on the disclosure form that explains how a consumer may calculate his or her actual monthly payments for a loan amount other than $10,000. The example should be based upon the most recent payment shown in the historical example or upon the initial interest rate reflected in the maximum rate and payment disclosure. In transactions in which the latest payment shown in the historical example is not for the latest year of index values shown (such as in a five-year loan), a creditor may provide additional examples based on the initial and maximum payments disclosed under §1026.19(b)(2)(viii)(B). The creditor, however, is not required to calculate the consumer's payments. (See the model clauses in appendix H–4(C).)

Paragraph 19(b)(2)(x)

1. *Demand feature.* If a variable-rate loan subject to §1026.19(b) requirements contains a demand feature as discussed in the commentary to §1026.18(i), this fact must be disclosed. (Pursuant to §1026.18(i), creditors would also disclose the demand feature in the standard disclosures given later.)

Paragraph 19(b)(2)(xi)

1. *Adjustment notices.* A creditor must disclose to the consumer the type of information that will be contained in subsequent notices of adjustments and when such notices will be provided. (See the commentary to §1026.20(c) and (d) regarding notices of adjustments.) For example, the disclosure provided pursuant to §1026.20(d) might state, ''You will be notified at least 210, but no more than 240, days before the first payment at the adjusted level is due after the initial interest rate adjustment of the loan. This

notice will contain information about the adjustment, including the interest rate, payment amount, and loan balance.'' The disclosure provided pursuant to §1026.20(c) might state, ''You will be notified at least 60, but no more than 120, days before the first payment at the adjusted level is due after any interest rate adjustment resulting in a corresponding payment change. This notice will contain information about the adjustment, including the interest rate, payment amount, and loan balance.''

Paragraph 19(b)(2)(xii)

1. *Multiple loan programs.* A creditor that offers multiple variable-rate loan programs is required to have disclosures for each variable-rate loan program subject to §1026.19(b)(2). Unless disclosures for all of its variable-rate programs are provided initially, the creditor must inform the consumer that other closed-end variable-rate programs exist, and that disclosure forms are available for these additional loan programs. For example, the disclosure form might state, ''Information on other adjustable rate mortgage programs is available upon request.''

19(c) Electronic Disclosures

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

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

ii. In contrast, if a consumer is physically present in the creditor's office, and accesses an ARM loan application 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 creditor to provide applications to consumers), the creditor may provide disclosures in either electronic or paper form, provided the creditor complies with the timing, delivery, and retainability requirements of the regulation.

19(e) Mortgage loans—Early disclosures.

1. *Affiliate.* The term ''affiliate,'' as used in §1026.19(e), has the same meaning as in §1026.32(b)(5).

19(e)(1) Provision of disclosures.

19(e)(1)(i) Creditor.

1. *Requirements.* Section 1026.19(e)(1)(i) requires early disclosure of credit terms in closed-end credit transactions that are secured by real property or a cooperative unit, other than reverse mortgages. These disclosures must be provided in good faith. Except as otherwise provided in §1026.19(e), a disclosure is in good faith if it is consistent with §1026.17(c)(2)(i). Section 1026.17(c)(2)(i) provides that if any information necessary for an accurate disclosure is unknown to the creditor, the creditor shall make the disclosure based on the best information reasonably available to the creditor at the time the disclosure is provided to the consumer. The ''reasonably available'' standard requires that the creditor, acting in good faith, exercise due diligence in obtaining information. See comment 17(c)(2)(i)–1 for an explanation of the standard set forth in §1026.17(c)(2)(i). See comment 17(c)(2)(i)–2 for labeling disclosures required under §1026.19(e) that are estimates.

2. *Cooperative units.* Section 1026.19(e)(1)(i) requires early disclosure of credit terms in closed-end credit transactions, other than reverse mortgages, that are secured by real property or a cooperative unit, regardless of whether a cooperative unit is treated as real property under State or other applicable law.

19(e)(1)(ii) Mortgage broker.

1. *Mortgage broker responsibilities.* Section 1026.19(e)(1)(ii)(A) provides that if a mortgage broker receives a consumer's application, either the creditor or the mortgage broker must provide the consumer with the disclosures required under §1026.19(e)(1)(i) in accordance with §1026.19(e)(1)(iii). Section 1026.19(e)(1)(ii)(A) also provides that if the mortgage broker provides the required disclosures, it must comply with all relevant requirements of §1026.19(e). This means that ''mortgage broker'' should be read in the place of ''creditor'' for all provisions of §1026.19(e), except to the extent that such a reading would create responsibility for mortgage brokers under §1026.19(f). To illustrate, §1026.19(e)(4)(i) states that if a creditor uses a revised estimate pursuant to §1026.19(e)(3)(iv) for the purpose of determining good faith under §1026.19(e)(3)(i) and (ii), the creditor shall provide a revised version of the disclosures required under §1026.19(e)(1)(i) or the disclosures required under §1026.19(f)(1)(i) (including any corrected disclosures provided under §1026.19(f)(2)(i) or (ii)) reflecting the revised estimate. ''Mortgage broker'' could not be read in place of ''creditor'' in reference to the disclosures required under §1026.19(f)(1)(i), (f)(2)(i), or (f)(2)(ii) because mortgage brokers are not responsible for the disclosures required under §1026.19(f)(1)(i), (f)(2)(i), or (f)(2)(ii). In addition, §1026.19(e)(1)(ii)(A) provides that the creditor must ensure that disclosures provided by mortgage brokers comply with all requirements of §1026.19(e), and that disclosures provided by mortgage brokers that do comply

with all such requirements satisfy the creditor's obligation under §1026.19(e). The term "mortgage broker," as used in §1026.19(e)(1)(ii), has the same meaning as in §1026.36(a)(2). See also comment 36(a)–2. Section 1026.19(e)(1)(ii)(B) provides that if a mortgage broker provides any disclosure required under §1026.19(e), the mortgage broker must also comply with the requirements of §1026.25(c). For example, if a mortgage broker provides the disclosures required under §1026.19(e)(1)(i), it must maintain records for three years, in compliance with §1026.25(c)(1)(i).

2. *Creditor responsibilities.* If a mortgage broker issues any disclosure required under §1026.19(e) in the creditor's place, the creditor remains responsible under §1026.19(e) for ensuring that the requirements of §1026.19(e) have been satisfied. For example, if a mortgage broker receives a consumer's application and provides the consumer with the disclosures required under §1026.19(e)(1)(i), the creditor does not satisfy the requirements of §1026.19(e)(1)(i) if it provides duplicative disclosures to the consumer. In the same example, even if the broker provides an erroneous disclosure, the creditor is responsible and may not issue a revised disclosure correcting the error. The creditor is expected to maintain communication with the broker to ensure that the broker is acting in place of the creditor.

19(e)(1)(iii) Timing.

1. *Timing and use of estimates.* The disclosures required by §1026.19(e)(1)(i) must be delivered not later than three business days after the creditor receives the consumer's application. For example, if an application is received on Monday, the creditor satisfies this requirement by either hand delivering the disclosures on or before Thursday, or placing them in the mail on or before Thursday, assuming each weekday is a business day. For purposes of §1026.19(e)(1)(iii)(A), the term "business day" means a day on which the creditor's offices are open to the public for carrying out substantially all of its business functions. *See* §1026.2(a)(6).

2. *Waiting period.* The seven-business-day waiting period begins when the creditor delivers the disclosures or places them in the mail, not when the consumer receives or is considered to have received the disclosures. For example, if a creditor delivers the early disclosures to the consumer in person or places them in the mail on Monday, June 1, consummation may occur on or after Tuesday, June 9, the seventh business day following delivery or mailing of the early disclosures, because, for the purposes of §1026.19(e)(1)(iii)(B), Saturday is a business day, pursuant to §1026.2(a)(6).

3. *Denied or withdrawn applications.* The creditor may determine within the three-business-day period that the application will not or cannot be approved on the terms requested, such as when a consumer's credit score is lower than the minimum score required for the terms the consumer applied for, or the consumer applies for a type or amount of credit that the creditor does not offer. In that case, or if the consumer withdraws the application within the three-business-day period by, for instance, informing the creditor that he intends to take out a loan from another creditor within the three-business-day period, the creditor need not make the disclosures required under §1026.19(e)(1)(i). If the creditor fails to provide early disclosures and the transaction is later consummated on the terms originally applied for, then the creditor does not comply with §1026.19(e)(1)(i). If, however, the consumer amends the application because of the creditor's unwillingness to approve it on the terms originally applied for, no violation occurs for not providing disclosures based on those original terms. But the amended application is a new application subject to §1026.19(e)(1)(i).

4. *Timeshares.* If consummation occurs within three business days after a creditor's receipt of an application for a transaction that is secured by a consumer's interest in a timeshare plan described in 11 U.S.C. 101(53D), a creditor complies with §1026.19(e)(1)(iii) by providing the disclosures required under §1026.19(f)(1)(i) instead of the disclosures required under §1026.19(e)(1)(i).

5. *Multiple-advance construction loans.* Section 1026.19(e)(1)(iii) generally requires a creditor to deliver the Loan Estimate or place it in the mail not later than the third business day after the creditor receives the consumer's application and not later than the seventh business day before consummation. When a multiple-advance loan to finance the construction of a dwelling may be permanently financed by the same creditor, §1026.17(c)(6)(ii) and comment 17(c)(6)–2 permit creditors to treat the construction phase and the permanent phase as either one transaction, with one combined disclosure, or more than one transaction, with a separate disclosure for each transaction. For construction—permanent transactions disclosed as one transaction, the creditor complies with §1026.19(e)(1)(iii) by delivering or placing in the mail one combined disclosure required by §1026.19(e)(1)(i) not later than the third business day after the creditor receives an application and not later than the seventh business day before consummation. For construction—permanent transactions disclosed as a separate construction phase and a separate permanent phase for which an application for both the construction and permanent financing has been received, the creditor complies with §1026.19(e)(1)(iii) by delivering or placing in the mail the separate disclosures required by §1026.19(e)(1)(i) for both the construction financing and the permanent financing not later than the third

business day after the creditor receives the application and not later than the seventh business day before consummation. A creditor may also provide a separate disclosure required by §1026.19(e)(1)(i) for the permanent phase before receiving an application for permanent financing at any time not later than the seventh business day before consummation. To illustrate:

i. Assume a creditor receives a consumer's application for construction financing only on Monday, June 1. The creditor must deliver or place in the mail the disclosures required by §1026.19(e)(1)(i) for only the construction financing no later than Thursday, June 4, the third business day after the creditor received the consumer's application, and not later than the seventh business day before consummation of the transaction.

ii. Assume the creditor receives a consumer's application for both construction and permanent financing on Monday, June 1. The creditor must deliver or place in the mail the disclosures required by §1026.19(e)(1)(i) for both the construction and permanent financing, disclosed as either one transaction or separate transactions, no later than Thursday, June 4, the third business day after the creditor received the consumer's application, and not later than the seventh business day before consummation of the transaction.

iii. Assume the creditor receives a consumer's application for construction financing only on Monday, June 1. Assume further that the creditor receives the consumer's application for permanent financing on Monday, June 8. The creditor must deliver or place in the mail the disclosures required by §1026.19(e)(1)(i) for the construction financing no later than Thursday, June 4, the third business day after the creditor received the consumer's application for the construction financing only, and not later than the seventh business day before consummation of the construction transaction. The creditor must deliver or place in the mail the disclosures required by §1026.19(e)(1)(i) for the permanent financing no later than Thursday, June 11, the third business day after the creditor received the consumer's application for the permanent financing, and not later than the seventh business day before consummation of the permanent financing transaction.

iv. Assume the same facts as in comment 19(e)(1)(iii)–5.ii, under which the creditor provides the disclosures required by §1026.19(e)(1)(i) for both construction financing and permanent financing. If the creditor generally conducts separate closings for the construction financing and the permanent financing or expects that the construction financing and the permanent financing may have separate closings, providing separate Loan Estimates for the construction financing and for the permanent financing allows the creditor to deliver separate Closing Disclosures for the separate phases. For example, assume further that the consumer has requested permanent financing after receiving separate Loan Estimates for the construction financing and for the permanent financing, that consummation of the construction financing is scheduled for July 1, and that consummation of the permanent financing is scheduled on or about June 1 of the following year. The creditor may provide the construction financing Closing Disclosure at least three business days before consummation of that transaction on July 1 and delay providing the permanent financing Closing Disclosure until three business days before consummation of that transaction on or about June 1 of the following year, in accordance with §1026.19(f)(1)(ii). The creditor may also issue a revised Loan Estimate for the permanent financing at any time prior to 60 days before consummation, following the procedures under §1026.19(e)(3)(iv)(F).

19(e)(1)(iv) Receipt of early disclosures.

1. *Mail delivery*. Section 1026.19(e)(1)(iv) provides that, if any disclosures required under §1026.19(e)(1)(i) are not provided to the consumer in person, the consumer is considered to have received the disclosures three business days after they are delivered or placed in the mail. The creditor may, alternatively, rely on evidence that the consumer received the disclosures earlier than three business days. For example, if the creditor sends the disclosures via overnight mail on Monday, and the consumer signs for receipt of the overnight delivery on Tuesday, the creditor could demonstrate that the disclosures were received on Tuesday.

2. *Electronic delivery*. The three-business-day period provided in §1026.19(e)(1)(iv) applies to methods of electronic delivery, such as email. For example, if a creditor sends the disclosures required under §1026.19(e) via email on Monday, pursuant to §1026.19(e)(1)(iv) the consumer is considered to have received the disclosures on Thursday, three business days later. The creditor may, alternatively, rely on evidence that the consumer received the emailed disclosures earlier. For example, if the creditor emails the disclosures at 1 p.m. on Tuesday, the consumer emails the creditor with an acknowledgement of receipt of the disclosures at 5 p.m. on the same day, the creditor could demonstrate that the disclosures were received on the same day. Creditors using electronic delivery methods, such as email, must also comply with §1026.37(o)(3)(iii), which provides that the disclosures in §1026.37 may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of the E-Sign Act. For example, if a creditor delivers the disclosures required under §1026.19(e)(1)(i) to a consumer via email, but the creditor did not obtain the

consumer's consent to receive disclosures via email prior to delivering the disclosures, then the creditor does not comply with §1026.37(o)(3)(iii), and the creditor does not comply with §1026.19(e)(1)(i), assuming the disclosures were not provided in a different manner in accordance with the timing requirements of §1026.19(e)(1)(iii).

19(e)(1)(v) Consumer's waiver of waiting period before consummation.

1. *Modification or waiver.* A consumer may modify or waive the right to the seven-business-day waiting period required by §1026.19(e)(1)(iii) only after the creditor makes the disclosures required by §1026.19(e)(1)(i). The consumer must have a bona fide personal financial emergency that necessitates consummating the credit transaction before the end of the waiting period. Whether these conditions are met is determined by the circumstances of the individual situation. The imminent sale of the consumer's home at foreclosure, where the foreclosure sale will proceed unless loan proceeds are made available to the consumer during the waiting period, is one example of a bona fide personal financial emergency. Each consumer who is primarily liable on the legal obligation must sign the written statement for the waiver to be effective.

2. *Examples of waivers within the seven-business-day waiting period.* If the early disclosures are delivered to the consumer in person on Monday, June 1, the seven-business-day waiting period ends on Tuesday, June 9. If on Monday, June 1, the consumer executes a waiver of the seven-business-day waiting period, the final disclosures required by §1026.19(f)(1)(i) could then be delivered three business days before consummation, as required by §1026.19(f)(1)(ii), on Tuesday, June 2, and the loan could be consummated on Friday, June 5. See §1026.19(f)(1)(iv) for waiver of the three-business-day waiting period under §1026.19(f).

19(e)(1)(vi) Shopping for settlement service providers.

1. *Permission to shop.* Section 1026.19(e)(1)(vi)(A) permits creditors to impose reasonable requirements regarding the qualifications of the provider. For example, the creditor may require that a settlement agent chosen by the consumer must be appropriately licensed in the relevant jurisdiction. In contrast, a creditor does not permit a consumer to shop for purposes of §1026.19(e)(1)(vi) if the creditor requires the consumer to choose a provider from a list provided by the creditor. Whether the creditor permits the consumer to shop consistent with §1026.19(e)(1)(vi)(A) is determined based on all the relevant facts and circumstances. The requirements of §1026.19(e)(1)(vi)(B) and (C) do not apply if the creditor does not permit the consumer to shop consistent with §1026.19(e)(1)(vi)(A).

2. *Disclosure of services for which the consumer may shop.* If a creditor permits a consumer to shop for a settlement service, §1026.19(e)(1)(vi)(B) requires the creditor to identify settlement services required by the creditor for which the consumer is permitted to shop in the disclosures provided pursuant to §1026.19(e)(1)(i). See §1026.37(f)(3) regarding the content and format for disclosure of services required by the creditor for which the consumer is permitted to shop.

3. *Written list of providers.* If the creditor permits the consumer to shop for a settlement service it requires, §1026.19(e)(1)(vi)(C) requires the creditor to provide the consumer with a written list identifying at least one available provider of that service and stating that the consumer may choose a different provider for that service. The settlement service providers identified on the written list required by §1026.19(e)(1)(vi)(C) must correspond to the required settlement services for which the consumer may shop, disclosed under §1026.37(f)(3). See form H–27 in appendix H to this part for a model list. Creditors using form H–27 in appendix H properly are deemed to be in compliance with §1026.19(e)(1)(vi)(C). Creditors may make changes in the format or content of form H–27 in appendix H and be deemed to be in compliance with §1026.19(e)(1)(vi)(C), so long as the changes do not affect the substance, clarity, or meaningful sequence of the form. An acceptable change to form H–27 in appendix H includes, for example, deleting the column for estimated fee amounts.

4. *Identification of available providers.* Section 1026.19(e)(1)(vi)(C) provides that the creditor must identify settlement service providers, that are available to the consumer, for the settlement services that are required by the creditor for which a consumer is permitted to shop. A creditor does not comply with the identification requirement in §1026.19(e)(1)(vi)(C) unless it provides sufficient information to allow the consumer to contact the provider, such as the name under which the provider does business and the provider's address and telephone number. Similarly, a creditor does not comply with the availability requirement in §1026.19(e)(1)(vi)(C) if it provides a written list consisting of only settlement service providers that are no longer in business or that do not provide services where the consumer or property is located.

5. *Statement that consumer may choose different provider.* Section 1026.19(e)(1)(vi)(C) requires the creditor to include on the written list a statement that the consumer may choose a provider that is not included on that list. *See* form H–27 of appendix H to this part for a model of such a statement.

6. *Additional information on written list.* The creditor may include a statement on the written list that the listing of a settlement

service provider does not constitute an endorsement of that service provider. The creditor may also identify on the written list providers of services for which the consumer is not permitted to shop, provided that the creditor clearly and conspicuously distinguishes those services from the services for which the consumer is permitted to shop. This may be accomplished by placing the services under different headings. For example, if the list provided pursuant to §1026.19(e)(1)(vi)(C) identifies providers of pest inspections and surveys, but the consumer may select a provider, other than those identified on the list, for only the survey, then the list must specifically inform the consumer that the consumer is permitted to select a provider, other than a provider identified on the list, for only the survey.

7. *Relation to RESPA and Regulation X.* Section 1026.19 does not prohibit creditors from including affiliates on the written list required under §1026.19(e)(1)(vi)(C). However, a creditor that includes affiliates on the written list must also comply with 12 CFR 1024.15. Furthermore, the written list is a ''referral'' under 12 CFR 1024.14(f).

19(e)(2) Predisclosure activity.

19(e)(2)(i) Imposition of fees on consumer.

19(e)(2)(i)(A) Fee restriction.

1. *Fees restricted.* A creditor or other person may not impose any fee, such as for an application, appraisal, or underwriting, until the consumer has received the disclosures required by §1026.19(e)(1)(i) and indicated an intent to proceed with the transaction. The only exception to the fee restriction allows the creditor or other person to impose a bona fide and reasonable fee for obtaining a consumer's credit report, pursuant to §1026.19(e)(2)(i)(B).

2. *Intent to proceed.* Section 1026.19(e)(2)(i)(A) provides that a consumer may indicate an intent to proceed with a transaction in any manner the consumer chooses, unless a particular manner of communication is required by the creditor. The creditor must document this communication to satisfy the requirements of §1026.25. For example, oral communication in person immediately upon delivery of the disclosures required by §1026.19(e)(1)(i) is sufficiently indicative of intent. Oral communication over the phone, written communication via email, or signing a pre-printed form are also sufficiently indicative of intent if such actions occur after receipt of the disclosures required by §1026.19(e)(1)(i). However, a consumer's silence is not indicative of intent because it cannot be documented to satisfy the requirements of §1026.25. For example, a creditor or third party may not deliver the disclosures, wait for some period of time for the consumer to respond, and then charge the consumer a fee for an appraisal if the consumer does not respond, even if the creditor or third party disclosed that it would do so.

3. *Timing of fees.* At any time prior to delivery of the disclosures required under §1026.19(e)(1)(i), a creditor or other person may impose a credit report fee in connection with the consumer's application for a mortgage loan that is subject to §1026.19(e)(1)(i) as provided in §1026.19(e)(2)(i)(B). The consumer must have received the disclosures required under §1026.19(e)(1)(i) and indicated an intent to proceed with the transaction described by those disclosures before paying or incurring any other fee imposed by a creditor or other person in connection with the consumer's application for a mortgage loan that is subject to §1026.19(e)(1)(i).

4. *Collection of fees.* A creditor or other person complies with §1026.19(e)(2)(i)(A) if:

i. A creditor receives a consumer's application directly from the consumer and does not impose any fee, other than a bona fide and reasonable fee for obtaining a consumer's credit report, until the consumer receives the disclosures required under §1026.19(e)(1)(i) and indicates an intent to proceed with the transaction described by those disclosures.

ii. A third party submits a consumer's application to a creditor and neither the creditor nor the third party imposes any fee, other than a bona fide and reasonable fee for obtaining a consumer's credit report, until the consumer receives the disclosures required under §1026.19(e)(1)(i) and indicates an intent to proceed with the transaction described by those disclosures.

iii. A third party submits a consumer's application to a creditor following a different creditor's denial of the consumer's application (or following the consumer's withdrawal of that application), and if a fee already has been assessed for obtaining the credit report, the new creditor or third party does not impose any additional fee until the consumer receives disclosures required under §1026.19(e)(1)(i) from the new creditor and indicates an intent to proceed with the transaction described by those disclosures.

5. *Fees ''imposed by'' a person.* For purposes of §1026.19(e), a fee is ''imposed by'' a person if the person requires a consumer to provide a method for payment, even if the payment is not made at that time. For example, if a creditor or other person requires the consumer to provide a $500 check to pay for a ''processing fee'' before the consumer receives the disclosures required by §1026.19(e)(1)(i), the creditor or other person does not comply with §1026.19(e)(2)(i), even if the creditor or other person had stated that the check will not be cashed until after the disclosures required by §1026.19(e)(1)(i) are received by the consumer and waited until after the consumer subsequently indicated an intent to proceed to cash the check. Similarly, a creditor or other person does not

comply with the requirements of §1026.19(e)(2)(i) if the creditor or other person requires the consumer to provide a credit card number before the consumer receives the disclosures required by §1026.19(e)(1)(i), even if the creditor or other person had promised not to charge the consumer's credit card for the $500 processing fee until after the disclosures required by §1026.19(e)(1)(i) are received by the consumer and waited until after the consumer subsequently indicated an intent to proceed. In contrast, a creditor or other person complies with §1026.19(e)(2)(i) if the creditor or other person requires the consumer to provide a credit card number before the consumer receives the disclosures required by §1026.19(e)(1)(i) and subsequently indicates an intent to proceed, provided that the consumer's authorization is only to pay for the cost of a credit report and the creditor or other person only charges a reasonable and bona fide fee for obtaining the consumer's credit report. This is so even if the creditor or other person maintains the consumer's credit card number on file and charges the consumer a $500 processing fee after the disclosures required by §1026.19(e)(1)(i) are received and the consumer subsequently indicates an intent to proceed with the transaction described by those disclosures, provided that the creditor or other person requested and received a separate authorization from the consumer for the processing fee after the consumer received the disclosures required by §1026.19(e)(1)(i) and indicated an intent to proceed with the transaction described by those disclosures.

19(e)(2)(i)(B) Exception to fee restriction.

1. *Requirements.* A creditor or other person may impose a fee before the consumer receives the required disclosures if the fee is for purchasing a credit report on the consumer. The fee also must be bona fide and reasonable in amount. For example, a creditor or other person may collect a fee for obtaining a credit report if it is in the creditor's or other person's ordinary course of business to obtain a credit report. If the criteria in §1026.19(e)(2)(i)(B) are met, the creditor or other person must accurately describe or refer to this fee, for example, as a "credit report fee."

19(e)(2)(ii) Written information provided to consumer.

1. *Requirements.* Section 1026.19(e)(2)(ii) requires the creditor or other person to include a clear and conspicuous statement on the top of the front of the first page of a written estimate of terms or costs specific to the consumer if it is provided to the consumer before the consumer receives the disclosures required by §1026.19(e)(1)(i). For example, if the creditor provides a document showing the estimated monthly payment for a mortgage loan, and the estimate was based on the estimated loan amount and the consumer's estimated credit score, then the creditor must include the statement on the document. In contrast, if the creditor provides the consumer with a preprinted list of closing costs common in the consumer's area, the creditor need not include the statement. Similarly, the statement would not be required on a preprinted list of available rates for different loan products. This requirement does not apply to an advertisement, as defined in §1026.2(a)(2). Section 1026.19(e)(2)(ii) requires that the notice must be in a font size that is no smaller than 12-point font, and must state: "Your actual rate, payment, and costs could be higher. Get an official Loan Estimate before choosing a loan." *See* form H–26 of appendix H to this part for a model statement. Section 1026.19(e)(2)(ii) also prohibits the creditor or other person from making these written estimates with headings, content, and format substantially similar to form H–24 or H–25 of appendix H to this part.

19(e)(2)(iii) Verification of information.

1. *Requirements.* The creditor or other person may collect from the consumer any information that it requires prior to providing the early disclosures before or at the same time as collecting the information listed in §1026.2(a)(3)(ii). However, the creditor or other person is not permitted to require, before providing the disclosures required by §1026.19(e)(1)(i), that the consumer submit documentation to verify the information collected from the consumer. See also §1026.2(a)(3) and the related commentary regarding the definition of application. To illustrate:

i. A creditor may ask for the sale price and address of the property, but the creditor may not require the consumer to provide a purchase and sale agreement to support the information the consumer provides orally before the creditor provides the disclosures required by §1026.19(e)(1)(i).

ii. A mortgage broker may ask for the names, account numbers, and balances of the consumer's checking and savings accounts, but the mortgage broker may not require the consumer to provide bank statements, or similar documentation, to support the information the consumer provides orally before the mortgage broker provides the disclosures required by §1026.19(e)(1)(i).

19(e)(3) Good faith determination for estimates of closing costs.

19(e)(3)(i) General rule.

1. *Requirement.* Section 1026.19(e)(3)(i) provides the general rule that an estimated closing cost disclosed under §1026.19(e) is not in good faith if the charge paid by or imposed on the consumer exceeds the amount originally disclosed under §1026.19(e)(1)(i). Although §1026.19(e)(3)(ii) and (iii) provide exceptions to the general rule, the charges that are generally subject to §1026.19(e)(3)(i)

include, but are not limited to, the following:

i. Fees paid to the creditor.

ii. Fees paid to a mortgage broker.

iii. Fees paid to an affiliate of the creditor or a mortgage broker.

iv. Fees paid to an unaffiliated third party if the creditor did not permit the consumer to shop for a third party service provider for a settlement service.

v. Transfer taxes.

2. *Charges ''paid by or imposed on the consumer.''* For purposes of §1026.19(e), a charge ''paid by or imposed on the consumer'' refers to the final amount for the charge paid by or imposed on the consumer at consummation or settlement, whichever is later. ''Consummation'' is defined in §1026.2(a)(13). ''Settlement'' is defined in Regulation X, 12 CFR 1024.2(b). For example, at consummation, the consumer pays the creditor $100 for recording fees. Settlement of the transaction concludes five days after consummation, and the actual recording fees are $70. The creditor refunds the consumer $30 immediately after recording. The recording fee paid by the consumer is $70.

3. *Fees ''paid to'' a person.* For purposes of §1026.19(e), a fee is not considered ''paid to'' a person if the person does not retain the fee. For example, if a consumer pays the creditor transfer taxes and recording fees at the real estate closing and the creditor subsequently uses those funds to pay the county that imposed these charges, then the transfer taxes and recording fees are not ''paid to'' the creditor for purposes of §1026.19(e). Similarly, if a consumer pays the creditor an appraisal fee in advance of the real estate closing and the creditor subsequently uses those funds to pay another party for an appraisal, then the appraisal fee is not ''paid to'' the creditor for the purposes of §1026.19(e). A fee is also not considered ''paid to'' a person, for purposes of §1026.19(e), if the person retains the fee as reimbursement for an amount it has already paid to another party. If a creditor pays for an appraisal in advance of the real estate closing and the consumer pays the creditor an appraisal fee at the real estate closing, then the fee is not ''paid to'' the creditor for the purposes of §1026.19(e), even though the creditor retains the fee, because the payment is a reimbursement for an amount already paid.

4. *Transfer taxes and recording fees.* See comments 37(g)(1)–1, –2, and –3 for a discussion of the difference between transfer taxes and recording fees.

5. *Lender credits.* The disclosure of ''lender credits,'' as identified in §1026.37(g)(6)(ii), is required by §1026.19(e)(1)(i). ''Lender credits,'' as identified in §1026.37(g)(6)(ii), represents the sum of non-specific lender credits and specific lender credits. Non-specific lender credits are generalized payments from the creditor to the consumer that do not pay for a particular fee on the disclosures provided pursuant to §1026.19(e)(1). Specific lender credits are specific payments, such as a credit, rebate, or reimbursement, from a creditor to the consumer to pay for a specific fee. Non-specific lender credits and specific lender credits are negative charges to the consumer. The actual total amount of lender credits, whether specific or non-specific, provided by the creditor that is less than the estimated ''lender credits'' identified in §1026.37(g)(6)(ii) and disclosed pursuant to §1026.19(e) is an increased charge to the consumer for purposes of determining good faith under §1026.19(e)(3)(i). For example, if the creditor discloses a $750 estimate for ''lender credits'' pursuant to §1026.19(e), but only $500 of lender credits is actually provided to the consumer, the creditor has not complied with §1026.19(e)(3)(i) because the actual amount of lender credits provided is less than the estimated ''lender credits'' disclosed pursuant to §1026.19(e), and is therefore, an increased charge to the consumer for purposes of determining good faith under §1026.19(e)(3)(i). However, if the creditor discloses a $750 estimate for ''lender credits'' identified in §1026.37(g)(6)(ii) to cover the cost of a $750 appraisal fee, and the appraisal fee subsequently increases by $150, and the creditor increases the amount of the lender credit by $150 to pay for the increase, the credit is not being revised in a way that violates the requirements of §1026.19(e)(3)(i) because, although the credit increased from the amount disclosed, the amount paid by the consumer did not. However, if the creditor discloses a $750 estimate for ''lender credits'' to cover the cost of a $750 appraisal fee, but subsequently reduces the credit by $50 because the appraisal fee decreased by $50, then the requirements of §1026.19(e)(3)(i) have been violated because, although the amount of the appraisal fee decreased, the amount of the lender credit decreased. See also §1026.19(e)(3)(iv)(D) and comment 19(e)(3)(iv)(D)–1 for a discussion of lender credits in the context of interest rate dependent charges.

6. *Good faith analysis for lender credits.* For purposes of conducting the good faith analysis required under §1026.19(e)(3)(i) for lender credits, the total amount of lender credits, whether specific or non-specific, actually provided to the consumer is compared to the amount of the ''lender credits'' identified in §1026.37(g)(6)(ii). The total amount of lender credits actually provided to the consumer is determined by aggregating the amount of the ''lender credits'' identified in §1026.38(h)(3) with the amounts paid by the creditor that are attributable to a specific loan cost or other cost, disclosed pursuant to §1026.38(f) and (g).

7. *Use of unrounded numbers.* Sections 1026.37(o)(4) and 1026.38(t)(4) require that the dollar amounts of certain charges disclosed

on the Loan Estimate and Closing Disclosure, respectively, to be rounded to the nearest whole dollar. However, to conduct the good faith analysis required under §1026.19(e)(3)(i) and (ii), the creditor should use unrounded numbers to compare the actual charge paid by or imposed on the consumer for a settlement service with the estimated cost of the service.

19(e)(3)(ii) Limited increases permitted for certain charges.

1. *Requirements.* Section 1026.19(e)(3)(ii) provides that certain estimated charges are in good faith if the sum of all such charges paid by or imposed on the consumer does not exceed the sum of all such charges disclosed pursuant to §1026.19(e) by more than 10 percent. Section 1026.19(e)(3)(ii) permits this limited increase for only the following items:

i. Fees paid to an unaffiliated third party if the creditor permitted the consumer to shop for the third-party service, consistent with §1026.19(e)(1)(vi)(A).

ii. Recording fees.

2. *Aggregate increase limited to ten percent.* Under §1026.19(e)(3)(ii)(A), whether an individual estimated charge subject to §1026.19(e)(3)(ii) is in good faith depends on whether the sum of all charges subject to §1026.19(e)(3)(ii) increases by more than 10 percent, regardless of whether a particular charge increases by more than 10 percent. This is true even if an individual charge was omitted from the estimate provided under §1026.19(e)(1)(i) and then imposed at consummation. The following examples illustrate the determination of good faith for charges subject to §1026.19(e)(3)(ii):

i. Assume that, in the disclosures provided under §1026.19(e)(1)(i), the creditor includes a $300 estimated fee for a settlement agent, the settlement agent fee is included in the category of charges subject to §1026.19(e)(3)(ii), and the sum of all charges subject to §1026.19(e)(3)(ii) (including the settlement agent fee) equals $1,000. In this case, the creditor does not violate §1026.19(e)(3)(ii) if the actual settlement agent fee exceeds the estimated settlement agent fee by more than 10 percent (*i.e.*, the fee exceeds $330), provided that the sum of all such actual charges does not exceed the sum of all such estimated charges by more than 10 percent (*i.e.*, the sum of all such charges does not exceed $1,100).

ii. Assume that, in the disclosures provided under §1026.19(e)(1)(i), the sum of all estimated charges subject to §1026.19(e)(3)(ii) equals $1,000. If the creditor does not include an estimated charge for a notary fee but a $10 notary fee is charged to the consumer, and the notary fee is subject to §1026.19(e)(3)(ii), then the creditor does not violate §1026.19(e)(1)(i) if the sum of all amounts charged to the consumer subject to §1026.19(e)(3)(ii) does not exceed $1,100, even though an individual notary fee was not included in the estimated disclosures provided under §1026.19(e)(1)(i).

3. *Services for which the consumer may, but does not, select a settlement service provider.* Good faith is determined pursuant to §1026.19(e)(3)(ii), instead of §1026.19(e)(3)(i), if the creditor permits the consumer to shop for a settlement service provider, consistent with §1026.19(e)(1)(vi)(A). Section 1026.19(e)(3)(ii) provides that if the creditor requires a service in connection with the mortgage loan transaction, and permits the consumer to shop for that service consistent with §1026.19(e)(1)(vi), but the consumer either does not select a settlement service provider or chooses a settlement service provider identified by the creditor on the list, then good faith is determined pursuant to §1026.19(e)(3)(ii), instead of §1026.19(e)(3)(i). For example, if, in the disclosures provided pursuant to §§1026.19(e)(1)(i) and 1026.37(f)(3), a creditor discloses an estimated fee for an unaffiliated settlement agent and permits the consumer to shop for that service, but the consumer either does not choose a provider, or chooses a provider identified by the creditor on the written list provided pursuant to §1026.19(e)(1)(vi)(C), then the estimated settlement agent fee is included with the fees that may, in aggregate, increase by no more than 10 percent for the purposes of §1026.19(e)(3)(ii). If, however, the consumer chooses a provider that is not on the written list, then good faith is determined according to §1026.19(e)(3)(iii).

4. *Recording fees.* Section 1026.19(e)(3)(ii) provides that an estimate of a charge for a third-party service or recording fees is in good faith if the conditions specified in §1026.19(e)(3)(ii)(A), (B), and (C) are satisfied. Recording fees are not charges for third-party services because recording fees are paid to the applicable government entity where the documents related to the mortgage transaction are recorded, and thus, the condition specified in §1026.19(e)(3)(ii)(B) that the charge for third-party service not be paid to an affiliate of the creditor is inapplicable for recording fees. The condition specified in §1026.19(e)(3)(ii)(C), that the creditor permits the consumer to shop for the third-party service, is similarly inapplicable. Therefore, estimates of recording fees need only satisfy the condition specified in §1026.19(e)(3)(ii)(A) to meet the requirements of §1026.19(e)(3)(ii).

5. *Calculating the aggregate amount of estimated charges.* In calculating the aggregate amount of estimated charges for purposes of conducting the good faith analysis pursuant to §1026.19(e)(3)(ii), the aggregate amount of estimated charges must reflect charges for services that are actually performed. For example, assume that the creditor included a $100 estimated fee for a pest inspection in the disclosures provided pursuant to

§1026.19(e)(1)(i), and the fee is included in the category of charges subject to §1026.19(e)(3)(ii), but a pest inspection was not obtained in connection with the transaction, then for purposes of the good faith analysis required under §1026.19(e)(3)(ii), the sum of all charges subject to §1026.19(e)(3)(ii) paid by or imposed on the consumer is compared to the sum of all such charges disclosed pursuant to §1026.19(e), minus the $100 estimated pest inspection fee.

6. *Shopping for a third-party service.* For good faith to be determined under §1026.19(e)(3)(ii) a creditor must permit a consumer to shop consistent with §1026.19(e)(1)(vi)(A). Section 1026.19(e)(1)(vi)(A) provides that a creditor permits a consumer to shop for a settlement service if the creditor permits the consumer to select the provider of that service, subject to reasonable requirements. If the creditor permits the consumer to shop consistent with §1026.19(e)(1)(vi)(A) good faith is determined under §1026.19(e)(3)(ii), unless the settlement service provider is the creditor or an affiliate of the creditor, in which case good faith is determined under §1026.19(e)(3)(i). As noted in comment 19(e)(1)(vi)–1, whether the creditor permits the consumer to shop consistent with §1026.19(e)(1)(vi)(A) is determined based on all the relevant facts and circumstances.

19(e)(3)(iii) Variations permitted for certain charges.

1. *Good faith requirement for prepaid interest, property insurance premiums, and escrowed amounts.* Estimates of prepaid interest, property insurance premiums, and amounts placed into an escrow, impound, reserve or similar account must be consistent with the best information reasonably available to the creditor at the time the disclosures are provided. Differences between the amounts of such charges disclosed under §1026.19(e)(1)(i) and the amounts of such charges paid by or imposed on the consumer do not constitute a lack of good faith, so long as the original estimated charge, or lack of an estimated charge for a particular service, was based on the best information reasonably available to the creditor at the time the disclosure was provided. This means that the estimate disclosed under §1026.19(e)(1)(i) was obtained by the creditor through due diligence, acting in good faith. *See* comments 17(c)(2)(i)–1 and 19(e)(1)(i)–1. For example, if the creditor requires homeowner's insurance but fails to include a homeowner's insurance premium on the estimates provided pursuant to §1026.19(e)(1)(i), then the creditor's failure to disclose does not comply with §1026.19(e)(3)(iii). However, if the creditor does not require flood insurance and the subject property is located in an area where floods frequently occur, but not specifically located in a zone where flood insurance is required, failure to include flood insurance on the original estimates provided pursuant to §1026.19(e)(1)(i) does not constitute a lack of good faith under §1026.19(e)(3)(iii). Or, if the creditor knows that the loan must close on the 15th of the month but estimates prepaid interest to be paid from the 30th of that month, then the under-disclosure does not comply with §1026.19(e)(3)(iii). If, however, the creditor estimates consistent with the best information reasonably available that the loan will close on the 30th of the month and bases the estimate of prepaid interest accordingly, but the loan actually closed on the 1st of the next month instead, the creditor complies with §1026.19(e)(3)(iii).

2. *Good faith requirement for required services chosen by the consumer.* If a service is required by the creditor, the creditor permits the consumer to shop for that service consistent with §1026.19(e)(1)(vi)(A), the creditor provides the list required under §1026.19(e)(1)(vi)(C), and the consumer chooses a service provider that is not on that list to perform that service, then the actual amounts of such fees need not be compared to the original estimates for such fees to perform the good faith analysis required under §1026.19(e)(3)(i) or (ii). Differences between the amounts of such charges disclosed under §1026.19(e)(1)(i) and the amounts of such charges paid by or imposed on the consumer do not constitute a lack of good faith, so long as the original estimated charge, or lack of an estimated charge for a particular service, was based on the best information reasonably available to the creditor at the time the disclosure was provided. For example, if the consumer informs the creditor that the consumer will choose a settlement agent not identified by the creditor on the written list provided under §1026.19(e)(1)(vi)(C), and the creditor discloses an unreasonably low estimated settlement agent fee of $20 when the average prices for settlement agent fees in that area are $150, then the under-disclosure does not comply with §1026.19(e)(3)(iii) and good faith is determined under §1026.19(e)(3)(i). If the creditor permits the consumer to shop consistent with §1026.19(e)(1)(vi)(A) but fails to provide the written list required under §1026.19(e)(1)(vi)(C), good faith is determined under §1026.19(e)(3)(ii) instead of §1026.19(e)(3)(iii) unless the settlement service provider is the creditor or an affiliate of the creditor in which case good faith is determined under §1026.19(e)(3)(i). As noted in comment 19(e)(1)(vi)–1 whether the creditor permits the consumer to shop consistent with §1026.19(e)(1)(vi)(A) is determined based on all the relevant facts and circumstances.

3. *Good faith requirement for property taxes or non-required services chosen by the consumer.* Differences between the amounts of estimated charges for property taxes or services not required by the creditor disclosed under §1026.19(e)(1)(i) and the amounts of

such charges paid by or imposed on the consumer do not constitute a lack of good faith, so long as the original estimated charge, or lack of an estimated charge for a particular service, was based on the best information reasonably available to the creditor at the time the disclosure was provided. For example, if the consumer informs the creditor that the consumer will obtain a type of inspection not required by the creditor, the creditor must include the charge for that item in the disclosures provided under §1026.19(e)(1)(i), but the actual amount of the inspection fee need not be compared to the original estimate for the inspection fee to perform the good faith analysis required by §1026.19(e)(3)(iii). The original estimated charge, or lack of an estimated charge for a particular service, complies with §1026.19(e)(3)(iii) if it is made based on the best information reasonably available to the creditor at the time that the estimate was provided. But, for example, if the subject property is located in a jurisdiction where consumers are customarily represented at closing by their own attorney, even though it is not a requirement, and the creditor fails to include a fee for the consumer's attorney, or includes an unreasonably low estimate for such fee, on the original estimates provided under §1026.19(e)(1)(i), then the creditor's failure to disclose, or unreasonably low estimation, does not comply with §1026.19(e)(3)(iii). Similarly, the amount disclosed for property taxes must be based on the best information reasonably available to the creditor at the time the disclosure was provided. For example, if the creditor fails to include a charge for property taxes, or includes an unreasonably low estimate for that charge, on the original estimates provided under §1026.19(e)(1)(i), then the creditor's failure to disclose, or unreasonably low estimation, does not comply with §1026.19(e)(3)(iii) and the charge for property tax would be subject to the good faith determination under §1026.19(e)(3)(i).

4. *Bona fide charges.* In covered transactions, §1026.19(e)(1)(i) requires the creditor to provide the consumer with good faith estimates of the disclosures in §1026.37. Section 1026.19(e)(3)(iii) provides that an estimate of the charges listed in §1026.19(e)(3)(iii) is in good faith if it is consistent with the best information reasonably available to the creditor at the time the disclosure is provided and that good faith is determined under §1026.19(e)(3)(iii) even if such charges are paid to the creditor or affiliates of the creditor, so long as the charges are bona fide. For determining good faith under §1026.19(e)(1)(i), to be bona fide, charges must be lawful and for services that are actually performed.

19(e)(3)(iv) Revised estimates.

1. *Requirement.* Pursuant to §1026.19(e)(3)(i) and (ii), good faith is determined by calculating the difference between the estimated charges originally provided pursuant to §1026.19(e)(1)(i) and the actual charges paid by or imposed on the consumer. Section 1026.19(e)(3)(iv) provides the exception to this rule. Pursuant to §1026.19(e)(3)(iv), for purposes of determining good faith under §1026.19(e)(3)(i) and (ii), the creditor may use a revised estimate of a charge instead of the amount originally disclosed under §1026.19(e)(1)(i) if the revision is due to one of the reasons set forth in §1026.19(e)(3)(iv)(A) through (F).

2. *Actual increase.* A creditor may determine good faith under §1026.19(e)(3)(i) and (ii) based on the increased charges reflected on revised disclosures only to the extent that the reason for revision, as identified in §1026.19(e)(3)(iv)(A) through (F), actually increased the particular charge. For example, if a consumer requests a rate lock extension, then the revised disclosures on which a creditor relies for purposes of determining good faith under §1026.19(e)(3)(i) may reflect a new rate lock extension fee, but the fee may be no more than the rate lock extension fee charged by the creditor in its usual course of business, and the creditor may not rely on changes to other charges unrelated to the rate lock extension for purposes of determining good faith under §1026.19(e)(3)(i) and (ii).

3. *Documentation requirement.* In order to comply with §1026.25, creditors must retain records demonstrating compliance with the requirements of §1026.19(e). For example, if revised disclosures are provided because of a changed circumstance under §1026.19(e)(3)(iv)(A) affecting settlement costs, the creditor must be able to show compliance with §1026.19(e) by documenting the original estimate of the cost at issue, explaining the reason for revision and how it affected settlement costs, showing that the corrected disclosure increased the estimate only to the extent that the reason for revision actually increased the cost, and showing that the timing requirements of §1026.19(e)(4) were satisfied. However, the documentation requirement does not require separate corrected disclosures for each change. A creditor may provide corrected disclosures reflecting multiple changed circumstances, provided that the creditor's documentation demonstrates that each correction complies with the requirements of §1026.19(e).

4. *Revised disclosures for general informational purposes.* Section 1026.19(e)(3)(iv) does not prohibit the creditor from issuing revised disclosures for informational purposes, *e.g.*, to keep the consumer apprised of updated information, even if the revised disclosures may not be used for purposes of determining good faith under §1026.19(e)(3)(i) and (ii). See comment 19(e)(3)(iv)(A)–1.ii for an example in which the creditor issues revised disclosures even though the sum of all costs

subject to the 10 percent tolerance category has not increased by more than 10 percent.

5. *Best information reasonably available.* Regardless of whether a creditor may use particular disclosures for purposes of determining good faith under §1026.19(e)(3)(i) and (ii), except as otherwise provided in §1026.19(e), any disclosures must be based on the best information reasonably available to the creditor at the time they are provided to the consumer. *See* §1026.17(c)(2)(i) and comment 17(c)(2)(i)–1. For example, if the creditor issues revised disclosures reflecting a new rate lock extension fee for purposes of determining good faith under §1026.19(e)(3)(i), other charges unrelated to the rate lock extension must be reflected on the revised disclosures based on the best information reasonably available to the creditor at the time the revised disclosures are provided. Nonetheless, any increases in those other charges unrelated to the rate lock extension may not be used for the purposes of determining good faith under §1026.19(e)(3).

19(e)(3)(iv)(A) Changed circumstance affecting settlement charges.

1. *Requirement.* For the purpose of determining good faith under §1026.19(e)(3)(i) and (ii), revised charges are compared to actual charges if the revision was caused by a changed circumstance. See also comment 19(e)(3)(iv)(A)–2 regarding the definition of a changed circumstance. The following examples illustrate the application of this provision:

i. *Charges subject to the zero percent tolerance category.* Assume a creditor provides a $200 estimated appraisal fee pursuant to §1026.19(e)(1)(i), which will be paid to an affiliated appraiser and therefore may not increase for purposes of determining good faith under §1026.19(e)(3)(i), except as provided in §1026.19(e)(3)(iv). The estimate was based on information provided by the consumer at application, which included information indicating that the subject property was a single-family dwelling. Upon arrival at the subject property, the appraiser discovers that the property is actually a single-family dwelling located on a farm. A different schedule of appraisal fees applies to residences located on farms. A changed circumstance has occurred (*i.e.*, information provided by the consumer is found to be inaccurate after the disclosures required under §1026.19(e)(1)(i) were provided), which caused an increase in the cost of the appraisal. Therefore, if the creditor issues revised disclosures with the corrected appraisal fee, the actual appraisal fee of $400 paid at the real estate closing by the consumer will be compared to the revised appraisal fee of $400 to determine if the actual fee has increased above the estimated fee. However, if the creditor failed to provide revised disclosures, then the actual appraisal fee of $400 must be compared to the originally disclosed estimated appraisal fee of $200.

ii. *Charges subject to the ten percent tolerance category.* Assume a creditor provides a $400 estimate of title fees, which are included in the category of fees which may not increase by more than 10 percent for the purposes of determining good faith under §1026.19(e)(3)(ii), except as provided in §1026.19(e)(3)(iv). An unreleased lien is discovered and the title company must perform additional work to release the lien. However, the additional costs amount to only a five percent increase over the sum of all fees included in the category of fees which may not increase by more than 10 percent. A changed circumstance has occurred (*i.e.*, new information), but the sum of all costs subject to the 10 percent tolerance category has not increased by more than 10 percent. Section 1026.19(e)(3)(iv) does not prohibit the creditor from issuing revised disclosures, but if the creditor issues revised disclosures in this scenario, when the disclosures required by §1026.19(f)(1)(i) are delivered, the actual title fees of $500 may not be compared to the revised title fees of $500; they must be compared to the originally estimated title fees of $400 because the changed circumstance did not cause the sum of all costs subject to the 10 percent tolerance category to increase by more than 10 percent.

2. *Changed circumstance.* A changed circumstance may be an extraordinary event beyond the control of any interested party. For example, a war or a natural disaster would be an extraordinary event beyond the control of an interested party. A changed circumstance may also be an unexpected event specific to the consumer or the transaction. For example, if the creditor provided an estimate of title insurance on the disclosures required under §1026.19(e)(1)(i), but the title insurer goes out of business during underwriting, then this unexpected event specific to the transaction is a changed circumstance. A changed circumstance may also be information specific to the consumer or transaction that the creditor relied upon when providing the disclosures required under §1026.19(e)(1)(i) and that was inaccurate or changed after the disclosures were provided. For example, if the creditor relied on the consumer's income when providing the disclosures required under §1026.19(e)(1)(i), and the consumer represented to the creditor that the consumer had an annual income of $90,000, but underwriting determines that the consumer's annual income is only $80,000, then this inaccuracy in information relied upon is a changed circumstance. Or, assume two co-applicants applied for a mortgage loan. One applicant's income was $30,000, while the other applicant's income was $50,000. If the creditor relied on the combined income of $80,000 when providing the disclosures required under

§1026.19(e)(1)(i), but the applicant earning $30,000 becomes unemployed during underwriting, thereby reducing the combined income to $50,000, then this change in information relied upon is a changed circumstance. A changed circumstance may also be the discovery of new information specific to the consumer or transaction that the creditor did not rely on when providing the original disclosures required under §1026.19(e)(1)(i). For example, if the creditor relied upon the value of the property in providing the disclosures required under §1026.19(e)(1)(i), but during underwriting a neighbor of the seller, upon learning of the impending sale of the property, files a claim contesting the boundary of the property to be sold, then this new information specific to the transaction is a changed circumstance.

3. *Six pieces of information presumed collected, but not required.* Section 1026.19(e)(1)(iii) requires creditors to deliver the disclosures not later than the third business day after the creditor receives the consumer's application, which consists of the six pieces of information identified in §1026.2(a)(3)(ii). A creditor is not required to collect the consumer's name, monthly income, social security number to obtain a credit report, the property address, an estimate of the value of the property, or the mortgage loan amount sought. However, for purposes of determining whether an estimate is provided in good faith under §1026.19(e)(1)(i), a creditor is presumed to have collected these six pieces of information. For example, if a creditor provides the disclosures required by §1026.19(e)(1)(i) prior to receiving the property address from the consumer, the creditor cannot subsequently claim that the receipt of the property address is a changed circumstance pursuant to §1026.19(e)(3)(iv)(A) or (B).

19(e)(3)(iv)(B) Changed circumstance affecting eligibility.

1. *Requirement.* If changed circumstances cause a change in the consumer's eligibility for specific loan terms disclosed pursuant to §1026.19(e)(1)(i) and revised disclosures are provided because the change in eligibility resulted in increased cost for a settlement service beyond the applicable tolerance threshold, the charge paid by or imposed on the consumer for the settlement service for which cost increased due to the change in eligibility is compared to the revised estimated cost for the settlement service to determine if the actual fee has increased above the estimated fee. For example, assume that, prior to providing the disclosures required by §1026.19(e)(1)(i), the creditor believed that the consumer was eligible for a loan program that did not require an appraisal. The creditor then provides the estimated disclosures required by §1026.19(e)(1)(i), which do not include an estimated charge for an appraisal. During underwriting it is discovered that the consumer was delinquent on mortgage loan payments in the past, making the consumer ineligible for the loan program originally identified on the estimated disclosures, but the consumer remains eligible for a different program that requires an appraisal. If the creditor provides revised disclosures reflecting the new program and including the appraisal fee, then the actual appraisal fee will be compared to the appraisal fee included in the revised disclosures to determine if the actual fee has increased above the estimated fee. However, if the revised disclosures also include increased estimates for title fees, the actual title fees must be compared to the original estimates assuming that the increased title fees do not stem from the change in eligibility or any other change warranting a revised disclosure. See also §1026.19(e)(3)(iv)(A) and comment 19(e)(3)(iv)(A)–2 regarding the definition of changed circumstances.

19(e)(3)(iv)(C) Revisions requested by the consumer.

1. *Requirement.* If the consumer requests revisions to the transaction that affect items disclosed pursuant to §1026.19(e)(1)(i), and the creditor provides revised disclosures reflecting the consumer's requested changes, the final disclosures are compared to the revised disclosures to determine whether the actual fee has increased above the estimated fee. For example, assume that the consumer decides to grant a power of attorney authorizing a family member to consummate the transaction on the consumer's behalf after the disclosures required under §1026.19(e)(1)(i) are provided. If the creditor provides revised disclosures reflecting the fee to record the power of attorney, then the actual charges will be compared to the revised charges to determine if the fees have increased.

19(e)(3)(iv)(D) Interest rate dependent charges.

1. *Requirements.* If the interest rate is not locked when the disclosures required by §1026.19(e)(1)(i) are provided, then, no later than three business days after the date the interest rate is subsequently locked, §1026.19(e)(3)(iv)(D) requires the creditor to provide a revised version of the disclosures required under §1026.19(e)(1)(i) reflecting the revised interest rate, the points disclosed under §1026.37(f)(1), lender credits, and any other interest rate dependent charges and terms. The following example illustrates this requirement:

i. Assume a creditor sets the interest rate by executing a rate lock agreement with the consumer. If such an agreement exists when the original disclosures required under §1026.19(e)(1)(i) are provided, then the actual points and lender credits are compared to the estimated points disclosed under §1026.37(f)(1) and lender credits included in the original disclosures provided under

§1026.19(e)(1)(i) for the purpose of determining good faith under §1026.19(e)(3)(i). If the consumer enters into a rate lock agreement with the creditor after the disclosures required under §1026.19(e)(1)(i) were provided, then §1026.19(e)(3)(iv)(D) requires the creditor to provide, no later than three business days after the date that the consumer and the creditor enter into a rate lock agreement, a revised version of the disclosures required under §1026.19(e)(1)(i) reflecting the revised interest rate, the points disclosed under §1026.37(f)(1), lender credits, and any other interest rate dependent charges and terms. Provided that the revised version of the disclosures required under §1026.19(e)(1)(i) reflect any revised points disclosed under §1026.37(f)(1) and lender credits, the actual points and lender credits are compared to the revised points and lender credits for the purpose of determining good faith under §1026.19(e)(3)(i).

2. *After the Closing Disclosure is provided.* Under §1026.19(e)(3)(iv)(D), no later than three business days after the date the interest rate is locked, the creditor must provide to the consumer a revised version of the Loan Estimate as required by §1026.19(e)(1)(i). Section 1026.19(e)(4)(ii) prohibits a creditor from providing a revised version of the Loan Estimate as required by §1026.19(e)(1)(i) on or after the date on which the creditor provides the Closing Disclosure as required by §1026.19(f)(1)(i). If the interest rate is locked on or after the date on which the creditor provides the Closing Disclosure and the Closing Disclosure is inaccurate as a result, then the creditor must provide the consumer a corrected Closing Disclosure, at or before consummation, reflecting any changed terms, pursuant to §1026.19(f)(2). If the rate lock causes the Closing Disclosure to become inaccurate before consummation in a manner listed in §1026.19(f)(2)(ii), the creditor must ensure that the consumer receives a corrected Closing Disclosure no later than three business days before consummation, as provided in that paragraph.

19(e)(3)(iv)(E) Expiration.

1. *Requirements.* If the consumer indicates an intent to proceed with the transaction more than 10 business days after the disclosures were originally provided under §1026.19(e)(1)(iii), for the purpose of determining good faith under §1026.19(e)(3)(i) and (ii), a creditor may use a revised estimate of a charge instead of the amount originally disclosed under §1026.19(e)(1)(i). Section 1026.19(e)(3)(iv)(E) requires no justification for the change to the original estimate other than the lapse of 10 business days. For example, assume a creditor includes a $500 underwriting fee on the disclosures provided under §1026.19(e)(1)(i) and the creditor delivers those disclosures on a Monday. If the consumer indicates intent to proceed 11 business days later, the creditor may provide new disclosures with a $700 underwriting fee. In this example, §1026.19(e) and §1026.25 require the creditor to document that a new disclosure was provided under §1026.19(e)(3)(iv)(E) but do not require the creditor to document a reason for the increase in the underwriting fee.

2. *Longer time period.* For transactions in which the interest rate is locked for a specific period of time, §1026.37(a)(13)(ii) requires the creditor to provide the date and time (including the applicable time zone) when that period ends. If the creditor establishes a period greater than 10 business days after the disclosures were originally provided (or subsequently extends it to such a longer period) before the estimated closing costs expire, notwithstanding the 10-business-day period discussed in comment 19(e)(3)(iv)(E)–1, that longer time period becomes the relevant time period for purposes of §1026.19(e)(3)(iv)(E). Accordingly, in such a case, the creditor may not issue revised disclosures for purposes of determining good faith under §1026.19(e)(3)(i) and (ii) under §1026.19(e)(3)(iv)(E) until after the longer time period has expired. A creditor establishes such a period greater than 10 business days by communicating the greater time period to the consumer, including through oral communication.

19(e)(3)(iv)(F) Delayed settlement date on a construction loan.

1. *Requirements.* A loan for the purchase of a home that has yet to be constructed, or a loan to purchase a home under construction (*i.e.*, construction is currently underway), is a construction loan to build a home for the purposes of §1026.19(e)(3)(iv)(F). However, if a use and occupancy permit has been issued for the home prior to the issuance of the disclosures required under §1026.19(e)(1)(i), then the home is not considered to be under construction and the transaction would not be a construction loan to build a home for the purposes of §1026.19(e)(3)(iv)(F).

19(e)(4) Provision and receipt of revised disclosures.

19(e)(4)(i) General Rule

1. *Three-business-day requirement.* Section 1026.19(e)(4)(i) provides that, subject to the requirements of §1026.19(e)(4)(ii), if a creditor uses a revised estimate pursuant to §1026.19(e)(3)(iv) for the purpose of determining good faith under §1026.19(e)(3)(i) and (ii), the creditor shall provide a revised version of the disclosures required under §1026.19(e)(1)(i) or the disclosures required under §1026.19(f)(1)(i) (including any corrected disclosures provided under §1026.19(f)(2)(i) or (ii)) reflecting the revised estimate within three business days of receiving information sufficient to establish that one of the reasons for revision provided under §1026.19(e)(3)(iv)(A) through (F) has occurred. The following examples illustrate these requirements:

i. Assume a creditor requires a pest inspection. The unaffiliated pest inspection company informs the creditor on Monday that the subject property contains evidence of termite damage, requiring a further inspection, the cost of which will cause an increase in estimated settlement charges subject to §1026.19(e)(3)(ii) by more than 10 percent. The creditor must provide revised disclosures by Thursday to comply with §1026.19(e)(4)(i).

ii. Assume a creditor receives information on Monday that, because of a changed circumstance under §1026.19(e)(3)(iv)(A), the title fees will increase by an amount totaling six percent of the originally estimated settlement charges subject to §1026.19(e)(3)(ii). The creditor had received information three weeks before that, because of a changed circumstance under §1026.19(e)(3)(iv)(A), the pest inspection fees increased by an amount totaling five percent of the originally estimated settlement charges subject to §1026.19(e)(3)(ii). Thus, on Monday, the creditor has received sufficient information to establish a valid reason for revision and must provide revised disclosures reflecting the 11 percent increase by Thursday to comply with §1026.19(e)(4)(i).

iii. Assume a creditor requires an appraisal. The creditor receives the appraisal report, which indicates that the value of the home is significantly lower than expected. However, the creditor has reason to doubt the validity of the appraisal report. A reason for revision has not been established because the creditor reasonably believes that the appraisal report is incorrect. The creditor then chooses to send a different appraiser for a second opinion, but the second appraiser returns a similar report. At this point, the creditor has received information sufficient to establish that a reason for revision has, in fact, occurred, and must provide corrected disclosures within three business days of receiving the second appraisal report. In this example, in order to comply with §§1026.19(e)(3)(iv) and 1026.25, the creditor must maintain records documenting the creditor's doubts regarding the validity of the appraisal to demonstrate that the reason for revision did not occur upon receipt of the first appraisal report.

19(e)(4)(ii) Relationship Between Revised Loan Estimates and Closing Disclosures

1. *Revised Loan Estimate may not be delivered at the same time as the Closing Disclosure*. Section 1026.19(e)(4)(ii) prohibits a creditor from providing a revised version of the disclosures required under §1026.19(e)(1)(i) on or after the date on which the creditor provides the disclosures required under §1026.19(f)(1)(i). Section 1026.19(e)(4)(ii) also requires that the consumer must receive any revised version of the disclosures required under §1026.19(e)(1)(i) no later than four business days prior to consummation, and provides that if the revised version of the disclosures are not provided to the consumer in person, the consumer is considered to have received the revised version of the disclosures three business days after the creditor delivers or places in the mail the revised version of the disclosures. See also comments 19(e)(1)(iv)–1 and –2. However, if a creditor uses a revised estimate pursuant to §1026.19(e)(3)(iv) for the purpose of determining good faith under §1026.19(e)(3)(i) and (ii), §1026.19(e)(4)(i) permits the creditor to provide the revised estimate in the disclosures required under §1026.19(f)(1)(i) (including any corrected disclosures provided under §1026.19(f)(2)(i) or (ii)). See below for illustrative examples:

i. If the creditor is scheduled to meet with the consumer and provide the disclosures required by §1026.19(f)(1)(i) on Wednesday, June 3, and the APR becomes inaccurate on Tuesday, June 2, the creditor complies with the requirements of §1026.19(e)(4) by providing the disclosures required under §1026.19(f)(1)(i) reflecting the revised APR on Wednesday, June 3. However, the creditor does not comply with the requirements of §1026.19(e)(4) if it provides both a revised version of the disclosures required under §1026.19(e)(1)(i) reflecting the revised APR on Wednesday, June 3, and also provides the disclosures required under §1026.19(f)(1)(i) on Wednesday, June 3.

ii. If the creditor is scheduled to email the disclosures required under §1026.19(f)(1)(i) to the consumer on Wednesday, June 3, and the consumer requests a change to the loan that would result in revised disclosures pursuant to §1026.19(e)(3)(iv)(C) on Tuesday, June 2, the creditor complies with the requirements of §1026.19(e)(4) by providing the disclosures required under §1026.19(f)(1)(i) reflecting the consumer-requested changes on Wednesday, June 3. However, the creditor does not comply with the requirements of §1026.19(e)(4) if it provides disclosures reflecting the consumer-requested changes using both the revised version of the disclosures required under §1026.19(e)(1)(i) on Wednesday, June 3, and also the disclosures required under §1026.19(f)(1)(i) on Wednesday, June 3.

iii. Consummation is scheduled for Thursday, June 4. The creditor hand delivers the disclosures required by §1026.19(f)(1)(i) on Monday, June 1, and, on Tuesday, June 2, the consumer requests a change to the loan that would result in revised disclosures pursuant to §1026.19(e)(3)(iv)(C) but would not require a new waiting period pursuant to §1026.19(f)(2)(ii). Under §1026.19(f)(2)(i), the creditor is required to provide corrected disclosures reflecting any changed terms to the consumer so that the consumer receives the corrected disclosures at or before consummation. The creditor complies with the requirements of §1026.19(e)(4) by hand delivering the disclosures required by §1026.19(f)(2)(i) reflecting the consumer-requested changes on Thursday, June 4.

iv. Consummation is originally scheduled for Wednesday, June 10. The creditor hand delivers the disclosures required by §1026.19(f)(1)(i) on Friday, June 5. On Monday, June 8, the consumer reschedules consummation for Wednesday, June 17. Also on Monday, June 8, the consumer requests a rate lock extension that would result in revised disclosures pursuant to §1026.19(e)(3)(iv)(C) but would not require a new waiting period pursuant to §1026.19(f)(2)(ii). The creditor complies with the requirements of §1026.19(e)(4) by delivering or placing in the mail the disclosures required by §1026.19(f)(2)(i) reflecting the consumer-requested changes on Thursday, June 11. Under §1026.19(f)(2)(i), the creditor is required to provide corrected disclosures reflecting any changed terms to the consumer so that the consumer receives the corrected disclosures at or before consummation. The creditor complies with §1026.19(f)(2)(i) by hand delivering the disclosures on Thursday, June 11. Alternatively, the creditor complies with §1026.19(f)(2)(i) by providing the disclosures to the consumer by mail, including by electronic mail, on Thursday, June 11, because the consumer is considered to have received the corrected disclosures on Monday, June 15 (unless the creditor relies on evidence that the consumer received the corrected disclosures earlier). See §1026.19(f)(1)(iii) and comments 19(f)(1)(iii)–1 and –2. See also §1026.38(t)(3) and comment 19(f)(1)(iii)–2 regarding providing the disclosures required by §1026.19(f)(1)(i) (including any corrected disclosures provided under §1026.19(f)(2)(i) or (ii)) in electronic form.

v. Consummation is originally scheduled for Wednesday, June 10. The creditor hand delivers the disclosures required by §1026.19(f)(1)(i) on Friday, June 5, and the APR becomes inaccurate on Monday, June 8, such that the creditor is required to delay consummation and provide corrected disclosures, including any other changed terms, so that the consumer receives them at least three business days before consummation under §1026.19(f)(2)(ii). Consummation is rescheduled for Friday, June 12. The creditor complies with the requirements of §1026.19(e)(4) by hand delivering the disclosures required by §1026.19(f)(2)(ii) reflecting the revised APR and any other changed terms to the consumer on Tuesday, June 9. See §1026.19(f)(2)(ii) and associated commentary regarding changes before consummation requiring a new waiting period. See comment 19(e)(4)(i)–1 for further guidance on when sufficient information has been received to establish an event has occurred.

19(f) Mortgage loans—Final disclosures.

19(f)(1) Provision of disclosures.

19(f)(1)(i) Scope.

1. *Requirements.* Section 1026.19(f)(1)(i) requires disclosure of the actual terms of the credit transaction, and the actual costs associated with the settlement of that transaction, for closed-end credit transactions that are secured by real property or a cooperative unit, other than reverse mortgages subject to §1026.33. For example, if the creditor requires the consumer to pay money into a reserve account for the future payment of taxes, the creditor must disclose to the consumer the exact amount that the consumer is required to pay into the reserve account. If the disclosures provided under §1026.19(f)(1)(i) do not contain the actual terms of the transaction, the creditor does not violate §1026.19(f)(1)(i) if the creditor provides corrected disclosures that contain the actual terms of the transaction and complies with the other requirements of §1026.19(f), including the timing requirements in §1026.19(f)(1)(ii) and (f)(2). For example, if the creditor provides the disclosures required by §1026.19(f)(1)(i) on Monday, June 1, but the consumer adds a mobile notary service to the terms of the transaction on Tuesday, June 2, the creditor complies with §1026.19(f)(1)(i) if it provides disclosures reflecting the revised terms of the transaction on or after Tuesday, June 2, assuming that the corrected disclosures are also provided at or before consummation, under §1026.19(f)(2)(i).

2. *Best information reasonably available.* Creditors may estimate disclosures provided under §1026.19(f)(1)(ii)(A) and (f)(2)(ii) using the best information reasonably available when the actual term is unknown to the creditor at the time disclosures are made, consistent with §1026.17(c)(2)(i).

i. *Actual term unknown.* An actual term is unknown if it is not reasonably available to the creditor at the time the disclosures are made. The ''reasonably available'' standard requires that the creditor, acting in good faith, exercise due diligence in obtaining the information. For example, the creditor must at a minimum utilize generally accepted calculation tools, but need not invest in the most sophisticated computer program to make a particular type of calculation. The creditor normally may rely on the representations of other parties in obtaining information. For example, the creditor might look to the consumer for the time of consummation, to insurance companies for the cost of insurance, to realtors for taxes and escrow fees, or to a settlement agent for homeowner's association dues or other information in connection with a real estate settlement. The following examples illustrate the reasonably available standard for purposes of §1026.19(f)(1)(i).

A. Assume a creditor provides the disclosure under §1026.19(f)(1)(ii)(A) for a transaction in which the title insurance company that is providing the title insurance policies is acting as the settlement agent in connection with the transaction, but the creditor does not request the actual cost of the lender's title insurance policy that the consumer is purchasing from the title insurance company and instead discloses an estimate based on information from a different transaction. The creditor has not exercised due diligence in obtaining the information about the cost of the lender's title insurance policy required under the ''reasonably available'' standard in connection with the estimate disclosed for the lender's title insurance policy.

B. Assume that in the prior example the creditor obtained information about the terms of the consumer's transaction from the settlement agent regarding the amounts disclosed under § 1026.38(j) and (k). The creditor has exercised due diligence in obtaining the information about the costs under § 1026.38(j) and (k) for purposes of the ''reasonably available'' standard in connection with such disclosures under § 1026.38(j) and (k).

ii. *Estimates.* If an actual term is unknown, the creditor may utilize estimates using the best information reasonably available in making disclosures even though the creditor knows that more precise information will be available at or before consummation. However, the creditor may not utilize an estimate without exercising due diligence to obtain the actual term for the consumer's transaction. *See* comment 19(f)(1)(i)–2.i. The creditor is required to provide corrected disclosures containing the actual terms of the transaction at or before consummation under § 1026.19(f)(2), subject to the exceptions provided for in that paragraph. Disclosures under § 1026.19(f) are subject to the labeling rules set forth in § 1026.38. See comment 17(c)(2)(i)–2 for guidance on labeling estimates.

iii. *Settlement agent.* If a settlement agent provides disclosures required by § 1026.19(f)(1)(i) three business days before consummation pursuant to § 1026.19(f)(1)(v), the ''best information reasonably available'' standard applies to terms for which the actual term is unknown to the settlement agent at the time the disclosures are provided. The settlement agent normally may rely on the representations of other parties in obtaining information, but if information about actual terms is not reasonably available, the settlement agent also must satisfy the ''best information reasonably available'' standard. Accordingly, the settlement agent is required to exercise due diligence to obtain information if it is providing the Closing Disclosure pursuant to § 1026.19(f)(1)(v). For example, for the loan terms table required to be disclosed under § 1026.38(b), the settlement agent would be considered to have exercised due diligence if it obtained such information from the creditor. Because the creditor remains responsible under § 1026.19(f)(1)(v) for ensuring that the Closing Disclosure is provided in accordance with § 1026.19(f), the creditor is expected to maintain communication with the settlement agent to ensure that the settlement agent is acting in place of the creditor. See comment 19(f)(1)(v)–3 for guidance on a creditor's responsibilities where a settlement agent provides disclosures.

3. *Denied or withdrawn applications.* The creditor is not required to provide the disclosures required under § 1026.19(f)(1)(i) if, before the time the creditor is required to provide the disclosures under § 1026.19(f), the creditor determines the consumer's application will not or cannot be approved on the terms requested, or the consumer has withdrawn the application, and, as such, the transaction will not be consummated. For transactions covered by § 1026.19(f)(1)(i), the creditor may rely on comment 19(e)(1)(iii)–3 in determining that disclosures are not required by § 1026.19(f)(1)(i) because the consumer's application will not or cannot be approved on the terms requested or the consumer has withdrawn the application.

19(f)(1)(ii) Timing.

1. *Timing.* Except as provided in § 1026.19(f)(1)(ii)(B), (f)(2)(i), (f)(2)(iii), (f)(2)(iv), and (f)(2)(v), the disclosures required by § 1026.19(f)(1)(i) must be received by the consumer no later than three business days before consummation. For example, if consummation is scheduled for Thursday, the creditor satisfies this requirement by hand delivering the disclosures on Monday, assuming each weekday is a business day. For purposes of § 1026.19(f)(1)(ii), the term ''business day'' means all calendar days except Sundays and legal public holidays referred to in § 1026.2(a)(6). *See* comment 2(a)(6)–2.

2. *Receipt of disclosures three business days before consummation.* Section 1026.19(f)(1)(ii)(A) provides that the consumer must receive the disclosures no later than three business days before consummation. To comply with this requirement, the creditor must arrange for delivery accordingly. Section 1026.19(f)(1)(iii) provides that, if any disclosures required under § 1026.19(f)(1)(i) are not provided to the consumer in person, the consumer is considered to have received the disclosures three business days after they are delivered or placed in the mail. Thus, for example, if consummation is scheduled for Thursday, a creditor would satisfy the requirements of § 1026.19(f)(1)(ii)(A) if the creditor places the disclosures in the mail on Thursday of the previous week, because, for the purposes of § 1026.19(f)(1)(ii), Saturday is a business day, pursuant to § 1026.2(a)(6), and, pursuant to § 1026.19(f)(1)(iii), the consumer would be considered to have received the disclosures on the Monday before consummation is scheduled. *See* comment 19(f)(1)(iii)–1. A creditor would not satisfy the requirements of § 1026.19(f)(1)(ii)(A) in this example

if the creditor places the disclosures in the mail on the Monday before consummation. However, the creditor in this example could satisfy the requirements of §1026.19(f)(1)(ii)(A) by delivering the disclosures on Monday, for instance, by way of electronic mail, provided the requirements of §1026.38(t)(3)(iii) relating to disclosures in electronic form are satisfied and assuming that each weekday is a business day, and provided that the creditor obtains evidence that the consumer received the emailed disclosures on Monday. *See* comment 19(f)(1)(iii)–2.

3. *Timeshares.* For transactions secured by a consumer's interest in a timeshare plan described in 11 U.S.C. 101(53D), §1026.19(f)(1)(ii)(B) requires a creditor to ensure that the consumer receives the disclosures required under §1026.19(f)(1)(i) no later than consummation. Timeshare transactions covered by §1026.19(f)(1)(ii)(B) may be consummated at the time or any time after the disclosures required by §1026.19(f)(1)(i) are received by the consumer. For example, if a consumer provides the creditor with an application, as defined by §1026.2(a)(3), for a mortgage loan secured by a timeshare on Monday, June 1, and consummation of the timeshare transaction is scheduled for Friday, June 5, the creditor complies with §1026.19(f)(1)(ii)(B) by ensuring that the consumer receives the disclosures required by §1026.19(f)(1)(i) no later than consummation on Friday, June 5. If a consumer provides the creditor with an application for a mortgage loan secured by a timeshare on Monday, June 1 and consummation of the timeshare transaction is scheduled for Tuesday, June 2, then the creditor complies with §1026.19(f)(1)(ii)(B) by ensuring that the consumer receives the disclosures required by §1026.19(f)(1)(i) no later than consummation on Tuesday, June 2. In some cases, a Loan Estimate must be provided under §1026.19(e) before provision of the Closing Disclosure. See comment 19(e)(1)(iii)–4 for guidance on providing the Loan Estimate for transactions secured by a consumer's interest in a timeshare plan.

19(f)(1)(iii) Receipt of disclosures.

1. *Mail delivery.* Section 1026.19(f)(1)(iii) provides that, if any disclosures required under §1026.19(f)(1)(i) are not provided to the consumer in person, the consumer is considered to have received the disclosures three business days after they are delivered or placed in the mail. If the creditor delivers the disclosures required under §1026.19(f)(1)(i) in person, consummation may occur any time on the third business day following delivery. If the creditor provides the disclosures by mail, the consumer is considered to have received them three business days after they are placed in the mail, for purposes of determining when the three-business-day waiting period required under §1026.19(f)(1)(ii)(A) begins. The creditor may, alternatively, rely on evidence that the consumer received the disclosures earlier than three business days after mailing. See comment 19(e)(1)(iv)–1 for an example in which the creditor sends disclosures via overnight mail.

2. *Other forms of delivery.* Creditors that use electronic mail or a courier other than the United States Postal Service also may follow the approach for disclosures provided by mail described in comment 19(f)(1)(iii)–1. For example, if a creditor sends a disclosure required under §1026.19(f) via email on Monday, pursuant to §1026.19(f)(1)(iii) the consumer is considered to have received the disclosure on Thursday, three business days later. The creditor may, alternatively, rely on evidence that the consumer received the emailed disclosures earlier after delivery. See comment 19(e)(1)(iv)–2 for an example in which the creditor emails disclosures and receives an acknowledgment from the consumer on the same day. Creditors using electronic delivery methods, such as email, must also comply with §1026.38(t)(3)(iii). For example, if a creditor delivers the disclosures required by §1026.19(f)(1)(i) to a consumer via email, but the creditor did not obtain the consumer's consent to receive disclosures via email prior to delivering the disclosures, then the creditor does not comply with §1026.38(t)(3)(iii), and the creditor does not comply with §1026.19(f)(1)(i), assuming the disclosures were not provided in a different manner in accordance with the timing requirements of §1026.19(f)(1)(ii).

19(f)(1)(iv) Consumer's waiver of waiting period before consummation.

1. *Modification or waiver.* A consumer may modify or waive the right to the three-business-day waiting periods required by §1026.19(f)(1)(ii)(A) or (f)(2)(ii) only after the creditor makes the disclosures required by §1026.19(f)(1)(i). The consumer must have a bona fide personal financial emergency that necessitates consummating the credit transaction before the end of the waiting period. Whether these conditions are met is determined by the facts surrounding individual situations. The imminent sale of the consumer's home at foreclosure, where the foreclosure sale will proceed unless loan proceeds are made available to the consumer during the waiting period, is one example of a bona fide personal financial emergency. Each consumer who is primarily liable on the legal obligation must sign the written statement for the waiver to be effective.

19(f)(1)(v) Settlement agent.

1. *Requirements.* For purposes of §1026.19(f), a settlement agent is the person conducting the settlement. A settlement agent may provide the disclosures required under §1026.19(f)(1)(i) instead of the creditor. By assuming this responsibility, the settlement agent becomes responsible for complying with all of the relevant requirements of

§1026.19(f), meaning that ''settlement agent'' should be read in the place of ''creditor'' for all the relevant provisions of §1026.19(f), except where such a reading would create responsibility for settlement agents under §1026.19(e). For example, comment 19(f)(1)(ii)–3 explains that, in some cases involving transactions secured by a consumer's interest in a timeshare plan, a Loan Estimate must be provided under §1026.19(e). ''Settlement agent'' could not be read in place of ''creditor'' in comment 19(f)(1)(ii)–3 because settlement agents are not responsible for the disclosures required by §1026.19(e)(1)(i). To ensure timely and accurate compliance with the requirements of §1026.19(f)(1)(v), the creditor and settlement agent need to communicate effectively.

2. *Settlement agent responsibilities.* If a settlement agent provides any disclosure under §1026.19(f), the settlement agent must comply with the relevant requirements of §1026.19(f). For example, if the creditor and settlement agent agree that the creditor will deliver the disclosures required under §1026.19(f)(1)(i) to be received by the consumer three business days before consummation, pursuant to §1026.19(f)(1)(ii)(A), and that the settlement agent will deliver any corrected disclosures at or before consummation, including disclosures provided so that they are received by the consumer three business days before consummation under §1026.19(f)(2)(ii), and will permit the consumer to inspect the disclosures during the business day before consummation, the settlement agent must ensure that the consumer receives the disclosures required under §1026.19(f)(1)(i) at or before consummation and is able to inspect the disclosures during the business day before consummation, if the consumer so requests, in accordance with §1026.19(f)(2)(i). See comment 19(f)(1)(v)–3 below for additional guidance regarding the creditor's responsibilities where the settlement agent provides disclosures. The settlement agent may assume the responsibility to provide some or all of the disclosures required by §1026.19(f). See comment 19(f)(1)(v)–4 for guidance on how creditors and settlement agents may divide responsibilities for completing the disclosures.

3. *Creditor responsibilities.* If a settlement agent provides disclosures required under §1026.19(f) in the creditor's place, the creditor remains responsible under §1026.19(f) for ensuring that the requirements of §1026.19(f) have been satisfied. For example, if the settlement agent assumes the responsibility for providing all of the disclosures required under §1026.19(f)(1)(i), the creditor does not comply with §1026.19(f) if the settlement agent does not provide these disclosures at all, or if the consumer receives the disclosures later than three business days before consummation, as required by §1026.19(f)(1)(ii)(A) and, as applicable, (f)(2)(ii). The creditor does not satisfy the requirements of §1026.19(f) if it provides duplicative disclosures. For example, a creditor does not satisfy its obligation by issuing disclosures required under §1026.19(f) that mirror ones already issued by the settlement agent for the purpose of demonstrating that the consumer received timely disclosures. The creditor is expected to maintain communication with the settlement agent to ensure that the settlement agent is acting in place of the creditor. Disclosures provided by a settlement agent in accordance with §1026.19(f)(1)(v) satisfy the creditor's obligation under §1026.19(f)(1)(i).

4. *Shared responsibilities permitted—completing the disclosures.* Creditors and settlement agents may agree to divide responsibility with respect to completing any of the disclosures under §1026.38 for the disclosures provided under §1026.19(f)(1)(i). The settlement agent may assume the responsibility to complete some or all of the disclosures required by §1026.19(f). For example, the creditor complies with the requirements of §1026.19(f)(1)(i) and the settlement agent complies with the requirements of §1026.19(f)(1)(v) if the settlement agent agrees to complete only the portion of the disclosures required by §1026.19(f)(1)(i) related to closing costs for taxes, title fees, and insurance premiums, and the creditor agrees to complete the remainder of the disclosures required by §1026.19(f)(1)(i), and either the settlement agent or the creditor provides the consumer with one single disclosure form containing all of the information required to be disclosed pursuant to §1026.19(f)(1)(i), in accordance with the other requirements in §1026.19(f), such as requirements related to timing and delivery.

19(f)(2) Subsequent changes.

19(f)(2)(i) Changes before consummation not requiring a new waiting period.

1. *Requirements.* Under §1026.19(f)(2)(i), if the disclosures provided under §1026.19(f)(1)(i) become inaccurate before consummation, other than as provided under §1026.19(f)(2)(ii), the creditor shall provide corrected disclosures reflecting any changed terms to the consumer so that the consumer receives the corrected disclosures at or before consummation. The creditor need not comply with the timing requirements in §1026.19(f)(1)(ii) if an event other than one identified in §1026.19(f)(2)(ii) occurs, and such changes occur after the creditor provides the consumer with the disclosures required by §1026.19(f)(1)(i). For example:

i. Assume consummation is scheduled for Thursday, the consumer received the disclosures required under §1026.19(f)(1)(i) on Monday, and a walk-through inspection occurs on Wednesday morning. During the walk-through the consumer discovers damage to the dishwasher. The seller agrees to credit the consumer $500 towards a new dishwasher.

The creditor complies with the requirements of §1026.19(f) if the creditor provides corrected disclosures so that the consumer receives them at or before consummation on Thursday.

ii. Assume consummation is scheduled for Friday and on Monday morning the creditor sends the disclosures via overnight delivery to the consumer, ensuring that the consumer receives the disclosures on Tuesday. On Monday night, the seller agrees to sell certain household furnishings to the consumer for an additional $1,000, to be paid at the real estate closing, and the consumer immediately informs the creditor of the change. The creditor must provide corrected disclosures so that the consumer receives them at or before consummation. The creditor does not violate §1026.19(f) because the change to the transaction resulting from negotiations between the seller and consumer occurred after the creditor provided the final disclosures, regardless of the fact that the change occurred before the consumer had received the final disclosures.

iii. Assume consummation is scheduled for Thursday, the consumer received the disclosures required under §1026.19(f)(1)(i) on Monday, and a walk-through inspection occurs on Wednesday morning. As a result of consumer and seller negotiations, the total amount due from the buyer increases by $500. Also on Wednesday, the creditor discovers that the homeowner's insurance premium that was disclosed as $800 is actually $850. The new $500 amount due and the $50 insurance premium understatements are not violations of §1026.19(f)(1)(i), and the creditor complies with §1026.19(f)(1)(i) by providing corrected disclosures reflecting the $550 increase so that the consumer receives them at or before consummation, pursuant to §1026.19(f)(2)(ii).

2. *Inspection.* A settlement agent may satisfy the requirement to permit the consumer to inspect the disclosures under §1026.19(f)(2)(i), subject to §1026.19(f)(1)(v).

19(f)(2)(ii) Changes before consummation requiring a new waiting period.

1. *Conditions for corrected disclosures.* Pursuant to §1026.19(f)(2)(ii), if, at the time of consummation, the annual percentage rate becomes inaccurate, the loan product changes, or a prepayment penalty is added to the transaction, the creditor must provide corrected disclosures with all changed terms so that the consumer receives them not later than the third business day before consummation. Requirements for annual percentage rate disclosures are set forth in §1026.38(o)(4), and requirements determining whether an annual percentage rate is accurate are set forth in §1026.22. Requirements for loan product disclosures are set forth in §1026.38(a)(5)(iii) and §1026.37(a)(10). Requirements for prepayment penalty disclosures are set forth in §1026.38(b) and §1026.37(b)(4).

i. *Example—APR becomes inaccurate.* Assume consummation is scheduled for Thursday, June 11 and the disclosure for a regular mortgage transaction received by the consumer on Monday, June 8 under §1026.19(f)(1)(i) discloses an annual percentage rate of 7.00 percent:

A. On Thursday, June 11, the annual percentage rate will be 7.10 percent. The creditor is not required to delay consummation to provide corrected disclosures under §1026.19(f)(2)(ii) because the annual percentage rate is accurate pursuant to §1026.22, but the creditor is required under §1026.19(f)(2)(i) to provide corrected disclosures, including any other changed terms, so that the consumer receives them on or before Thursday, June 11.

B. On Thursday, June 11, the annual percentage rate will be 7.15 percent and corrected disclosures were not received by the consumer on or before Monday, June 8 because the annual percentage rate is inaccurate pursuant to §1026.22. The creditor is required to delay consummation and provide corrected disclosures, including any other changed terms, so that the consumer receives them at least three business days before consummation under §1026.19(f)(2)(ii).

ii. *Example—loan product changes.* Assume consummation is scheduled for Thursday, June 11 and the disclosures provided under §1026.19(f)(1)(i) disclose a product required to be disclosed as a ''Fixed Rate'' that contains no features that may change the periodic payment.

A. On Thursday, June 11, the loan product required to be disclosed changes to a ''5/1 Adjustable Rate.'' The creditor is required to provide corrected disclosures and delay consummation until the consumer has received the corrected disclosures provided under §1026.19(f)(1)(i) reflecting the change in the product disclosure, and any other changed terms, at least three business days before consummation. If, after the corrected disclosures in this example are provided, the loan product subsequently changes before consummation to a ''3/1 Adjustable Rate,'' the creditor is required to provide additional corrected disclosures and again delay consummation until the consumer has received the corrected disclosures provided under §1026.19(f)(1)(i) reflecting the change in the product disclosure, and any other changed terms, at least three business days before consummation.

B. On Thursday, June 11, the loan product required to be disclosed has changed to a ''Fixed Rate'' with a ''Negative Amortization'' feature. The creditor is required to provide corrected disclosures and delay consummation until the consumer has received the corrected disclosures provided under §1026.19(f)(1)(i) reflecting the change in the product disclosure, and any other changed terms, at least three business days before consummation.

iii. *Example—prepayment penalty is added.* Assume consummation is scheduled for Thursday, June 11 and the disclosure provided under §1026.19(f)(1)(i) did not disclose a prepayment penalty. On Wednesday, June 10, a prepayment penalty is added to the transaction such that the disclosure required by §1026.38(b) becomes inaccurate. The creditor is required to provide corrected disclosures and delay consummation until the consumer has received the corrected disclosures provided under §1026.19(f)(1)(i) reflecting the change in the disclosure of the loan terms, and any other changed terms, at least three business days before consummation. If, after the revised disclosures in this example are provided but before consummation, the prepayment penalty is removed such that the description of the prepayment penalty again becomes inaccurate, and no other changes to the transaction occur, the creditor is required to provide corrected disclosures so that the consumer receives them at or before consummation under §1026.19(f)(2)(i), but the creditor is not required to delay consummation because §1026.19(f)(2)(ii)(C) applies only when a prepayment penalty is added.

19(f)(2)(iii) Changes due to events occurring after consummation.

1. *Requirements.* Under §1026.19(f)(2)(iii), if during the 30-day period following consummation, an event in connection with the settlement of the transaction occurs that causes the disclosures to become inaccurate, and such inaccuracy results in a change to an amount actually paid by the consumer from that amount disclosed under §1026.19(f)(1)(i), the creditor shall deliver or place in the mail corrected disclosures not later than 30 days after receiving information sufficient to establish that such event has occurred. The following examples illustrate this requirement. (See also comment 19(e)(4)(i)–1 for further guidance on when sufficient information has been received to establish an event has occurred.)

i. Assume consummation occurs on a Monday and the security instrument is recorded on Tuesday, the day after consummation. If the creditor learns on Tuesday that the fee charged by the recorder's office differs from that previously disclosed pursuant to §1026.19(f)(1)(i), and the changed fee results in a change in the amount actually paid by the consumer, the creditor complies with §1026.19(f)(1)(i) and (f)(2)(iii) by revising the disclosures accordingly and delivering or placing them in the mail no later than 30 days after Tuesday.

ii. Assume consummation occurs on a Tuesday, October 1 and the security instrument is not recorded until 15 days after October 1 on Thursday, October 16. The creditor learns on Monday, November 4 that the transfer taxes owed to the State differ from those previously disclosed pursuant to §1026.19(f)(1)(i), resulting in an increase in the amount actually paid by the consumer. The creditor complies with §1026.19(f)(1)(i) and §1026.19(f)(2)(iii) by revising the disclosures accordingly and delivering or placing them in the mail no later than 30 days after Monday, November 4. Assume further that the increase in transfer taxes paid by the consumer also exceeds the amount originally disclosed under §1026.19(e)(1)(i) above the limitations prescribed by §1026.19(e)(3)(i). Pursuant to §1026.19(f)(2)(v), the creditor does not violate §1026.19(e)(1)(i) if the creditor refunds the excess to the consumer no later than 60 days after consummation, and the creditor does not violate §1026.19(f)(1)(i) if the creditor delivers disclosures corrected to reflect the refund of such excess no later than 60 days after consummation. The creditor satisfies these requirements under §1026.19(f)(2)(v) if it revises the disclosures accordingly and delivers or places them in the mail by November 30.

iii. Assume consummation occurs on a Monday and the security instrument is recorded on Tuesday, the day after consummation. During the recording process on Tuesday the settlement agent and the creditor discover that the property is subject to an unpaid $500 nuisance abatement assessment, which was not disclosed pursuant to §1026.19(f)(1)(i), and learns that pursuant to an agreement with the seller, the $500 assessment will be paid by the seller rather than the consumer. Because the $500 assessment does not result in a change to an amount actually paid by the consumer, the creditor is not required to provide a corrected disclosure pursuant to §1026.19(f)(2)(iii). However, the assessment will result in a change to an amount actually paid by the seller from the amount disclosed under §1026.19(f)(4)(i). Pursuant to §1026.19(f)(4)(ii), the settlement agent must deliver or place in the mail corrected disclosures to the seller no later than 30 days after Tuesday and provide a copy to the creditor pursuant to §1026.19(f)(4)(iv).

iv. Assume consummation occurs on a Monday and the security instrument is recorded on Tuesday, the day after consummation. Assume further that ten days after consummation the municipality in which the property is located raises property tax rates effective after the date on which settlement concludes. Section 1026.19(f)(2)(iii) does not require the creditor to provide the consumer with corrected disclosures because the increase in property tax rates is not in connection with the settlement of the transaction.

2. *Per-diem interest.* Under §1026.19(f)(2)(iii), if during the 30-day period following consummation, an event in connection with the settlement of the transaction occurs that causes the disclosures to become inaccurate, and such inaccuracy results in a change to an amount actually paid by the consumer

from that amount disclosed under §1026.19(f)(1)(i), the creditor must provide the consumer corrected disclosures, except as described in this comment. A creditor is not required to provide corrected disclosures under §1026.19(f)(2)(iii) if the only changes that would be required to be disclosed in the corrected disclosure are changes to per-diem interest and any disclosures affected by the change in per-diem interest, even if the amount of per-diem interest actually paid by the consumer differs from the amount disclosed under §1026.38(g)(2) and (o). Nonetheless, if a creditor is providing a corrected disclosure under §1026.19(f)(2)(iii) for reasons other than changes in per-diem interest and the per-diem interest has changed as well, the creditor must disclose in the corrected disclosures under §1026.19(f)(2)(iii) the correct amount of the per-diem interest and provide corrected disclosures for any disclosures that are affected by the change in per-diem interest.

19(f)(2)(iv) Changes due to clerical errors.

1. *Requirements.* Section 1026.19(f)(2)(iv) requires the creditor to deliver or place in the mail corrected disclosures if the disclosures provided pursuant to §1026.19(f)(1)(i) contain non-numeric clerical errors. An error is considered clerical if it does not affect a numerical disclosure and does not affect requirements imposed by §1026.19(e) or (f). For example, if the disclosure identifies the incorrect settlement service provider as the recipient of a payment, then §1026.19(f)(2)(iv) requires the creditor to deliver or place in the mail corrected disclosures reflecting the corrected non-numeric disclosure no later than 60 days after consummation. However, if, for example, the disclosure lists the wrong property address, which affects the delivery requirement imposed by §1026.19(e) or (f), the error would not be considered clerical.

19(f)(2)(v) Refunds related to the good faith analysis.

1. *Requirements.* Section 1026.19(f)(2)(v) provides that, if amounts paid at consummation exceed the amounts specified under §1026.19(e)(3)(i) or (ii), the creditor does not violate §1026.19(e)(1)(i) if the creditor refunds the excess to the consumer no later than 60 days after consummation, and the creditor does not violate §1026.19(f)(1)(i) if the creditor delivers or places in the mail disclosures corrected to reflect the refund of such excess no later than 60 days after consummation. For example, assume that at consummation the consumer must pay four itemized charges that are subject to the good faith determination under §1026.19(e)(3)(i). If the actual amounts paid by the consumer for the four itemized charges subject to §1026.19(e)(3)(i) exceed their respective estimates on the disclosures required under §1026.19(e)(1)(i) by $30, $25, $25, and $15, then the total would exceed the limitations prescribed by §1026.19(e)(3)(i) by $95. If, further, the amounts paid by the consumer for services that are subject to the good faith determination under §1026.19(e)(3)(ii) totaled $1,190, but the respective estimates on the disclosures required under §1026.19(e)(1)(i) totaled only $1,000, then the total would exceed the limitations prescribed by §1026.19(e)(3)(ii) by $90. The creditor does not violate §1026.19(e)(1)(i) if the creditor refunds $185 to the consumer no later than 60 days after consummation. The creditor does not violate §1026.19(f)(1)(i) if the creditor delivers or places in the mail corrected disclosures reflecting the $185 refund of the excess amount collected no later than 60 days after consummation. See comments 38–4 and 38(h)(3)–2 for additional guidance on disclosing refunds.

19(f)(3) Charges disclosed.

19(f)(3)(i) Actual charge.

1. *Requirements.* Section 1026.19(f)(3)(i) provides the general rule that the amount imposed on the consumer for any settlement service shall not exceed the amount actually received by the settlement service provider for that service. Except as otherwise provided in §1026.19(f)(3)(ii), a creditor violates §1026.19(f)(3)(i) if the amount imposed upon the consumer exceeds the amount actually received by the service provider for that service.

19(f)(3)(ii) Average charge.

1. *Requirements.* Average-charge pricing is the exception to the rule in §1026.19(f)(3)(i) that consumers shall not pay more than the exact amount charged by a settlement service provider for the performance of that service. *See* comment 19(f)(3)(i)–1. If the creditor develops representative samples of specific settlement costs for a particular class of transactions, the creditor may charge the average cost for that settlement service instead of the actual cost for such transactions. An average-charge program may not be used in a way that inflates the cost for settlement services overall.

2. *Defining the class of transactions.* Section 1026.19(f)(3)(ii)(B) requires a creditor to use an appropriate period of time, appropriate geographic area, and appropriate type of loan to define a particular class of transactions. For purposes of §1026.19(f)(3)(ii)(B), a period of time is appropriate if the sample size is sufficient to calculate average costs with reasonable precision, provided that the period of time is not less than 30 days and not more than six months. For purposes of §1026.19(f)(3)(ii)(B), a geographic area and loan type are appropriate if the sample size is sufficient to calculate average costs with reasonable precision, provided that the area and loan type are not defined in a way that pools costs between dissimilar populations. For example:

i. Assume a creditor defines a geographic area that contains two subdivisions, one with a median appraisal cost of $200, and the other with a median appraisal cost of $1,000. This geographic area would not satisfy the requirements of §1026.19(f)(3)(ii) because the cost characteristics of the two populations are dissimilar. However, a geographic area would be appropriately defined if both subdivisions had a relatively normal distribution of appraisal costs, even if the distribution for each subdivision ranges from below $200 to above $1,000.

ii. Assume a creditor defines a type of loan that includes two distinct rate products. The median recording fee for one product is $80, while the median recording fee for the other product is $130. This definition of loan type would not satisfy the requirements of §1026.19(f)(3)(ii) because the cost characteristics of the two products are dissimilar. However, a type of loan would be appropriately defined if both products had a relatively normal distribution of recording fees, even if the distribution for each product ranges from below $80 to above $130.

3. *Uniform use.* If a creditor chooses to use an average charge for a settlement service for a particular loan within a class, §1026.19(f)(3)(ii)(C) requires the creditor to use that average charge for that service on all loans within the class. For example:

i. Assume a creditor elects to use an average charge for appraisal fees. The creditor defines a class of transactions as all fixed rate loans originated between January 1 and April 30 secured by real property or a cooperative unit located within a particular metropolitan statistical area. The creditor must then charge the average appraisal charge to all consumers obtaining fixed rate loans originated between May 1 and August 30 secured by real property or a cooperative unit located within the same metropolitan statistical area.

ii. The example in paragraph i of this comment assumes that a consumer would not be required to pay the average appraisal charge unless an appraisal was required on that particular loan. Using the example above, if a consumer applies for a loan within the defined class, but already has an appraisal report acceptable to the creditor from a prior loan application, the creditor may not charge the consumer the average appraisal fee because an acceptable appraisal report has already been obtained for the consumer's application. Similarly, although the creditor defined the class broadly to include all fixed rate loans, the creditor may not require the consumer to pay the average appraisal charge if the particular fixed rate loan program the consumer applied for does not require an appraisal.

4. *Average amount paid.* The average charge must correspond to the average amount paid by or imposed on consumers and sellers during the prior defined time period. For example, assume a creditor calculates an average tax certification fee based on four-month periods starting January 1 of each year. The tax certification fees charged to a consumer on May 20 may not exceed the average tax certification fee paid from January 1 through April 30. A creditor may delay the period by a reasonable amount of time if such delay is needed to perform the necessary analysis and update the affected systems, provided that each subsequent period is scheduled accordingly. For example, a creditor may define a four-month period from January 1 to April 30 and begin using the average charge from that period on May 15, provided the average charge is used until September 15, at which time the average charge for the period from May 1 to August 31 becomes effective.

5. *Adjustments based on retrospective analysis required.* Creditors using average charges must ensure that the total amount paid by or imposed on consumers for a service does not exceed the total amount paid to the providers of that service for the particular class of transactions. A creditor may find that, even though it developed an average-cost pricing program in accordance with the requirements of §1026.19(f)(3)(ii), over time it has collected more from consumers than it has paid to settlement service providers. For example, assume a creditor defines a class of transactions and uses that class to develop an average charge of $135 for pest inspections. The creditor then charges $135 per transaction for 100 transactions from January 1 through April 30, but the actual average cost to the creditor of pest inspections during this period is $115. The creditor then decreases the average charge for the May to August period to account for the lower average cost during the January to April period. At this point, the creditor has collected $2,000 more than it has paid to settlement service providers for pest inspections. The creditor then charges $115 per transaction for 70 transactions from May 1 to August 30, but the actual average cost to the creditor of pest inspections during this period is $125. Based on the average cost to the creditor from the May to August period, the average charge to the consumer for the September to December period should be $125. However, while the creditor spent $700 more than it collected during the May to August period, it collected $1,300 more than it spent from January to August. In cases such as these, the creditor remains responsible for ensuring that the amount collected from consumers does not exceed the total amounts paid for the corresponding settlement services over time. The creditor may develop a variety of methods that achieve this outcome. For example, the creditor may choose to refund the proportional overage paid to the affected consumers. Or the creditor may choose to factor in the excess amount collected to decrease the average charge for an upcoming period. Although any method may comply

with this requirement, a creditor is deemed to have complied if it defines a six-month time period and establishes a rolling monthly period of reevaluation. For example, assume a creditor defines a six-month time period from January 1 to June 30 and the creditor uses the average charge starting July 1. If, at the end of July, the creditor recalculates the average cost from February 1 to July 31, and then uses the recalculated average cost for transactions starting August 1, the creditor complies with the requirements of §1026.19(f)(3)(ii), even if the creditor actually collected more from consumers than was paid to providers over time.

6. *Adjustments based on prospective analysis permitted, but not required.* A creditor may prospectively adjust average charges if it develops a statistically reliable and accurate method for doing so. For example, assume a creditor calculates average charges based on two time periods: winter (October 1 to March 31), and summer (April 1 to September 30). If the creditor can demonstrate that the average cost of a particular settlement service is always at least 15 percent more expensive during the winter period than the summer period, the creditor may increase the average charge for the next winter period by 15 percent over the average cost for the current summer period, provided, however, that the creditor performs retrospective periodic adjustments, as explained in comment 19(f)(3)(ii)–5.

7. *Charges that vary with loan amount or property value.* An average charge may not be used for any charge that varies according to the loan amount or property value. For example, an average charge may not be used for a transfer tax if the transfer tax is calculated as a percentage of the loan amount or property value. Average charges also may not be used for any insurance premium. For example, average charges may not be used for title insurance or for either the upfront premium or initial escrow deposit for hazard insurance.

8. *Prohibited by law.* An average charge may not be used where prohibited by any applicable State or local law. For example, a creditor may not impose an average charge for an appraisal if applicable law prohibits creditors from collecting any amount in excess of the actual cost of the appraisal.

9. *Documentation required.* To comply with §1026.25, a creditor must retain all documentation used to calculate the average charge for a particular class of transactions for at least three years after any settlement for which that average charge was used. The documentation must support the components and methods of calculation. For example, if a creditor calculates an average charge for a particular county recording fee by simply averaging all of the relevant fees paid in the prior month, the creditor need only retain the receipts for the individual recording fees, a ledger demonstrating that the total amount received did not exceed the total amount paid over time, and a document detailing the calculation. However, if a creditor develops complex algorithms for determining averages, not only must the creditor maintain the underlying receipts and ledgers, but the creditor must maintain documentation sufficiently detailed to allow an examiner to verify the accuracy of the calculations.

19(f)(4) Transactions involving a seller.

19(f)(4)(i) Provision to seller.

1. *Requirement.* Section 1026.19(f)(4)(i) requires the settlement agent to provide the seller with the disclosures required under §1026.38 that relate to the seller's transaction reflecting the actual terms of the seller's transaction. The settlement agent complies with this provision by providing a copy of the Closing Disclosure provided to the consumer, if the Closing Disclosure also contains the information under §1026.38 relating to the seller's transaction or, alternatively, by providing the disclosures under §1026.38(t)(5)(v) or (vi), as applicable.

2. *Simultaneous subordinate financing.* In a purchase transaction with simultaneous subordinate financing, the settlement agent complies with §1026.19(f)(4)(i) by providing the seller with only the first-lien transaction disclosures required under §1026.38 that relate to the seller's transaction reflecting the actual terms of the seller's transaction in accordance with comment 19(f)(4)(i)–1 if the first-lien Closing Disclosure records the entirety of the seller's transaction. If the first-lien Closing Disclosure does not record the entirety of the seller's transaction, the settlement agent complies with §1026.19(f)(4)(i) by providing the seller with both the first-lien and simultaneous subordinate financing transaction disclosures required under §1026.38 that relate to the seller's transaction reflecting the actual terms of the seller's transaction in accordance with comment 19(f)(4)(i)–1.

19(f)(4)(ii) Timing.

1. *Requirement.* Section 1026.19(f)(4)(ii) provides that the settlement agent shall provide the disclosures required under §1026.19(f)(4)(i) no later than the day of consummation. If during the 30-day period following consummation, an event in connection with the settlement of the transaction occurs that causes such disclosures to become inaccurate and such inaccuracy results in a change to the amount actually paid by the seller from that amount disclosed under §1026.19(f)(4)(i), the settlement agent shall deliver or place in the mail corrected disclosures not later than 30 days after receiving information sufficient to establish that such event has occurred. Section 1026.19(f)(4)(i) requires disclosure of the items that relate to the seller's transaction. Thus, the settlement agent need only redisclose if an item related to the seller's

transaction becomes inaccurate and such inaccuracy results in a change to the amount actually paid by the seller. For example, assume a transaction where the seller pays the transfer tax, the consummation occurs on Monday, and the security instrument is recorded on Tuesday, the day after consummation. If the settlement agent receives information on Tuesday sufficient to establish that transfer taxes owed to the State differ from those disclosed pursuant to §1026.19(f)(4)(i), the settlement agent complies with §1026.19(f)(4)(ii) by revising the disclosures accordingly and delivering or placing them in the mail not later than 30 days after Tuesday. See comment 19(e)(4)(i)–1 for guidance on when sufficient information has been received to establish an event has occurred. See also comment 19(f)(2)(iii)–1.iii for another example in which corrected disclosures must be provided to the seller.

19(g) Special information booklet at time of application.

19(g)(1) Creditor to provide special information booklet.

1. *Revision of booklet.* The Bureau may, from time to time, issue revised or alternative versions of the special information booklet that addresses transactions subject to §1026.19(g) by publishing a notice in the FEDERAL REGISTER. The Bureau also may choose to permit the forms or booklets of other Federal agencies to be used by creditors. In such an event, the availability of the booklet or alternate materials for these transactions will be set forth in a notice in the FEDERAL REGISTER. The current version of the booklet can be accessed on the Bureau's Web site, *www.consumerfinance.gov/learnmore.*

2. *Multiple applicants.* When two or more persons apply together for a loan, the creditor complies with §1026.19(g) if the creditor provides a copy of the booklet to one of the persons applying.

3. *Consumer's application.* Section 1026.19(g)(1)(i) requires that the creditor deliver or place in the mail the special information booklet not later than three business days after the consumer's application is received. "Application" is defined in §1026.2(a)(3)(ii). The creditor need not provide the booklet under §1026.19(g)(1)(i) when it denies an application or if the consumer withdraws the application before the end of the three-business-day period under §1026.19(e)(1)(iii)(A). See comment 19(e)(1)(iii)–3 for additional guidance on denied or withdrawn applications.

19(g)(2) Permissible changes.

1. *Reproduction.* The special information booklet may be reproduced in any form, provided that no changes are made, except as otherwise provided under §1026.19(g)(2). *See also* comment 19(g)(2)–3. Provision of the special information booklet as a part of a larger document does not satisfy the requirements of §1026.19(g). Any color, size and quality of paper, type of print, and method of reproduction may be used so long as the booklet is clearly legible.

2. *Other permissible changes.* The special information booklet may be translated into languages other than English. Changes to the booklet other than those specified in §1026.19(g)(2)(i) through (iv) and comment 19(g)(2)–3 do not comply with §1026.19(g).

3. *Permissible changes to title of booklets in use before October 3, 2015.* Section 1026.19(g)(2)(iv) provides that the title appearing on the cover of the booklet shall not be changed. Comment 19(g)(1)–1 states that the Bureau may, from time to time, issue revised or alternative versions of the special information booklet that address transactions subject to §1026.19(g) by publishing a notice in the FEDERAL REGISTER. Until the Bureau issues a version of the special information booklet relating to the Loan Estimate and Closing Disclosure under §§1026.37 and 1026.38, for applications that are received on or after October 3, 2015, a creditor may change the title appearing on the cover of the version of the special information booklet in use before October 3, 2015, provided the words "settlement costs" are used in the title. See comment 1(d)(5)–1 for guidance regarding compliance with §1026.19(g) for applications received on or after October 3, 2015.

Section 1026.20 Disclosure Requirements Regarding Post-Consummation Events

20(a) Refinancings

1. *Definition.* A refinancing is a new transaction requiring a complete new set of disclosures. Whether a refinancing has occurred is determined by reference to whether the original obligation has been satisfied or extinguished and replaced by a new obligation, based on the parties' contract and applicable law. The refinancing may involve the consolidation of several existing obligations, disbursement of new money to the consumer or on the consumer's behalf, or the rescheduling of payments under an existing obligation. In any form, the new obligation must completely replace the prior one.

i. Changes in the terms of an existing obligation, such as the deferral of individual installments, will not constitute a refinancing unless accomplished by the cancellation of that obligation and the substitution of a new obligation.

ii. A substitution of agreements that meets the refinancing definition will require new disclosures, even if the substitution does not substantially alter the prior credit terms.

2. *Exceptions.* A transaction is subject to §1026.20(a) only if it meets the general definition of a refinancing. Section 1026.20(a)(1) through (5) lists 5 events that are not treated

as refinancings, even if they are accomplished by cancellation of the old obligation and substitution of a new one.

3. *Variable-rate.* i. If a variable-rate feature was properly disclosed under the regulation, a rate change in accord with those disclosures is not a refinancing. For example, no new disclosures are required when the variable-rate feature is invoked on a renewable balloon-payment mortgage that was previously disclosed as a variable-rate transaction.

ii. Even if it is not accomplished by the cancellation of the old obligation and substitution of a new one, a new transaction subject to new disclosures results if the creditor either:

A. Increases the rate based on a variable-rate feature that was not previously disclosed; or

B. Adds a variable-rate feature to the obligation. A creditor does not add a variable-rate feature by changing the index of a variable-rate transaction to a comparable index, whether the change replaces the existing index or substitutes an index for one that no longer exists. For example, a creditor does not add a variable-rate feature by changing the index of a variable-rate transaction from the 1-month, 3-month, 6-month, or 12-month U.S. Dollar LIBOR index to the Board-selected benchmark replacement for consumer loans to replace the 1-month, 3-month, 6-month, or 12-month U.S. Dollar LIBOR index respectively because the replacement index is a comparable index to the corresponding U.S. Dollar LIBOR index. *See* §1026.2(a)(28) for the definition of *the Board-selected benchmark replacement for consumer loans. See* comment 20(a)–3.iv for factors to be used in determining whether a replacement index is comparable to a particular LIBOR index.

iii. If either of the events in paragraph 20(a)–3.ii.A or ii.B occurs in a transaction secured by a principal dwelling with a term longer than one year, the disclosures required under §1026.19(b) also must be given at that time.

iv. Except for the Board-selected benchmark replacement for consumer loans as defined in §1026.2(a)(28), the relevant factors to be considered in determining whether a replacement index is comparable to a particular LIBOR index depend on the replacement index being considered and the LIBOR index being replaced. For example, these determinations may need to consider certain aspects of the historical data itself for a particular replacement index, such as whether the replacement index is a backward-looking rate (e.g., historical average of rates) such that timing aspects of the data may need to be adjusted to match up with the particular forward-looking LIBOR term-rate being replaced. The types of relevant factors to establish if a replacement index could meet the ''comparable'' standard with respect to a particular LIBOR index using historical data or future expectations, include but are not limited to, whether: (1) the movements over time are comparable; (2) the consumers' payments using the replacement index compared to payments using the LIBOR index are comparable if there is sufficient data for this analysis; (3) the index levels are comparable; (4) the replacement index is publicly available; and (5) the replacement index is outside the control of the creditor. The Board-selected benchmark replacement for consumer loans is considered comparable with respect to the LIBOR tenor being replaced, and therefore, these factors need not be considered.

4. *Unearned finance charge.* In a transaction involving precomputed finance charges, the creditor must include in the finance charge on the refinanced obligation any unearned portion of the original finance charge that is not rebated to the consumer or credited against the underlying obligation. For example, in a transaction with an add-on finance charge, a creditor advances new money to a consumer in a fashion that extinguishes the original obligation and replaces it with a new one. The creditor neither refunds the unearned finance charge on the original obligation to the consumer nor credits it to the remaining balance on the old obligation. Under these circumstances, the unearned finance charge must be included in the finance charge on the new obligation and reflected in the annual percentage rate disclosed on refinancing. Accrued but unpaid finance charges are included in the amount financed in the new obligation.

5. *Coverage.* Section 1026.20(a) applies only to refinancings undertaken by the original creditor or a holder or servicer of the original obligation. A ''refinancing'' by any other person is a new transaction under the regulation, not a refinancing under this section.

Paragraph 20(a)(1)

1. *Renewal.* This exception applies both to obligations with a single payment of principal and interest and to obligations with periodic payments of interest and a final payment of principal. In determining whether a new obligation replacing an old one is a renewal of the original terms or a refinancing, the creditor may consider it a renewal even if:

i. Accrued unpaid interest is added to the principal balance.

ii. Changes are made in the terms of renewal resulting from the factors listed in §1026.17(c)(3).

iii. The principal at renewal is reduced by a curtailment of the obligation.

Paragraph 20(a)(2)

1. *Annual percentage rate reduction.* A reduction in the annual percentage rate with a

corresponding change in the payment schedule is not a refinancing. If the annual percentage rate is subsequently increased (even though it remains below its original level) and the increase is effected in such a way that the old obligation is satisfied and replaced, new disclosures must then be made.

2. *Corresponding change.* A corresponding change in the payment schedule to implement a lower annual percentage rate would be a shortening of the maturity, or a reduction in the payment amount or the number of payments of an obligation. The exception in §1026.20(a)(2) does not apply if the maturity is lengthened, or if the payment amount or number of payments is increased beyond that remaining on the existing transaction.

Paragraph 20(a)(3)

1. *Court agreements.* This exception includes, for example, agreements such as reaffirmations of debts discharged in bankruptcy, settlement agreements, and post-judgment agreements. (See the commentary to §1026.2(a)(14) for a discussion of court-approved agreements that are not considered "credit.")

Paragraph 20(a)(4)

1. *Workout agreements.* A workout agreement is not a refinancing unless the annual percentage rate is increased or additional credit is advanced beyond amounts already accrued plus insurance premiums.

Paragraph 20(a)(5)

1. *Insurance renewal.* The renewal of optional insurance added to an existing credit transaction is not a refinancing, assuming that appropriate Truth in Lending disclosures were provided for the initial purchase of the insurance.

20(b) Assumptions

1. *General definition.* i. An assumption as defined in §1026.20(b) is a new transaction and new disclosures must be made to the subsequent consumer. An assumption under the regulation requires the following three elements:

A. A residential mortgage transaction.

B. An express acceptance of the subsequent consumer by the creditor.

C. A written agreement.

ii. The assumption of a nonexempt consumer credit obligation requires no disclosures unless all three elements are present. For example, an automobile dealer need not provide Truth in Lending disclosures to a customer who assumes an existing obligation secured by an automobile. However, a residential mortgage transaction with the elements described in §1026.20(b) is an assumption that calls for new disclosures; the disclosures must be given whether or not the assumption is accompanied by changes in the terms of the obligation. (See comment 2(a)(24)–5 for a discussion of assumptions that are not considered residential mortgage transactions.)

2. *Existing residential mortgage transaction.* A transaction may be a residential mortgage transaction as to one consumer and not to the other consumer. In that case, the creditor must look to the assuming consumer in determining whether a residential mortgage transaction exists. To illustrate: The original consumer obtained a mortgage to purchase a home for vacation purposes. The loan was not a residential mortgage transaction as to that consumer. The mortgage is assumed by a consumer who will use the home as a principal dwelling. As to that consumer, the loan is a residential mortgage transaction. For purposes of §1026.20(b), the assumed loan is an "existing residential mortgage transaction" requiring disclosures, if the other criteria for an assumption are met.

3. *Express agreement. Expressly agrees* means that the creditor's agreement must relate specifically to the new debtor and must unequivocally accept that debtor as a primary obligor. The following events are not construed to be express agreements between the creditor and the subsequent consumer:

i. Approval of creditworthiness.

ii. Notification of a change in records.

iii. Mailing of a coupon book to the subsequent consumer.

iv. Acceptance of payments from the new consumer.

4. *Retention of original consumer.* The retention of the original consumer as an obligor in some capacity does not prevent the change from being an assumption, provided the new consumer becomes a primary obligor. But the mere addition of a guarantor to an obligation for which the original consumer remains primarily liable does not give rise to an assumption. However, if neither party is designated as the primary obligor but the creditor accepts payment from the subsequent consumer, an assumption exists for purposes of §1026.20(b).

5. *Status of parties.* Section 1026.20(b) applies only if the previous debtor was a consumer and the obligation is assumed by another consumer. It does not apply, for example, when an individual takes over the obligation of a corporation.

6. *Disclosures.* For transactions that are assumptions within this provision, the creditor must make disclosures based on the "remaining obligation." For example:

i. The amount financed is the remaining principal balance plus any arrearages or other accrued charges from the original transaction.

ii. If the finance charge is computed from time to time by application of a percentage rate to an unpaid balance, in determining the amount of the finance charge and the annual percentage rate to be disclosed, the creditor should disregard any prepaid finance charges paid by the original obligor, but must include in the finance charge any prepaid finance charge imposed in connection with the assumption.

iii. If the creditor requires the assuming consumer to pay any charges as a condition of the assumption, those sums are prepaid finance charges as to that consumer, unless exempt from the finance charge under §1026.4. If a transaction involves add-on or discount finance charges, the creditor may make abbreviated disclosures, as outlined in §1026.20(b)(1) through (5). Creditors providing disclosures pursuant to this section for assumptions of variable-rate transactions secured by the consumer's principal dwelling with a term longer than one year need not provide new disclosures under §1026.18(f)(2)(ii) or §1026.19(b). In such transactions, a creditor may disclose the variable-rate feature solely in accordance with §1026.18(f)(1).

7. *Abbreviated disclosures.* The abbreviated disclosures permitted for assumptions of transactions involving add-on or discount finance charges must be made clearly and conspicuously in writing in a form that the consumer may keep. However, the creditor need not comply with the segregation requirement of §1026.17(a)(1). The terms *annual percentage rate* and *total of payments*, when disclosed according to §1026.20(b)(4) and (5), are not subject to the description requirements of §1026.18(e) and (h). The term *annual percentage rate* disclosed under §1026.20(b)(4) need not be more conspicuous than other disclosures.

20(c) Rate adjustments with a corresponding change in payment.

1. *Creditors, assignees, and servicers.* Creditors, assignees, and servicers that own either the applicable adjustable-rate mortgage or the applicable mortgage servicing rights or both are subject to the requirements of §1026.20(c). Creditors, assignees, and servicers are also subject to the requirements of any provision of subpart C that governs §1026.20(c). For example, the form requirements of §1026.17(a) apply to §1026.20(c) disclosures and thus, assignees and servicers, as well as creditors, are subject to those requirements. While creditors, assignees, and servicers are all subject to the requirements of §1026.20(c), they may decide among themselves which of them will provide the required disclosures.

2. *Loan modifications.* Under §1026.20(c), the interest rate adjustment disclosures are required only for interest rate adjustments occurring pursuant to the loan contract. Accordingly, creditors, assignees, and servicers need not provide the disclosures for interest rate adjustments occurring in loan modifications made for loss mitigation purposes. Subsequent interest rate adjustments resulting in a corresponding payment change occurring pursuant to the modified loan contract, however, are subject to the requirements of §1026.20(c).

3. *Conversions.* In addition to the disclosures required for interest rate adjustments under an adjustable-rate mortgage, §1026.20(c) also requires the disclosures for an ARM converting to a fixed-rate transaction when the conversion changes the interest rate and results in a corresponding payment change. When an open-end account converts to a closed-end adjustable-rate mortgage, the §1026.20(c) disclosure is not required until the implementation of an interest rate adjustment post-conversion that results in a corresponding payment change. For example, for an open-end account that converts to a closed-end 3/1 hybrid ARM, *i.e.*, an ARM with a fixed rate of interest for the first three years after which the interest rate adjusts annually, the first §1026.20(c) disclosure would not be required until three years after the conversion, and only if that first adjustment resulted in a payment change.

Paragraph 20(c)(1)(i).

1. *In general.* An adjustable-rate mortgage, as defined in §1026.20(c)(1)(i), is a variable-rate transaction as that term is used in subpart C, except as distinguished by comment §1026.20(c)(1)(ii)–3. The requirements of this section are not limited to transactions financing the initial acquisition of the consumer's principal dwelling.

Paragraph 20(c)(1)(ii).

1. *Short-term ARMs.* Under §1026.20(c)(1)(ii), construction, home improvement, bridge, and other loans with terms of one year or less are not subject to the requirements in §1026.20(c). In determining the term of a construction loan that may be permanently financed by the same creditor or assignee, the creditor or assignee may treat the construction and the permanent phases as separate transactions with distinct terms to maturity or as a single combined transaction.

2. *First new payment due within 210 days after consummation.* Section 1026.20(c) disclosures are not required if the first payment at the adjusted level is due within 210 days after consummation, when the new interest rate disclosed at consummation pursuant to §1026.20(d) is not an estimate. For example, the creditor, assignee, or servicer would not be required to provide the disclosures required by §1026.20(c) for the first time an ARM interest rate adjusts if the first payment at the adjusted level was due 120 days after consummation and the adjusted interest rate disclosed at consummation pursuant to §1026.20(d) was not an estimate.

3. *Non-adjustable-rate mortgages.* The following transactions, if structured as fixed-rate and not as adjustable-rate mortgages based on an index or formula, are not subject to §1026.20(c):

i. Shared-equity or shared-appreciation mortgages;

ii. Price-level adjusted or other indexed mortgages that have a fixed rate of interest but provide for periodic adjustments to payments and the loan balance to reflect changes in an index measuring prices or inflation;

iii. Graduated-payment mortgages or step-rate transactions;

iv. Renewable balloon-payment instruments; and

v. Preferred-rate loans.

Paragraph 20(c)(2).

1. *Timing.* The requirement that §1026.20(c) disclosures be provided to consumers within a certain timeframe means that the creditor, assignee, or servicer must deliver the notice or place it in the mail within that timeframe, excluding any grace or courtesy periods. The requirement that the §1026.20(c) disclosures must be provided between 25 and 120 days before the first payment at the adjusted level is due for frequently-adjusting ARMs, applies to ARMs that adjust regularly at a maximum of every 60 days.

Paragraph 20(c)(2)(ii)(A).

1. C*urrent and new interest rates.* The current interest rate is the interest rate that applies on the date the disclosure is provided to the consumer. The new interest rate is the actual interest rate that will apply on the date of the adjustment. The new interest rate is used to determine the new payment. The ''new interest rate'' has the same meaning as the ''adjusted interest rate.'' The requirements of §1026.20(c)(2)(ii)(A) do not preclude creditors, assignees, and servicers from rounding the interest rate, pursuant to the requirements of the ARM contract.

Paragraph 20(c)(2)(iv).

1. *Rate limits and foregone interest rate increases.* Interest rate carryover, or foregone interest rate increases, is the amount of interest rate increase foregone at any ARM interest rate adjustment that, subject to rate caps, can be added to future interest rate adjustments to increase, or to offset decreases in, the rate determined by using the index or formula. The disclosures required by §1026.20(c)(2)(iv) regarding foregone interest rate increases apply only to transactions permitting interest rate carryover.

Paragraph 20(c)(2)(v)(B).

1. *Application of previously foregone interest rate increases.* The disclosures regarding the application of previously foregone interest rate increases apply only to transactions permitting interest rate carryover.

Paragraph 20(c)(2)(vi).

1. *Amortization statement.* For ARMs requiring the payment of interest only, such as interest-only loans, §1026.20(c)(2)(vi) requires a statement that the new payment covers all of the interest but none of the principal, and therefore will not reduce the loan balance. For negatively-amortizing ARMs, §1026.20(c)(2)(vi) requires a statement that the new payment covers only part of the interest and none of the principal, and therefore the unpaid interest will be added to the principal balance.

2. *Amortization payment.* Disclosure of the payment needed to amortize fully the outstanding balance at the new interest rate over the remainder of the loan term is required only when negative amortization occurs as a result of the interest rate adjustment. The disclosure is not required simply because a loan has interest-only or partially-amortizing payments. For example, an ARM with a five-year term and payments based on a longer amortization schedule, in which the final payment will equal the periodic payment plus the remaining unpaid balance, does not require disclosure of the payment necessary to amortize fully the loan in the remainder of the five-year term. A disclosure is also not required when the new payment is sufficient to prevent negative amortization but the final loan payment will be a different amount due to rounding.

Paragraph 20(c)(2)(vii).

1. *Prepayment penalty.* The creditor, assignee, or servicer of an ARM with no prepayment penalty, as that term is used in §1026.20(c)(2)(vii), may decide to exclude the prepayment section from the §1026.20(c) disclosure, retain the prepayment section and insert after the heading ''None'' or other indication that there is no prepayment penalty, or indicate there is no prepayment penalty in some other manner. *See also* comment 1.vi to Appendices G and H—Open-End and Closed-End Model Forms and Clauses.

Paragraph 20(c)(3)(i).

1. *Format of disclosures.* The requirements of §1026.20(c)(3)(i) and (ii) to provide the §1026.20(c) disclosures in the same order as, and with headings and format substantially similar to, the model and sample forms do not preclude creditors, assignees, and servicers from modifying the disclosures to accommodate particular consumer circumstances or transactions not addressed by the forms. For example, in the case of a consumer bankruptcy or under certain State laws, the creditor, assignee, or servicer may modify the forms to remove language regarding personal liability. Creditors, assignees, and servicers providing the required notice to a consumer whose ARM is converting to a fixed-rate mortgage, may modify the model language to explain that the interest rate will no longer adjust. Creditors, assignees, and servicers electing to provide consumers with interest rate notices in cases where the interest rate adjusts without a corresponding change in payment may modify

the forms to fit that circumstance. A payment-option ARM, which is an ARM permitting consumers to choose among several different payment options for each billing period, is an example of a loan that may require modification of the §1026.20(c) model and sample forms. See appendix H–30(C) for an example of an allocation table for a payment-option loan.

20(d) Initial rate adjustment.

1. *Creditors, assignees, and servicers.* Creditors, assignees, and servicers that own either the applicable adjustable-rate mortgage or the applicable mortgage servicing rights or both are subject to the requirements of §1026.20(d). Creditors, assignees, and servicers are also subject to the requirements of any provision of subpart C that governs §1026.20(d). For example, the form requirements of §1026.17(a) apply to §1026.20(d) disclosures and thus, assignees and servicers, as well as creditors, are subject to those requirements. While creditors, assignees, and servicers are all subject to the requirements of §1026.20(d), they may decide among themselves which of them will provide the required disclosures.

2. *Loan modifications.* Under §1026.20(d), the interest rate adjustment disclosures are required only for the initial interest rate adjustment occurring pursuant to the loan contract. Accordingly, creditors, assignees, and servicers need not provide the disclosures for interest rate adjustments occurring in loan modifications made for loss mitigation purposes. The initial interest rate adjustment occurring pursuant to the modified loan contract, however, is subject to the requirements of §1026.20(d).

3. *Timing and form of initial rate adjustment.* The requirement that §1026.20(d) disclosures be provided in writing, separate and distinct from all other correspondence, means that the initial ARM interest rate adjustment notice must be provided to consumers as a separate document but may, in the case of mailing the disclosure, be in the same envelope with other material and, in the case of emailing the disclosure, be a separate attachment from other attachments in the same email. The requirement that the disclosures be provided to consumers between 210 and 240 days ''before the first payment at the adjusted level is due'' means the creditor, assignee, or servicer must deliver the notice or place it in the mail between 210 and 240 days prior to the due date, excluding any grace or courtesy periods, of the first payment calculated using the adjusted interest rate.

4. *Conversions.* When an open-end account converts to a closed-end adjustable-rate mortgage, the §1026.20(d) disclosure is not required until the implementation of the initial interest rate adjustment post-conversion. For example, for an open-end account that converts to a closed-end 3/1 hybrid ARM, *i.e.*, an ARM with a fixed rate of interest for the first three years after which the interest rate adjusts annually, the §1026.20(d) disclosure would not be required until three years after the conversion when the interest rate adjusts for the first time.

Paragraph 20(d)(1)(i).

1. *In general.* An adjustable-rate mortgage, as defined in §1026.20(d)(1)(i), is a variable-rate transaction as that term is used in subpart C, except as distinguished by comment §1026.20(d)(1)(ii)–2. The requirements of this section are not limited to transactions financing the initial acquisition of the consumer's principal dwelling.

Paragraph 20(d)(1)(ii).

1. *Short-term ARMs.* Under §1026.20(d)(1)(ii), construction, home improvement, bridge, and other loans with terms of one year or less are not subject to the requirements in §1026.20(d). In determining the term of a construction loan that may be permanently financed by the same creditor or assignee, the creditor or assignee may treat the construction and the permanent phases as separate transactions with distinct terms to maturity or as a single combined transaction.

2. *Non-adjustable-rate mortgages.* The following transactions, if structured as fixed-rate and not as adjustable-rate mortgages based on an index or formula, are not subject to §1026.20(d):

i. Shared-equity or shared-appreciation mortgages;

ii. Price-level adjusted or other indexed mortgages that have a fixed rate of interest but provide for periodic adjustments to payments and the loan balance to reflect changes in an index measuring prices or inflation;

iii. Graduated-payment mortgages or step-rate transactions;

iv. Renewable balloon-payment instruments; and

v. Preferred-rate loans.

Paragraph 20(d)(2)(i).

1. *Date of the disclosure.* The date that must appear on the disclosure is the date the creditor, assignee, or servicer generates the notice to be provided to the consumer.

Paragraph 20(d)(2)(iii)(A).

1. *Current and new interest rates.* The current interest rate is the interest rate that applies on the date of the disclosure. The new interest rate is the interest rate used to calculate the new payment and may be an estimate pursuant to §1026.20(d)(2). The new payment, if calculated from an estimated new interest rate, will also be an estimate. The ''new interest rate'' has the same meaning as the ''adjusted interest rate.'' The requirements of §1026.20(d)(2)(iii)(A) do not preclude creditors, assignees, and servicers from rounding the interest rate, pursuant to the requirements of the ARM contract.

Paragraph 20(d)(2)(v).

1. *Rate limits and foregone interest rate increases*. Interest rate carryover, or foregone interest rate increases, is the amount of interest rate increase foregone at the first ARM interest rate adjustment that, subject to rate caps, can be added to future interest rate adjustments to increase, or to offset decreases in, the rate determined by using the index or formula. The disclosures required by §1026.20(d)(2)(v) regarding foregone interest rate increases apply only to transactions permitting interest rate carryover.

Paragraph 20(d)(2)(vii).

1. *Amortization statement*. For ARMs requiring the payment of interest only, such as interest-only loans, §1026.20(d)(2)(vii) requires a statement that the new payment covers all of the interest but none of the principal, and therefore will not reduce the loan balance. For negatively-amortizing ARMs, §1026.20(d)(2)(vii) requires a statement that the new payment covers only part of the interest and none of the principal, and therefore the unpaid interest will be added to the principal balance.

2. *Amortization payment*. Disclosure of the payment needed to amortize fully the outstanding balance at the new interest rate over the remainder of the loan term is required only when negative amortization occurs as a result of the interest rate adjustment. The disclosure is not required simply because a loan has interest-only or partially-amortizing payments. For example, an ARM with a five-year term and payments based on a longer amortization schedule, in which the final payment will equal the periodic payment plus the remaining unpaid balance, does not require disclosure of the payment necessary to amortize fully the loan in the remainder of the five-year term. A disclosure is also not required when the new payment is sufficient to prevent negative amortization but the final loan payment will be a different amount due to rounding.

Paragraph 20(d)(2)(viii).

1. *Prepayment penalty*. The creditor, assignee, or servicer of an ARM with no prepayment penalty, as that term is used in §1026.20(d)(2)(viii), may decide to exclude the prepayment section from the §1026.20(d) disclosure, retain the prepayment section and insert after the heading ''None'' or other indication that there is no prepayment penalty, or indicate there is no prepayment penalty in some other manner. *See also* comment to Appendices G and H—Open-End and Closed-End Model Forms and Clauses—1.vi.

Paragraph 20(d)(3)(i).

1. *Format of disclosures*. The requirements of §1026.20(d)(3)(i) and (iii) to provide the §1026.20(d) disclosures in the same order as, and with headings and format substantially similar to, the model and sample forms do not preclude creditors, assignees, and servicers from modifying the disclosures to accommodate particular consumer circumstances or transactions not addressed by the forms. For example, in the case of a consumer bankruptcy or under certain State laws, the creditor, assignee, or servicer may modify the forms to remove language regarding personal liability. A payment-option ARM, which is an ARM permitting consumers to choose among several different payment options for each billing period, is an example of a loan that may require modification of the §1026.20(d) model and sample forms. See appendix H–30(C) for an example of an allocation table for a payment-option loan.

20(e) Escrow account cancellation notice for certain mortgage transactions.

20(e)(1) Scope.

1. *Real property or dwelling*. For purposes of §1026.20(e)(1), the term ''real property'' includes vacant and unimproved land. The term ''dwelling'' includes vacation and second homes and mobile homes, boats, and trailers used as residences. *See* §1026.2(a)(19) and related commentary for additional guidance regarding the term ''dwelling.''

2. *Escrow account established in connection with the consumer's delinquency or default*. Neither creditors nor servicers are required to provide the disclosures required by §1026.20(e)(2) when an escrow account that was established solely in connection with the consumer's delinquency or default on the underlying debt obligation will be cancelled.

3. *Termination of the underlying debt obligation*. Neither creditors nor servicers are required to provide disclosures required by §1026.20(e)(2) when the underlying debt obligation for which an escrow account was established is terminated, including by repayment, refinancing, rescission, and foreclosure.

20(e)(2) Content requirements.

1. *Clear and conspicuous standard*. The clear and conspicuous standard generally requires that disclosures be in a reasonably understandable form and readily noticeable to the consumer.

Paragraph 20(e)(2)(i).

1. *Escrow closing fee*. Section 1026.20(e)(2)(i) requires the creditor to itemize the amount of any fee the creditor or servicer imposes on the consumer in connection with the closure of the consumer's escrow account, labeled ''Escrow Closing Fee.'' If the creditor or servicer independently decides to cancel the escrow account, rather than agreeing to close it at the request of the consumer, and does not charge a fee in connection with the cancellation, the creditor or service complies with §1026.20(e)(2) by leaving the disclosure blank on the front-side of the one-page document described in §1026.20(e)(4).

20(e)(3) Optional information.

1. *Optional information permitted*. Section 1026.20(e)(3) lists information that the creditor or servicer may, at its option, include on the notice required by §1026.20(e). To comply

with §1026.20(e)(3), the creditor or servicer may place the information required by §1026.20(e)(3), other than the name and logo of the creditor or servicer, between the heading required by §1026.20(e)(2) and the disclosures required by §1026.20(e)(2)(i) and (ii). The name and logo may be placed above the heading required §1026.20(e)(2).

20(e)(4) Form of disclosures.

1. *Grouped and separate.* The disclosures required by §1026.20(e)(2) must be grouped together on the front side of a separate one-page document that contains no other material.

2. *Notice must be in writing in a form that the consumer may keep.* The notice containing the disclosures required by §1026.20(e)(2) must be in writing in a form that the consumer may keep. See also §1026.17(a) and related commentary for additional guidance on the form requirements applicable to the disclosures required by §1026.20(e)(2).

3. *Modifications of disclosures.* The requirements of §1026.20(e)(4) to provide the §1026.20(e) disclosures with the headings, content, order, and format substantially similar to model form H–29 in appendix H to this part do not preclude creditors and servicers from modifying the disclosures to accommodate particular consumer circumstances or transactions not addressed by the form or from adjusting the statement required by §1026.20(e)(2)(ii)(A), concerning consequences if the consumer fails to pay property costs, to the circumstances of the particular consumer.

20(e)(5) Timing.

20(e)(5)(i) Cancellation upon consumer's request.

1. *Timing requirements* Section 1026.20(e)(5)(i) provides that if the creditor or servicer cancels the escrow account at the consumer's request, the creditor or servicer shall ensure that the consumer receives the disclosures required by §1026.20(e)(2) no later than three business days before closure of the consumer's escrow account. For example, for closure to occur on Thursday, the consumer must receive the disclosures on or before Monday, assuming each weekday is a business day. For purposes of §1026.20(e)(5), the term ''business day'' means all calendar days except Sundays and legal public holidays referred to in §1026.2(a)(6). *See* comment 2(a)(6)–2.

20(e)(5)(iii) Receipt of disclosure.

1. *Timing of receipt.* Section 1026.20(e)(5)(iii) provides that if the disclosures required under §1026.20(e)(2) are not provided to the consumer in person, the consumer is considered to have received the disclosures three business days after they are delivered or placed in the mail. If the creditor or servicer provides the disclosures required by §1026.20(e)(2) by mail, the consumer is considered to have received them three business days after they are placed in the mail for purposes of determining when the waiting periods required by §1026.20(e)(5)(i) and (ii) begins. Creditors and servicers that use electronic mail or a courier to provide disclosures may also follow this approach. If, however, the creditor or servicer delivers the disclosures required by §1026.20(e)(2) to the consumer in person, the escrow account may be closed any time on the third or 30th business day following the date of delivery, as applicable. Whatever method is used to provide disclosures, creditors and servicers may rely on documentation of receipt in determining when the waiting periods required by §1026.20(e)(5)(i) and (ii) begin.

Section 1026.21—Treatment of Credit Balances

Paragraph 21(a)

1. *Credit balance.* A credit balance arises whenever the creditor receives or holds funds in an account in excess of the total balance due from the consumer on that account. A balance might result, for example, from the debtor's paying off a loan by transmitting funds in excess of the total balance owed on the account, or from the early payoff of a loan entitling the consumer to a rebate of insurance premiums and finance charges. However, §1026.21 does not determine whether the creditor in fact owes or holds sums for the consumer. For example, if a creditor has no obligation to rebate any portion of precomputed finance charges on prepayment, the consumer's early payoff would not create a credit balance with respect to those charges. Similarly, nothing in this provision interferes with any rights the creditor may have under the contract or under state law with respect to set-off, cross collateralization, or similar provisions.

2. *Total balance due.* The phrase *total balance due* refers to the total outstanding balance. Thus, this provision does not apply where the consumer has simply paid an amount in excess of the payment due for a given period.

3. *Timing of refund.* The creditor may also fulfill its obligation under this section by:

i. Refunding any credit balance to the consumer immediately.

ii. Refunding any credit balance prior to a written request from the consumer.

iii. Making a good faith effort to refund any credit balance before 6 months have passed. If that attempt is unsuccessful, the creditor need not try again to refund the credit balance at the end of the 6-month period.

Paragraph 21(b)

1. *Written requests—standing orders.* The creditor is not required to honor standing orders requesting refunds of any credit balance that may be created on the consumer's account.

Paragraph 21(c)

1. *Good faith effort to refund.* The creditor must take positive steps to return any credit balance that has remained in the account for over 6 months. This includes, if necessary, attempts to trace the consumer through the consumer's last known address or telephone number, or both.

2. *Good faith effort unsuccessful.* Section 1026.21 imposes no further duties on the creditor if a good faith effort to return the balance is unsuccessful. The ultimate disposition of the credit balance (or any credit balance of $1 or less) is to be determined under other applicable law.

Section 1026.22—Determination of Annual Percentage Rate

22(a) Accuracy of Annual Percentage Rate

Paragraph 22(a)(1)

1. *Calculation method.* The regulation recognizes both the actuarial method and the United States Rule Method (U.S. Rule) as measures of an exact annual percentage rate. Both methods yield the same annual percentage rate when payment intervals are equal. They differ in their treatment of unpaid accrued interest.

2. *Actuarial method.* When no payment is made, or when the payment is insufficient to pay the accumulated finance charge, the actuarial method requires that the unpaid finance charge be added to the amount financed and thereby capitalized. Interest is computed on interest since in succeeding periods the interest rate is applied to the unpaid balance including the unpaid finance charge. Appendix J provides instructions and examples for calculating the annual percentage rate using the actuarial method.

3. *U.S. Rule.* The U.S. Rule produces no compounding of interest in that any unpaid accrued interest is accumulated separately and is not added to principal. In addition, under the U.S. Rule, no interest calculation is made until a payment is received.

4. *Basis for calculations.* When a transaction involves "step rates" or "split rates"—that is, different rates applied at different times or to different portions of the principal balance—a single composite annual percentage rate must be calculated and disclosed for the entire transaction. Assume, for example, a step-rate transaction in which a $10,000 loan is repayable in 5 years at 10 percent interest for the first 2 years, 12 percent for years 3 and 4, and 14 percent for year 5. The monthly payments are $210.71 during the first 2 years of the term, $220.25 for years 3 and 4, and $222.59 for year 5. The composite annual percentage rate, using a calculator with a "discounted cash flow analysis" or "internal rate of return" function, is 10.75 percent.

5. *Good faith reliance on faulty calculation tools.* Section 1026.22(a)(1) absolves a creditor of liability for an error in the annual percentage rate or finance charge that resulted from a corresponding error in a calculation tool used in good faith by the creditor. Whether or not the creditor's use of the tool was in good faith must be determined on a case-by-case basis, but the creditor must in any case have taken reasonable steps to verify the accuracy of the tool, including any instructions, before using it. Generally, the creditor is not liable only for errors directly attributable to the calculation tool itself, including software programs; §1026.22(a)(1) is not intended to absolve a creditor of liability for its own errors, or for errors arising from improper use of the tool, from incorrect data entry, or from misapplication of the law.

Paragraph 22(a)(2)

1. *Regular transactions.* The annual percentage rate for a regular transaction is considered accurate if it varies in either direction by not more than ⅛ of 1 percentage point from the actual annual percentage rate. For example, when the exact annual percentage rate is determined to be 101/8%, a disclosed annual percentage rate from 10% to 10 ¼%, or the decimal equivalent, is deemed to comply with the regulation.

Paragraph 22(a)(3)

1. *Irregular transactions.* The annual percentage rate for an irregular transaction is considered accurate if it varies in either direction by not more than ¼ of 1 percentage point from the actual annual percentage rate. This tolerance is intended for more complex transactions that do not call for a single advance and a regular series of equal payments at equal intervals. The ¼ of 1 percentage point tolerance may be used, for example, in a construction loan where advances are made as construction progresses, or in a transaction where payments vary to reflect the consumer's seasonal income. It may also be used in transactions with graduated payment schedules where the contract commits the consumer to several series of payments in different amounts. It does not apply, however, to loans with variable rate features where the initial disclosures are based on a regular amortization schedule over the life of the loan, even though payments may later change because of the variable rate feature.

22(a)(4) Mortgage Loans

1. *Example.* If a creditor improperly omits a $75 fee from the finance charge on a regular transaction, the understated finance charge is considered accurate under §1026.18(d)(1) or §1026.38(o)(2), as applicable, and the annual percentage rate corresponding to that understated finance charge also is considered accurate even if it falls outside the tolerance of

⅛ of 1 percentage point provided under §1026.22(a)(2). Because a $75 error was made, an annual percentage rate corresponding to a $100 understatement of the finance charge would not be considered accurate.

22(a)(5) Additional Tolerance for Mortgage Loans

1. *Example.* This paragraph contains an additional tolerance for a disclosed annual percentage rate that is incorrect but is closer to the actual annual percentage rate than the rate that would be considered accurate under the tolerance in §1026.22(a)(4). To illustrate: in an irregular transaction subject to a ¼ of 1 percentage point tolerance, if the actual annual percentage rate is 9.00 percent and a $75 omission from the finance charge corresponds to a rate of 8.50 percent that is considered accurate under §1026.22(a)(4), a disclosed APR of 8.65 percent is within the tolerance in §1026.22(a)(5). In this example of an understated finance charge, a disclosed annual percentage rate below 8.50 or above 9.25 percent will not be considered accurate.

22(b) Computation Tools

Paragraph 22(b)(1)

1. *Bureau tables.* Volumes I and II of the Bureau's Annual Percentage Rate Tables provide a means of calculating annual percentage rates for regular and irregular transactions, respectively. An annual percentage rate computed in accordance with the instructions in the tables is deemed to comply with the regulation, even where use of the tables produces a rate that falls outside the general standard of accuracy. To illustrate:Volume I may be used for single advance transactions with completely regular payment schedules or with payment schedules that are regular except for an odd first payment, odd first period or odd final payment. When used for a transaction with a large final balloon payment, Volume I may produce a rate that is considerably higher than the exact rate produced using a computer program based directly on appendix J. However, the Volume I rate—produced using certain adjustments in that volume—is considered to be in compliance.

Paragraph 22(b)(2)

1. *Other calculation tools.* Creditors need not use the Bureau tables in calculating the annual percentage rates. Any computation tools may be used, so long as they produce annual percentage rates within ⅛ or ¼ of 1 percentage point, as applicable, of the precise actuarial or U.S. Rule annual percentage rate.

22(c) Single Add-On Rate Transactions

1. *General rule.* Creditors applying a single add-on rate to all transactions up to 60 months in length may disclose the same annual percentage rate for all those transactions, although the actual annual percentage rate varies according to the length of the transaction. Creditors utilizing this provision must show the highest of those rates. For example, an add-on rate of 10 percent converted to an annual percentage rate produces the following actual annual percentage rates at various maturities: At 3 months, 14.94 percent; at 21 months, 18.18 percent; and at 60 months, 17.27 percent. The creditor must disclose an annual percentage rate of 18.18 percent (the highest annual percentage rate) for any transaction up to 5 years, even though that rate is precise only for a transaction of 21 months.

22(d) Certain Transactions Involving Ranges of Balances

1. *General rule.* Creditors applying a fixed dollar finance charge to all balances within a specified range of balances may understate the annual percentage rate by up to 8 percent of that rate, by disclosing for all those balances the annual percentage rate computed on the median balance within that range. For example: If a finance charge of $9 applies to all balances between $91 and $100, an annual percentage rate of 10 percent (the rate on the median balance) may be disclosed as the annual percentage rate for all balances, even though a $9 finance charge applied to the lowest balance ($91) would actually produce an annual percentage rate of 10.7 percent.

Section 1026.23—Right of Rescission

1. *Transactions not covered.* Credit extensions that are not subject to the regulation are not covered by §1026.23 even if a customer's principal dwelling is the collateral securing the credit. For example, the right of rescission does not apply to a business purpose loan, even though the loan is secured by the customer's principal dwelling.

23(a) Consumer's Right to Rescind

Paragraph 23(a)(1)

1. *Security interest arising from transaction.* i. In order for the right of rescission to apply, the security interest must be retained as part of the credit transaction. For example:

A. A security interest that is acquired by a contractor who is also extending the credit in the transaction.

B. A mechanic's or materialman's lien that is retained by a subcontractor or supplier of the contractor-creditor, even when the latter has waived its own security interest in the consumer's home.

ii. The security interest is not part of the credit transaction and therefore the transaction is not subject to the right of rescission when, for example:

A. A mechanic's or materialman's lien is obtained by a contractor who is not a party to the credit transaction but is merely paid with the proceeds of the consumer's unsecured bank loan.

B. All security interests that may arise in connection with the credit transaction are validly waived.

C. The creditor obtains a lien and completion bond that in effect satisfies all liens against the consumer's principal dwelling as a result of the credit transaction.

iii. Although liens arising by operation of law are not considered security interests for purposes of disclosure under §1026.2, that section specifically includes them in the definition for purposes of the right of rescission. Thus, even though an interest in the consumer's principal dwelling is not a required disclosure under §1026.18(m), it may still give rise to the right of rescission.

2. *Consumer.* To be a consumer within the meaning of §1026.2, that person must at least have an ownership interest in the dwelling that is encumbered by the creditor's security interest, although that person need not be a signatory to the credit agreement. For example, if only one spouse signs a credit contract, the other spouse is a consumer if the ownership interest of that spouse is subject to the security interest.

3. *Principal dwelling.* A consumer can only have one principal dwelling at a time. (But see comment 23(a)(1)–4.) A vacation or other second home would not be a principal dwelling. A transaction secured by a second home (such as a vacation home) that is not currently being used as the consumer's principal dwelling is not rescindable, even if the consumer intends to reside there in the future. When a consumer buys or builds a new dwelling that will become the consumer's principal dwelling within one year or upon completion of construction, the new dwelling is considered the principal dwelling if it secures the acquisition or construction loan. In that case, the transaction secured by the new dwelling is a residential mortgage transaction and is not rescindable. For example, if a consumer whose principal dwelling is currently A builds B, to be occupied by the consumer upon completion of construction, a construction loan to finance B and secured by B is a residential mortgage transaction. Dwelling, as defined in §1026.2, includes structures that are classified as personalty under state law. For example, a transaction secured by a mobile home, trailer, or houseboat used as the consumer's principal dwelling may be rescindable.

4. *Special rule for principal dwelling.* Notwithstanding the general rule that consumers may have only one principal dwelling, when the consumer is acquiring or constructing a new principal dwelling, any loan subject to Regulation Z and secured by the equity in the consumer's current principal dwelling (for example, a bridge loan) is subject to the right of rescission regardless of the purpose of that loan. For example, if a consumer whose principal dwelling is currently A builds B, to be occupied by the consumer upon completion of construction, a construction loan to finance B and secured by A is subject to the right of rescission. A loan secured by both A and B is, likewise, rescindable.

5. *Addition of a security interest.* Under §1026.23(a), the addition of a security interest in a consumer's principal dwelling to an existing obligation is rescindable even if the existing obligation is not satisfied and replaced by a new obligation, and even if the existing obligation was previously exempt under §1026.3(b). The right of rescission applies only to the added security interest, however, and not to the original obligation. In those situations, only the §1026.23(b) notice need be delivered, not new material disclosures; the rescission period will begin to run from the delivery of the notice.

Paragraph 23(a)(2)

1. *Consumer's exercise of right.* The consumer must exercise the right of rescission in writing but not necessarily on the notice supplied under §1026.23(b). Whatever the means of sending the notification of rescission—mail, telegram or other written means—the time period for the creditor's performance under §1026.23(d)(2) does not begin to run until the notification has been received. The creditor may designate an agent to receive the notification so long as the agent's name and address appear on the notice provided to the consumer under §1026.23(b). Where the creditor fails to provide the consumer with a designated address for sending the notification of rescission, delivering notification to the person or address to which the consumer has been directed to send, payments constitutes delivery to the creditor or assignee. State law determines whether delivery of the notification to a third party other than the person to whom payments are made is delivery to the creditor or assignee, in the case where the creditor fails to designate an address for sending the notification of rescission.

Paragraph 23(a)(3)

1. *Rescission period.* i. The period within which the consumer may exercise the right to rescind runs for 3 business days from the last of 3 events:

A. Consummation of the transaction.

B. Delivery of all material disclosures.

C. Delivery to the consumer of the required rescission notice.

ii. For example:

A. If a transaction is consummated on Friday, June 1, and the disclosures and notice of the right to rescind were given on Thursday, May 31, the rescission period will expire at midnight of the third business day after June 1—that is, Tuesday, June 5.

B. If the disclosures are given and the transaction consummated on Friday, June 1, and the rescission notice is given on Monday, June 4, the rescission period expires at midnight of the third business day after June 4—that is, Thursday, June 7. The consumer must place the rescission notice in the mail, file it for telegraphic transmission, or deliver it to the creditor's place of business within that period in order to exercise the right.

2. *Material disclosures.* Section 1026.23(a)(3)(ii) sets forth the material disclosures that must be provided before the rescission period can begin to run. Failure to provide information regarding the annual percentage rate also includes failure to inform the consumer of the existence of a variable rate feature. Failure to give the other required disclosures does not prevent the running of the rescission period, although that failure may result in civil liability or administrative sanctions.

3. *Unexpired right of rescission.* i. When the creditor has failed to take the action necessary to start the three-business day rescission period running, the right to rescind automatically lapses on the occurrence of the earliest of the following three events:

A. The expiration of three years after consummation of the transaction.

B. Transfer of all the consumer's interest in the property.

C. Sale of the consumer's interest in the property, including a transaction in which the consumer sells the dwelling and takes back a purchase money note and mortgage or retains legal title through a device such as an installment sale contract.

ii. Transfer of all the consumers' interest includes such transfers as bequests and gifts. A sale or transfer of the property need not be voluntary to terminate the right to rescind. For example, a foreclosure sale would terminate an unexpired right to rescind. As provided in Section 125 of the Act, the three-year limit may be extended by an administrative proceeding to enforce the provisions of this section. A partial transfer of the consumer's interest, such as a transfer bestowing co-ownership on a spouse, does not terminate the right of rescission.

Paragraph 23(a)(4)

1. *Joint owners.* When more than one consumer has the right to rescind a transaction, any of them may exercise that right and cancel the transaction on behalf of all. For example, if both husband and wife have the right to rescind a transaction, either spouse acting alone may exercise the right and both are bound by the rescission.

Paragraph 23(b)

23(b)(1) Notice of Right To Rescind

1. *Who receives notice.* Each consumer entitled to rescind must be given two copies of the rescission notice and the material disclosures. In a transaction involving joint owners, both of whom are entitled to rescind, both must receive the notice of the right to rescind and disclosures. For example, if both spouses are entitled to rescind a transaction, each must receive two copies of the rescission notice (one copy to each if the notice is provided in electronic form in accordance with the consumer consent and other applicable provisions of the E-Sign Act) and one copy of the disclosures.

2. *Format.* The notice must be on a separate piece of paper, but may appear with other information such as the itemization of the amount financed. The material must be clear and conspicuous, but no minimum type size or other technical requirements are imposed. The notices in appendix H provide models that creditors may use in giving the notice.

3. *Content.* The notice must include all of the information outlined in Section 1026.23(b)(1)(i) through (v). The requirement in §1026.23(b) that the transaction be identified may be met by providing the date of the transaction. The creditor may provide a separate form that the consumer may use to exercise the right of rescission, or that form may be combined with the other rescission disclosures, as illustrated in appendix H. The notice may include additional information related to the required information, such as:

i. A description of the property subject to the security interest.

ii. A statement that joint owners may have the right to rescind and that a rescission by one is effective for all.

iii. The name and address of an agent of the creditor to receive notice of rescission.

4. *Time of providing notice.* The notice required by §1026.23(b) need not be given before consummation of the transaction. The creditor may deliver the notice after the transaction is consummated, but the rescission period will not begin to run until the notice is given. For example, if the creditor provides the notice on May 15, but disclosures were given and the transaction was consummated on May 10, the 3-business day rescission period will run from May 15.

23(c) Delay of Creditor's Performance

1. *General rule.* Until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded, the creditor must not, either directly or through a third party:

i. Disburse loan proceeds to the consumer.

ii. Begin performing services for the consumer.

iii. Deliver materials to the consumer.

2. *Escrow*. The creditor may disburse loan proceeds during the rescission period in a valid escrow arrangement. The creditor may not, however, appoint the consumer as ''trustee'' or ''escrow agent'' and distribute funds to the consumer in that capacity during the delay period.

3. *Actions during the delay period*. Section 1026.23(c) does not prevent the creditor from taking other steps during the delay, short of beginning actual performance. Unless otherwise prohibited, such as by state law, the creditor may, for example:

i. Prepare the loan check.

ii. Perfect the security interest.

iii. Prepare to discount or assign the contract to a third party.

iv. Accrue finance charges during the delay period.

4. *Delay beyond rescission period*. i. The creditor must wait until it is reasonably satisfied that the consumer has not rescinded. For example, the creditor may satisfy itself by doing one of the following:

A. Waiting a reasonable time after expiration of the rescission period to allow for delivery of a mailed notice.

B. Obtaining a written statement from the consumer that the right has not been exercised.

ii. When more than one consumer has the right to rescind, the creditor cannot reasonably rely on the assurance of only one consumer, because other consumers may exercise the right.

23(d) Effects of Rescission

Paragraph 23(d)(1)

1. *Termination of security interest*. Any security interest giving rise to the right of rescission becomes void when the consumer exercises the right of rescission. The security interest is automatically negated regardless of its status and whether or not it was recorded or perfected. Under §1026.23(d)(2), however, the creditor must take any action necessary to reflect the fact that the security interest no longer exists.

Paragraph 23(d)(2)

1. *Refunds to consumer*. The consumer cannot be required to pay any amount in the form of money or property either to the creditor or to a third party as part of the credit transaction. Any amounts of this nature already paid by the consumer must be refunded. ''Any amount'' includes finance charges already accrued, as well as other charges, such as broker fees, application and commitment fees, or fees for a title search or appraisal, whether paid to the creditor, paid directly to a third party, or passed on from the creditor to the third party. It is irrelevant that these amounts may not represent profit to the creditor.

2. *Amounts not refundable to consumer*. Creditors need not return any money given by the consumer to a third party outside of the credit transaction, such as costs incurred for a building permit or for a zoning variance. Similarly, the term *any amount* does not apply to any money or property given by the creditor to the consumer; those amounts must be tendered by the consumer to the creditor under §1026.23(d)(3).

3. *Reflection of security interest termination*. The creditor must take whatever steps are necessary to indicate that the security interest is terminated. Those steps include the cancellation of documents creating the security interest, and the filing of release or termination statements in the public record. In a transaction involving subcontractors or suppliers that also hold security interests related to the credit transaction, the creditor must insure that the termination of their security interests is also reflected. The 20-day period for the creditor's action refers to the time within which the creditor must begin the process. It does not require all necessary steps to have been completed within that time, but the creditor is responsible for seeing the process through to completion.

Paragraph 23(d)(3)

1. *Property exchange*. Once the creditor has fulfilled its obligations under §1026.23(d)(2), the consumer must tender to the creditor any property or money the creditor has already delivered to the consumer. At the consumer's option, property may be tendered at the location of the property. For example, if lumber or fixtures have been delivered to the consumer's home, the consumer may tender them to the creditor by making them available for pick-up at the home, rather than physically returning them to the creditor's premises. Money already given to the consumer *must* be tendered at the creditor's place of business.

2. *Reasonable value*. If returning the property would be extremely burdensome to the consumer, the consumer may offer the creditor its reasonable value rather than returning the property itself. For example, if building materials have already been incorporated into the consumer's dwelling, the consumer may pay their reasonable value.

Paragraph 23(d)(4)

1. *Modifications*. The procedures outlined in §1026.23(d)(2) and (3) may be modified by a court. For example, when a consumer is in bankruptcy proceedings and prohibited from returning anything to the creditor, or when the equities dictate, a modification might be made. The sequence of procedures under §1026.23(d)(2) and (3), or a court's modification of those procedures under §1026.23(d)(4), does not affect a consumer's substantive right to rescind and to have the loan amount

adjusted accordingly. Where the consumer's right to rescind is contested by the creditor, a court would normally determine whether the consumer has a right to rescind and determine the amounts owed before establishing the procedures for the parties to tender any money or property.

23(e) Consumer's Waiver of Right to Rescind

1. *Need for waiver*. To waive the right to rescind, the consumer must have a bona fide personal financial emergency that must be met before the end of the rescission period. The existence of the consumer's waiver will not, of itself, automatically insulate the creditor from liability for failing to provide the right of rescission.

2. *Procedure*. To waive or modify the right to rescind, the consumer must give a written statement that specifically waives or modifies the right, and also includes a brief description of the emergency. Each consumer entitled to rescind must sign the waiver statement. In a transaction involving multiple consumers, such as a husband and wife using their home as collateral, the waiver must bear the signatures of both spouses.

23(f) Exempt Transactions

1. *Residential mortgage transaction*. Any transaction to construct or acquire a principal dwelling, whether considered real or personal property, is exempt. (See the commentary to §1026.23(a).) For example, a credit transaction to acquire a mobile home or houseboat to be used as the consumer's principal dwelling would not be rescindable.

2. *Lien status*. The lien status of the mortgage is irrelevant for purposes of the exemption in §1026.23(f)(1); the fact that a loan has junior lien status does not by itself preclude application of this exemption. For example, a home buyer may assume the existing first mortgage and create a second mortgage to finance the balance of the purchase price. Such a transaction would not be rescindable.

3. *Combined-purpose transaction*. A loan to acquire a principal dwelling and make improvements to that dwelling is exempt if treated as one transaction. If, on the other hand, the loan for the acquisition of the principal dwelling and the subsequent advances for improvements are treated as more than one transaction, then only the transaction that finances the acquisition of that dwelling is exempt.

4. *New advances*. The exemption in §1026.23(f)(2) applies only to refinancings (including consolidations) by the original creditor. The original creditor is the creditor to whom the written agreement was initially made payable. In a merger, consolidation or acquisition, the successor institution is considered the original creditor for purposes of the exemption in §1026.23(f)(2). If the refinancing involves a new advance of money, the amount of the new advance is rescindable. In determining whether there is a new advance, a creditor may rely on the amount financed, refinancing costs, and other figures stated in the latest Truth in Lending disclosures provided to the consumer and is not required to use, for example, more precise information that may only become available when the loan is closed. For purposes of the right of rescission, a new advance does not include amounts attributed solely to the costs of the refinancing. These amounts would include §1026.4(c)(7) charges (such as attorneys fees and title examination and insurance fees, if bona fide and reasonable in amount), as well as insurance premiums and other charges that are not finance charges. (Finance charges on the new transaction—points, for example—would not be considered in determining whether there is a new advance of money in a refinancing since finance charges are not part of the amount financed.) To illustrate, if the sum of the outstanding principal balance plus the earned unpaid finance charge is $50,000 and the new amount financed is $51,000, then the refinancing would be exempt if the extra $1,000 is attributed solely to costs financed in connection with the refinancing that are not finance charges. Of course, if new advances of money are made (for example, to pay for home improvements) and the consumer exercises the right of rescission, the consumer must be placed in the same position as he or she was in prior to entering into the new credit transaction. Thus, all amounts of money (which would include all the costs of the refinancing) already paid by the consumer to the creditor or to a third party as part of the refinancing would have to be refunded to the consumer. (See the commentary to §1026.23(d)(2) for a discussion of refunds to consumers.) A model rescission notice applicable to transactions involving new advances appears in appendix H. The general rescission notice (model form H–8) is the appropriate form for use by creditors not considered original creditors in refinancing transactions.

5. *State creditors*. Cities and other political subdivisions of states acting as creditors are not exempted from this section.

6. *Multiple advances*. Just as new disclosures need not be made for subsequent advances when treated as one transaction, no new rescission rights arise so long as the appropriate notice and disclosures are given at the outset of the transaction. For example, the creditor extends credit for home improvements secured by the consumer's principal dwelling, with advances made as repairs progress. As permitted by §1026.17(c)(6), the creditor makes a single set of disclosures at the beginning of the construction period, rather than separate disclosures for each advance. The right of rescission does not arise with each advance. However, if the advances

are treated as separate transactions, the right of rescission applies to each advance.7. *Spreader clauses.* When the creditor holds a mortgage or deed of trust on the consumer's principal dwelling and that mortgage or deed of trust contains a ''spreader clause,'' subsequent loans made are separate transactions and are subject to the right of rescission. Those loans are rescindable unless the creditor effectively waives its security interest under the spreader clause with respect to the subsequent transactions.

8. *Converting open-end to closed-end credit.* Under certain state laws, consummation of a closed-end credit transaction may occur at the time a consumer enters into the initial open-end credit agreement. As provided in the commentary to §1026.17(b), closed-end credit disclosures may be delayed under these circumstances until the conversion of the open-end account to a closed-end transaction. In accounts secured by the consumer's principal dwelling, no new right of rescission arises at the time of conversion. Rescission rights under §1026.15 are unaffected.

23(g) Tolerances for Accuracy

1. *Example.* See comment 38(o)–1 for examples illustrating the interaction of the finance charge and total of payments accuracy requirements for each transaction subject to §1026.19(e) and (f).

23(g)(2) One Percent Tolerance

1. *New advance.* The phrase ''new advance'' has the same meaning as in comment 23(f)–4.

23(h) Special Rules for Foreclosures

1. *Rescission.* Section 1026.23(h) applies only to transactions that are subject to rescission under §1026.23(a)(1).

Paragraph 23(h)(1)(i)

1. *Mortgage broker fees.* A consumer may rescind a loan in foreclosure if a mortgage broker fee that should have been included in the finance charge was omitted, without regard to the dollar amount involved. If the amount of the mortgage broker fee is included but misstated the rule in §1026.23(h)(2) applies.

23(h)(2) Tolerance for Disclosures

1. *General.* The tolerance for disclosure of the finance charge is based on the accuracy of the total finance charge rather than its component charges. For transactions subject to §1026.19(e) and (f), the tolerance for disclosure of the total of payments is based on the accuracy of the total of payments, taken as a whole, rather than its component charges.

2. *Example.* See comment 38(o)–1 for examples illustrating the interaction of the finance charge and total of payments accuracy requirements for each transaction subject to §1026.19(e) and (f).

Section 1026.24—Advertising

24(a) Actually Available Terms

1. *General rule.* To the extent that an advertisement mentions specific credit terms, it may state only those terms that the creditor is actually prepared to offer. For example, a creditor may not advertise a very low annual percentage rate that will not in fact be available at any time. This provision is not intended to inhibit the promotion of new credit programs, but to bar the advertising of terms that are not and will not be available. For example, a creditor may advertise terms that will be offered for only a limited period, or terms that will become available at a future date.

24(b) Clear and Conspicuous Standard

1. *Clear and conspicuous standard—general.* This section is subject to the general ''clear and conspicuous'' standard for this subpart, *see* §1026.17(a)(1), but prescribes no specific rules for the format of the necessary disclosures, other than the format requirements related to the advertisement of rates and payments as described in comment 24(b)–2 below. The credit terms need not be printed in a certain type size nor need they appear in any particular place in the advertisement. For example, a merchandise tag that is an advertisement under the regulation complies with this section if the necessary credit terms are on both sides of the tag, so long as each side is accessible.

2. *Clear and conspicuous standard—rates and payments in advertisements for credit secured by a dwelling.* For purposes of §1026.24(f), a clear and conspicuous disclosure means that the required information in §§1026.24(f)(2)(i) and 1026.24(f)(3)(i)(A) and (B) is disclosed with equal prominence and in close proximity to the advertised rates or payments triggering the required disclosures, and that the required information in §1026.24(f)(3)(i)(C) is disclosed prominently and in close proximity to the advertised rates or payments triggering the required disclosures. If the required information in §§1026.24(f)(2)(i) and 1026.24(f)(3)(i)(A) and (B) is the same type size as the advertised rates or payments triggering the required disclosures, the disclosures are deemed to be equally prominent. The information in §1026.24(f)(3)(i)(C) must be disclosed prominently, but need not be disclosed with equal prominence or be the same type size as the payments triggering the required disclosures. If the required information in §§1026.24(f)(2)(i) and 1026.24(f)(3)(i) is located immediately next to or directly above or below the advertised rates or payments triggering the required disclosures, without any intervening text or

graphical displays, the disclosures are deemed to be in close proximity. Notwithstanding the above, for electronic advertisements that disclose rates or payments, compliance with the requirements of §1026.24(e) is deemed to satisfy the clear and conspicuous standard.

3. *Clear and conspicuous standard—Internet advertisements for credit secured by a dwelling.* For purposes of this section, a clear and conspicuous disclosure for visual text advertisements on the Internet for credit secured by a dwelling means that the required disclosures are not obscured by techniques such as graphical displays, shading, coloration, or other devices and comply with all other requirements for clear and conspicuous disclosures under §1026.24. *See also* comment 24(e)–4.

4. *Clear and conspicuous standard—televised advertisements for credit secured by a dwelling.* For purposes of this section, including alternative disclosures as provided for by §1026.24(g), a clear and conspicuous disclosure in the context of visual text advertisements on television for credit secured by a dwelling means that the required disclosures are not obscured by techniques such as graphical displays, shading, coloration, or other devices, are displayed in a manner that allows a consumer to read the information required to be disclosed, and comply with all other requirements for clear and conspicuous disclosures under §1026.24. For example, very fine print in a television advertisement would not meet the clear and conspicuous standard if consumers cannot see and read the information required to be disclosed.

5. *Clear and conspicuous standard—oral advertisements for credit secured by a dwelling.* For purposes of this section, including alternative disclosures as provided for by §1026.24(g), a clear and conspicuous disclosure in the context of an oral advertisement for credit secured by a dwelling, whether by radio, television, or other medium, means that the required disclosures are given at a speed and volume sufficient for a consumer to hear and comprehend them. For example, information stated very rapidly at a low volume in a radio or television advertisement would not meet the clear and conspicuous standard if consumers cannot hear and comprehend the information required to be disclosed.

24(c) Advertisement of Rate of Finance Charge

1. *Annual percentage rate.* Advertised rates must be stated in terms of an *annual percentage rate,* as defined in §1026.22. Even though state or local law permits the use of add-on, discount, time-price differential, or other methods of stating rates, advertisements must state them as annual percentage rates. Unlike the transactional disclosure of an annual percentage rate under §1026.18(e), the advertised annual percentage rate need not include a descriptive explanation of the term and may be expressed using the abbreviation *APR.* The advertisement must state that the rate is subject to increase after consummation if that is the case, but the advertisement need not describe the rate increase, its limits, or how it would affect the payment schedule. As under §1026.18(f), relating to disclosure of a variable rate, the rate increase disclosure requirement in this provision does not apply to any rate increase due to delinquency (including late payment), default, acceleration, assumption, or transfer of collateral.

2. *Simple or periodic rates.* The advertisement may not simultaneously state any other rate, except that a simple annual rate or periodic rate applicable to an unpaid balance may appear along with (but not more conspicuously than) the annual percentage rate. An advertisement for credit secured by a dwelling may not state a periodic rate, other than a simple annual rate, that is applied to an unpaid balance. For example, in an advertisement for credit secured by a dwelling, a simple annual interest rate may be shown in the same type size as the annual percentage rate for the advertised credit, subject to the requirements of §1026.24(f). A simple annual rate or periodic rate that is applied to an unpaid balance is the rate at which interest is accruing; those terms do not include a rate lower than the rate at which interest is accruing, such as an effective rate, payment rate, or qualifying rate.

3. *Buydowns.* When a third party (such as a seller) or a creditor wishes to promote the availability of reduced interest rates (consumer or seller buydowns), the advertised annual percentage rate must be determined in accordance with the commentary to §1026.17(c) regarding the basis of transactional disclosures for buydowns. The seller or creditor may advertise the reduced simple interest rate, provided the advertisement shows the limited term to which the reduced rate applies and states the simple interest rate applicable to the balance of the term. The advertisement may also show the effect of the buydown agreement on the payment schedule for the buydown period, but this will trigger the additional disclosures under §1026.24(d)(2).

4. *Discounted variable-rate transactions.* The advertised annual percentage rate for discounted variable-rate transactions must be determined in accordance with comment 17(c)(1)–10 regarding the basis of transactional disclosures for such financing.

i. A creditor or seller may promote the availability of the initial rate reduction in such transactions by advertising the reduced simple annual rate, provided the advertisement shows with equal prominence and in close proximity the limited term to which the reduced rate applies and the annual percentage rate that will apply after the term of the initial rate reduction expires. *See* § 1026.24(f).

ii. Limits or caps on periodic rate or payment adjustments need not be stated. To illustrate using the second example in comment 17(c)(1)–10, the fact that the rate is presumed to be 11 percent in the second year and 12 percent for the remaining 28 years need not be included in the advertisement.

iii. The advertisement may also show the effect of the discount on the payment schedule for the discount period, but this will trigger the additional disclosures under § 1026.24(d).

24(d) Advertisement of Terms That Require Additional Disclosures

1. *General rule.* Under § 1026.24(d)(1), whenever certain triggering terms appear in credit advertisements, the additional credit terms enumerated in § 1026.24(d)(2) must also appear. These provisions apply even if the triggering term is not stated explicitly but may be readily determined from the advertisement. For example, an advertisement may state ''80 percent financing available,'' which is in fact indicating that a 20 percent downpayment is required.

24(d)(1) Triggering Terms

1. *Downpayment.* i. The dollar amount of a downpayment or a statement of the downpayment as a percentage of the price requires further information. By virtue of the definition of *downpayment* in § 1026.2, this triggering term is limited to credit sale transactions. It includes such statements as:

A. Only 5% down.

B. As low as $100 down.

C. Total move-in costs of $800.

ii. This provision applies only if a downpayment is actually required; statements such as *no downpayment* or *no trade-in required* do not trigger the additional disclosures under this paragraph.

2. *Payment period.* i. The number of payments required or the total period of repayment includes such statements as:

A. 48-month payment terms.

B. 30-year mortgage.

C. Repayment in as many as 36 monthly installments.

ii. But it does not include such statements as ''pay weekly,'' ''monthly payment terms arranged,'' or ''take years to repay,'' since these statements do not indicate a time period over which a loan may be financed.

3. *Payment amount.* i. The dollar amount of any payment includes statements such as:

A. ''Payable in installments of $103.''

B. ''$25 weekly.''

C. ''$500,000 loan for just $1,650 per month.''

D. ''$1,200 balance payable in 10 equal installments.''

ii. In the last example, the amount of each payment is readily determinable, even though not explicitly stated. But statements such as ''monthly payments to suit your needs'' or ''regular *monthly* payments'' are not deemed to be statements of the amount of any payment.

4. *Finance charge.* i. The dollar amount of the finance charge or any portion of it includes statements such as:

A. ''$500 total cost of credit.''

B. ''$2 monthly carrying charge.''

C. ''$50,000 mortgages, 2 points to the borrower.''

ii. In the last example, the $1,000 prepaid finance charge can be readily determined from the information given. Statements of the annual percentage rate or statements that there is no particular charge for credit (such as ''no closing costs'') are not triggering terms under this paragraph.

24(d)(2) Additional Terms

1. *Disclosure of downpayment.* The total downpayment as a dollar amount or percentage must be shown, but the word ''downpayment'' need not be used in making this disclosure. For example, ''10% cash required from buyer'' or ''credit terms require minimum $100 trade-in'' would suffice.

2. *Disclosure of repayment terms.* The phrase ''terms of repayment'' generally has the same meaning as the ''payment schedule'' required to be disclosed under § 1026.18(g), the interest rate and payment summary table required to be disclosed pursuant to § 1026.18(s), or the projected payments table required to be disclosed pursuant to §§ 1026.37(c) and 1026.38(c), as applicable. Section 1026.24(d)(2)(ii) provides flexibility to creditors in making this disclosure for advertising purposes. Repayment terms may be expressed in a variety of ways in addition to an exact repayment schedule; this is particularly true for advertisements that do not contemplate a single specific transaction. Repayment terms, however, must reflect the consumer's repayment obligations over the full term of the loan, including any balloon payment, *see* comment 24(d)(2)–3, not just the repayment terms that will apply for a limited period of time. For example:

i. A creditor may use a unit-cost approach in making the required disclosure, such as ''48 monthly payments of $27.83 per $1,000 borrowed.''

ii. In an advertisement for credit secured by a dwelling, when any series of payments varies because of the inclusion of mortgage insurance premiums, a creditor may state the number and timing of payments, the fact that payments do not include amounts for mortgage insurance premiums, and that the actual payment obligation will be higher.

iii. In an advertisement for credit secured by a dwelling, when one series of monthly payments will apply for a limited period of time followed by a series of higher monthly payments for the remaining term of the loan, the advertisement must state the number and time period of each series of payments, and the amounts of each of those payments. For this purpose, the creditor must assume that the consumer makes the lower series of payments for the maximum allowable period of time.

3. *Balloon payment; disclosure of repayment terms.* In some transactions, a balloon payment will occur when the consumer only makes the minimum payments specified in an advertisement. A balloon payment results if paying the minimum payments does not fully amortize the outstanding balance by a specified date or time, usually the end of the term of the loan, and the consumer must repay the entire outstanding balance at such time. If a balloon payment will occur when the consumer only makes the minimum payments specified in an advertisement, the advertisement must state with equal prominence and in close proximity to the minimum payment statement the amount and timing of the balloon payment that will result if the consumer makes only the minimum payments for the maximum period of time that the consumer is permitted to make such payments.

4. *Annual percentage rate.* The advertised annual percentage rate may be expressed using the abbreviation "APR." The advertisement must also state, if applicable, that the annual percentage rate is subject to increase after consummation.

5. *Use of examples.* A creditor may use illustrative credit transactions to make the necessary disclosures under §1026.24(d)(2). That is, where a range of possible combinations of credit terms is offered, the advertisement may use examples of typical transactions, so long as each example contains all of the applicable terms required by §1026.24(d). The examples must be labeled as such and must reflect representative credit terms made available by the creditor to present and prospective customers.

24(e) Catalogs or Other Multiple-Page Advertisements; Electronic Advertisements

1. *Definition.* The multiple-page advertisements to which this section refers are advertisements consisting of a series of sequentially numbered pages—for example, a supplement to a newspaper. A mailing consisting of several separate flyers or pieces of promotional material in a single envelope does not constitute a single multiple-page advertisement for purposes of §1026.24(e).

2. *General.* Section 1026.24(e) permits creditors to put credit information together in one place in a catalog or other multiple-page advertisement or in an electronic advertisement (such as an advertisement appearing on an Internet Web site). The rule applies only if the advertisement contains one or more of the triggering terms from §1026.24(d)(1). A list of different annual percentage rates applicable to different balances, for example, does not trigger further disclosures under §1026.24(d)(2) and so is not covered by §1026.24(e).

3. *Representative examples.* The table or schedule must state all the necessary information for a representative sampling of amounts of credit. This must reflect amounts of credit the creditor actually offers, up to and including the higher-priced items. This does not mean that the chart must make the disclosures for the single most expensive item the seller offers, but only that the chart cannot be limited to information about less expensive sales when the seller commonly offers a distinct level of more expensive goods or services. The range of transactions shown in the table or schedule in a particular catalog or multiple-page advertisement need not exceed the range of transactions actually offered in that advertisement.

4. *Electronic advertisement.* If an electronic advertisement (such as an advertisement appearing on an Internet Web site) contains the table or schedule permitted under §1026.24(e)(1), any statement of terms set forth in §1026.24(d)(1) appearing anywhere else in the advertisement must clearly direct the consumer to the location where the table or schedule begins. For example, a term triggering additional disclosures may be accompanied by a link that directly takes the consumer to the additional information.

24(f) Disclosure of Rates and Payments in Advertisements for Credit Secured by a Dwelling

1. *Applicability.* The requirements of §1026.24(f)(2) apply to advertisements for loans where more than one simple annual rate of interest will apply. The requirements of §1026.24(f)(3)(i)(A) require a clear and conspicuous disclosure of each payment that will apply over the term of the loan. In determining whether a payment will apply when the consumer may choose to make a series of lower monthly payments that will apply for a limited period of time, the creditor must assume that the consumer makes the series of lower payments for the maximum allowable period of time. *See* comment 24(d)(2)–2.iii. However, for purposes of §1026.24(f), the creditor may, but need not, assume that specific events which trigger changes to the simple annual rate of interest or to the applicable payments will occur. For example:

i. *Fixed-rate conversion loans.* If a loan program permits consumers to convert their variable-rate loans to fixed rate loans, the creditor need not assume that the fixed-rate conversion option, by itself, means that more than one simple annual rate of interest will apply to the loan under §1026.24(f)(2) and need not disclose as a separate payment under §1026.24(f)(3)(i)(A) the payment that would apply if the consumer exercised the fixed-rate conversion option.

ii. *Preferred-rate loans.* Some loans contain a preferred-rate provision, where the rate will increase upon the occurrence of some event, such as the consumer-employee leaving the creditor's employ or the consumer closing an existing deposit account with the creditor or the consumer revoking an election to make automated payments. A creditor need not assume that the preferred-rate provision, by itself, means that more than one simple annual rate of interest will apply to the loan under §1026.24(f)(2) and the payments that would apply upon occurrence of the event that triggers the rate increase need not be disclosed as a separate payment under §1026.24(f)(3)(i)(A).

iii. *Rate reductions.* Some loans contain a provision where the rate will decrease upon the occurrence of some event, such as if the consumer makes a series of payments on time. A creditor need not assume that the rate reduction provision, by itself, means that more than one simple annual rate of interest will apply to the loan under §1026.24(f)(2) and need not disclose the payments that would apply upon occurrence of the event that triggers the rate reduction as a separate payment under §1026.24(f)(3)(i)(A).

2. *Equal prominence, close proximity.* Information required to be disclosed under §§1026.24(f)(2)(i) and 1026.24(f)(3)(i) that is immediately next to or directly above or below the simple annual rate or payment amount (but not in a footnote) is deemed to be closely proximate to the listing. Information required to be disclosed under §§1026.24(f)(2)(i) and 1026.24(f)(3)(i)(A) and (B) that is in the same type size as the simple annual rate or payment amount is deemed to be equally prominent.

3. *Clear and conspicuous standard.* For more information about the applicable clear and conspicuous standard, see comment 24(b)–2.

4. *Comparisons in advertisements.* When making any comparison in an advertisement between actual or hypothetical credit payments or rates and the payments or rates available under the advertised product, the advertisement must state all applicable payments or rates for the advertised product and the time periods for which those payments or rates will apply, as required by this section.

5. *Application to variable-rate transactions—disclosure of rates.* In advertisements for variable-rate transactions, if a simple annual rate that applies at consummation is not based on the index and margin that will be used to make subsequent rate adjustments over the term of the loan, the requirements of §1026.24(f)(2)(i) apply.

6. *Reasonably current index and margin.* For the purposes of this section, an index and margin is considered reasonably current if:

i. For direct mail advertisements, it was in effect within 60 days before mailing;

ii. For advertisements in electronic form it was in effect within 30 days before the advertisement is sent to a consumer's email address, or in the case of an advertisement made on an Internet Web site, when viewed by the public; or

iii. For printed advertisements made available to the general public, including ones contained in a catalog, magazine, or other generally available publication, it was in effect within 30 days before printing.

24(f)(3) Disclosure of Payments

1. *Amounts and time periods of payments.* Section 1026.24(f)(3)(i) requires disclosure of the amounts and time periods of all payments that will apply over the term of the loan. This section may require disclosure of several payment amounts, including any balloon payment. For example, if an advertisement for credit secured by a dwelling offers $300,000 of credit with a 30-year loan term for a payment of $600 per month for the first six months, increasing to $1,500 per month after month six, followed by a balloon payment of $30,000 at the end of the loan term, the advertisement must disclose the amount and time periods of each of the two monthly payment streams, as well as the amount and timing of the balloon payment, with equal prominence and in close proximity to each other. However, if the final scheduled payment of a fully amortizing loan is not greater than two times the amount of any other regularly scheduled payment, the final payment need not be disclosed.

2. *Application to variable-rate transactions—disclosure of payments.* In advertisements for variable-rate transactions, if the payment that applies at consummation is not based on the index and margin that will be used to make subsequent payment adjustments over the term of the loan, the requirements of §1026.24(f)(3)(i) apply.

24(g) Alternative Disclosures—Television or Radio Advertisements

1. *Multi-purpose telephone number.* When an advertised telephone number provides a recording, disclosures should be provided early in the sequence to ensure that the consumer receives the required disclosures. For example, in providing several options—such as providing directions to the advertiser's place of business—the option allowing the consumer to request disclosures should be provided early in the telephone message to ensure that the option to request disclosures is not obscured by other information.

2. *Statement accompanying telephone number*. Language must accompany a telephone number indicating that disclosures are available by calling the telephone number, such as ''call 1–(800) 000–0000 for details about credit costs and terms.''

24(i) Prohibited Acts or Practices in Advertisements for Credit Secured by a Dwelling

1. *Comparisons in advertisements*. The requirements of §1026.24(i)(2) apply to all advertisements for credit secured by a dwelling, including radio and television advertisements. A comparison includes a claim about the amount a consumer may save under the advertised product. For example, a statement such as ''save $300 per month on a $300,000 loan'' constitutes an implied comparison between the advertised product's payment and a consumer's current payment.

2. *Misrepresentations about government endorsement*. A statement that the Federal Community Reinvestment Act entitles the consumer to refinance his or her mortgage at the low rate offered in the advertisement is prohibited because it conveys a misleading impression that the advertised product is endorsed or sponsored by the Federal government.

3. *Misleading claims of debt elimination*. The prohibition against misleading claims of debt elimination or waiver or forgiveness does not apply to legitimate statements that the advertised product may reduce debt payments, consolidate debts, or shorten the term of the debt. Examples of misleading claims of debt elimination or waiver or forgiveness of loan terms with, or obligations to, another creditor of debt include: ''Wipe-Out Personal Debts!'', ''New DEBT–FREE Payment'', ''Set yourself free; get out of debt today'', ''Refinance today and wipe your debt clean!'', ''Get yourself out of debt * * * Forever!'', and ''Pre-payment Penalty Waiver.''

SUBPART D—MISCELLANEOUS

Section 1026.25—Record Retention

25(a) General Rule

1. *Evidence of required actions*. The creditor must retain evidence that it performed the required actions as well as made the required disclosures. This includes, for example, evidence that the creditor properly handled adverse credit reports in connection with amounts subject to a billing dispute under §1026.13, and properly handled the refunding of credit balances under §§1026.11 and 1026.21.

2. *Methods of retaining evidence*. Adequate evidence of compliance does not necessarily mean actual paper copies of disclosure statements or other business records. The evidence may be retained by any method that reproduces records accurately (including computer programs). Unless otherwise required, the creditor need retain only enough information to reconstruct the required disclosures or other records. Thus, for example, the creditor need not retain each open-end periodic statement, so long as the specific information on each statement can be retrieved.

3. *Certain variable-rate transactions*. In variable-rate transactions that are subject to the disclosure requirements of §1026.19(b), written procedures for compliance with those requirements as well as a sample disclosure form for each loan program represent adequate evidence of compliance. (See comment 25(a)–2 pertaining to permissible methods of retaining the required disclosures.)

4. *Home equity plans*. In home equity plans that are subject to the requirements of §1026.40, written procedures for compliance with those requirements as well as a sample disclosure form and contract for each home equity program represent adequate evidence of compliance. (See comment 25(a)–2 pertaining to permissible methods of retaining the required disclosures.)

25(c) Records Related to Certain Requirements for Mortgage Loans.

25(c)(1) Records related to requirements for loans secured by real property or a cooperative unit.

1. *Evidence of required actions*. The creditor must retain evidence that it performed the required actions as well as made the required disclosures. This includes, for example, evidence that the creditor properly differentiated between affiliated and independent third party settlement service providers for determining good faith under §1026.19(e)(3); evidence that the creditor properly documented the reason for revisions under §1026.19(e)(3)(iv); or evidence that the creditor properly calculated average cost under §1026.19(f)(3)(ii).

2. *Mortgage brokers*. See §1026.19(e)(1)(ii)(B) for the responsibilities of mortgage brokers to comply with the requirements of §1026.25(c).

25(c)(2) Records Related to Requirements for Loan Originator Compensation

1. *Scope of records of loan originator compensation*. Section 1026.25(c)(2)(i) requires a creditor to maintain records sufficient to evidence all compensation it pays to a loan originator, as well as the compensation agreements that govern those payments, for three years after the date of the payments. Section 1026.25(c)(2)(ii) requires that a loan originator organization maintain records sufficient to evidence all compensation it receives from a creditor, a consumer, or another person and all compensation it pays to any individual loan originators, as well as the compensation agreements that govern

those payments or receipts, for three years after the date of the receipts or payments.

i. *Records sufficient to evidence payment and receipt of compensation.* Records are sufficient to evidence payment and receipt of compensation if they demonstrate the following facts: The nature and amount of the compensation; that the compensation was paid, and by whom; that the compensation was received, and by whom; and when the payment and receipt of compensation occurred. The compensation agreements themselves are to be retained in all circumstances consistent with §1026.25(c)(2)(i). The additional records that are sufficient necessarily will vary on a case-by-case basis depending on the facts and circumstances, particularly with regard to the nature of the compensation. For example, if the compensation is in the form of a salary, records to be retained might include copies of required filings under the Internal Revenue Code that demonstrate the amount of the salary. If the compensation is in the form of a contribution to or a benefit under a designated tax-advantaged plan, records to be maintained might include copies of required filings under the Internal Revenue Code or other applicable Federal law relating to the plan, copies of the plan and amendments thereto in which individual loan originators participate and the names of any loan originators covered by the plan, or determination letters from the Internal Revenue Service regarding the plan. If the compensation is in the nature of a commission or bonus, records to be retained might include a settlement agent ''flow of funds'' worksheet or other written record or a creditor closing instructions letter directing disbursement of fees at consummation. Where a loan originator is a mortgage broker, a disclosure of compensation or broker agreement required by applicable State law that recites the broker's total compensation for a transaction is a record of the amount actually paid to the loan originator in connection with the transaction, unless actual compensation deviates from the amount in the disclosure or agreement. Where compensation has been decreased to defray the cost, in whole or part, of an unforeseen increase in an actual settlement cost over an estimated settlement cost disclosed to the consumer pursuant to section 5(c) of RESPA (or omitted from that disclosure), records to be maintained are those documenting the decrease in compensation and reasons for it.

ii. *Compensation agreement.* For purposes of §1026.25(c)(2), a compensation agreement includes any agreement, whether oral, written, or based on a course of conduct that establishes a compensation arrangement between the parties (e.g., a brokerage agreement between a creditor and a mortgage broker or provisions of employment contracts between a creditor and an individual loan originator employee addressing payment of compensation). Where a compensation agreement is oral or based on a course of conduct and cannot itself be maintained, the records to be maintained are those, if any, evidencing the existence or terms of the oral or course of conduct compensation agreement. Creditors and loan originators are free to specify what transactions are governed by a particular compensation agreement as they see fit. For example, they may provide, by the terms of the agreement, that the agreement governs compensation payable on transactions consummated on or after some future effective date (in which case, a prior agreement governs transactions consummated in the meantime). For purposes of applying the record retention requirement to transaction-specific commissions, the relevant compensation agreement for a given transaction is the agreement pursuant to which compensation for that transaction is determined.

iii. *Three-year retention period.* The requirements in §1026.25(c)(2)(i) and (ii) that the records be retained for three years after the date of receipt or payment, as applicable, means that the records are retained for three years after each receipt or payment, as applicable, even if multiple compensation payments relate to a single transaction. For example, if a loan originator organization pays an individual loan originator a commission consisting of two separate payments of $1,000 each on June 5 and July 7, 2014, then the loan originator organization is required to retain records sufficient to evidence the two payments through June 4, 2017, and July 6, 2017, respectively.

2. *Example.* An example of the application of §1026.25(c)(2) to a loan originator organization is as follows: Assume a loan originator organization originates only transactions that are not subject to §1026.36(d)(2), thus all of its origination compensation is paid exclusively by creditors that fund its originations. Further assume that the loan originator organization pays its individual loan originator employees commissions and annual bonuses. The loan originator organization must retain a copy of the agreement with any creditor that pays the loan originator organization compensation for originating consumer credit transactions subject to §1026.36 and documentation evidencing the specific payment it receives from the creditor for each transaction originated. In addition, the loan originator organization must retain copies of the agreements with its individual loan originator employees governing their commissions and their annual bonuses and records of any specific commissions and bonuses paid.

25(c)(3) Records related to minimum standards for transactions secured by a dwelling.

1. *Evidence of compliance with repayment ability provisions.* A creditor must retain evidence of compliance with §1026.43 for three years after the date of consummation of a

consumer credit transaction covered by that section. (See comment 25(c)(3)–2 for guidance on the retention of evidence of compliance with the requirement to offer a consumer a loan without a prepayment penalty under §1026.43(g)(3).) If a creditor must verify and document information used in underwriting a transaction subject to §1026.43, the creditor shall retain evidence sufficient to demonstrate compliance with the documentation requirements of the rule. Although a creditor need not retain actual paper copies of the documentation used in underwriting a transaction subject to §1026.43, to comply with §1026.25(c)(3), the creditor must be able to reproduce such records accurately. For example, if the creditor uses a consumer's Internal Revenue Service (IRS) Form W–2 to verify the consumer's income, the creditor must be able to reproduce the IRS Form W–2 itself, and not merely the income information that was contained in the form.

2. *Dwelling-secured transactions and prepayment penalties.* If a transaction covered by §1026.43 has a prepayment penalty, the creditor must maintain records that document that the creditor complied with requirements for offering the consumer an alternative transaction that does not include a prepayment penalty under §1026.43(g)(3), (4), or (5). However, the creditor need not maintain records that document compliance with those provisions if a transaction is consummated without a prepayment penalty or if the creditor and consumer do not consummate a covered transaction. If a creditor offers a transaction with a prepayment penalty to a consumer through a mortgage broker, to evidence compliance with §1026.43(g)(4) the creditor should retain evidence of the alternative covered transaction presented to the mortgage broker, such as a rate sheet, and the agreement with the mortgage broker required by §1026.43(g)(4)(ii).

Section 1026.26—Use of Annual Percentage Rate in Oral Disclosures

1. *Application of rules.* The restrictions of §1026.26 apply only if the creditor chooses to respond orally to the consumer's request for credit cost information. Nothing in the regulation requires the creditor to supply rate information orally. If the creditor volunteers information (including rate information) through oral solicitations directed generally to prospective customers, as through a telephone solicitation, those communications may be advertisements subject to the rules in §§1026.16 and 1026.24.

26(a) Open-End Credit

1. *Information that may be given.* The creditor may state periodic rates in addition to the required annual percentage rate, but it need not do so. If the annual percentage rate is unknown because transaction charges, loan fees, or similar finance charges may be imposed, the creditor must give the corresponding annual percentage rate (that is, the periodic rate multiplied by the number of periods in a year, as described in §§1026.6(a)(1)(ii) and (b)(4)(i)(A) and 1026.7(a)(4) and (b)(4)). In such cases, the creditor may, but need not, also give the consumer information about other finance charges and other charges.

26(b) Closed-End Credit

1. *Information that may be given.* The creditor may state other annual or periodic rates that are applied to an unpaid balance, along with the required annual percentage rate. This rule permits disclosure of a simple interest rate, for example, but not an add-on, discount, or similar rate. If the creditor cannot give a precise annual percentage rate in its oral response because of variables in the transaction, it must give the annual percentage rate for a comparable sample transaction; in this case, other cost information may, but need not, be given. For example, the creditor may be unable to state a precise annual percentage rate for a mortgage loan without knowing the exact amount to be financed, the amount of loan fees or mortgage insurance premiums, or similar factors. In this situation, the creditor should state an annual percentage rate for a sample transaction; it may also provide information about the consumer's specific case, such as the contract interest rate, points, other finance charges, and other charges.

Section 1026.27—Language of Disclosures

1. *Subsequent disclosures.* If a creditor provides account-opening disclosures in a language other than English, subsequent disclosures need not be in that other language. For example, if the creditor gave Spanish-language account-opening disclosures, periodic statements and change-in-terms notices may be made in English.

Section 1026.28—Effect on State Laws

28(a) Inconsistent Disclosure Requirements

1. *General.* There are three sets of preemption criteria: One applies to the general disclosure and advertising rules of the regulation, and two apply to the credit billing provisions. Section 1026.28 also provides for Bureau determinations of preemption. For purposes of determining whether a State law is inconsistent with the requirements of sections 4 and 5 of RESPA (other than the RESPA section 5(c) requirements regarding provision of a list of certified homeownership counselors) and §§1026.19(e) and (f), 1026.37, and 1026.38 under §1026.28, any reference to ''creditor'' in §1026.28 or this commentary includes a creditor, a mortgage broker, or a settlement agent, as applicable.

2. *Rules for chapters 1, 2, and 3.* The standard for judging whether state laws that cover the types of requirements in chapters 1 (General provisions), 2 (Credit transactions), and 3 (Credit advertising) of the Act are inconsistent and therefore preempted, is contradiction of the Federal law. Examples of laws that would be preempted include:

i. A state law that requires use of the term *finance charge,* but defines the term to include fees that the Federal law excludes, or to exclude fees the Federal law includes.

ii. A state law that requires a label such as *nominal annual interest rate* to be used for what the Federal law calls the *annual percentage rate.*

3. *Laws not contradictory to chapters 1, 2, and 3.* i. Generally, state law requirements that call for the disclosure of items of information not covered by the Federal law, or that require more detailed disclosures, do not contradict the Federal requirements. Examples of laws that are not preempted include:

A. A state law that requires disclosure of the minimum periodic payment for open-end credit, even though not required by §1026.7.

B. A state law that requires contracts to contain warnings such as: ''Read this contract before you sign. Do not sign if any spaces are left blank. You are entitled to a copy of this contract.''

ii. Similarly, a state law that requires itemization of the amount financed does not automatically contradict the permissive itemization under §1026.18(c). However, a state law requirement that the itemization appear with the disclosure of the amount financed in the segregated closed-end credit disclosures is inconsistent, and this location requirement would be preempted.

4. *Creditor's options.* Before the Bureau makes a determination about a specific state law, the creditor has certain options.

i. Since the prohibition against giving the state disclosures does not apply until the Bureau makes its determination, the creditor may choose to give state disclosures until the Bureau formally determines that the state law is inconsistent. (The Bureau will provide sufficient time for creditors to revise forms and procedures as necessary to conform to its determinations.) Under this first approach, as in all cases, the Federal disclosures must be clear and conspicuous, and the closed-end disclosures must be properly segregated in accordance with §1026.17(a)(1). This ability to give state disclosures relieves any uncertainty that the creditor might have prior to Bureau determinations of inconsistency.

ii. As a second option, the creditor may apply the preemption standards to a state law, conclude that it is inconsistent, and choose not to give the state-required disclosures. However, nothing in §1026.28(a) provides the creditor with immunity for violations of state law if the creditor chooses *not* to make state disclosures and the Bureau later determines that the state law is not preempted.

5. *Rules for correction of billing errors and regulation of credit reports.* The preemption criteria for the fair credit billing provisions set forth in §1026.28 have two parts. With respect to the rules on correction of billing errors and regulation of credit reports (which are in §1026.13), §1026.28(a)(2)(i) provides that a state law is inconsistent and preempted if its requirements are different from the Federal law. An exception is made, however, for state laws that allow the consumer to inquire about an account and require the creditor to respond to such inquiries beyond the time limits in the Federal law. Such a state law is not preempted with respect to the extra time period. For example, §1026.13 requires the consumer to submit a written notice of billing error within 60 days after transmittal of the periodic statement showing the alleged error. If a state law allows the consumer 90 days to submit a notice, the state law remains in effect to provide the extra 30 days. Any state law disclosures concerning this extended state time limit must reflect the qualifications and conform to the format specified in §1026.28(a)(2)(i). Examples of laws that would be preempted include:

i. A state law that has a narrower or broader definition of *billing error.*

ii. A state law that requires the creditor to take different steps to resolve errors.

iii. A state law that provides different timing rules for error resolution (subject to the exception discussed above).

6. *Rules for other fair credit billing provisions.* The second part of the criteria for fair credit billing relates to the other rules implementing chapter 4 of the Act (addressed in §§1026.4(c)(8), 1026.5(b)(2)(ii), 1026.6(a)(5) and (b)(5)(iii), 1026.7(a)(9) and (b)(9), 1026.9(a), 1026.10, 1026.11, 1026.12(c) through (f), 1026.13, and 1026.21). Section 1026.28(a)(2)(ii) provides that the test of inconsistency is whether the creditor can comply with state law without violating Federal law. For example:

i. A state law that allows the card issuer to offset the consumer's credit-card indebtedness against funds held by the card issuer would be preempted, since §1026.12(d) prohibits such action.

ii. A state law that requires periodic statements to be sent more than 14 days before the end of a free-ride period would not be preempted.

iii. A state law that permits consumers to assert claims and defenses against the card issuer without regard to the $50 and 100-mile limitations of §1026.12(c)(3)(ii) would not be preempted.

iv. In paragraphs ii. and iii. of this comment, compliance with state law would involve no violation of the Federal law.

7. *Who may receive a chapter 4 determination*. Only states (through their authorized officials) may request and receive determinations on inconsistency with respect to the fair credit billing provisions.

8. *Preemption determination—Arizona*. The Bureau recognizes state law preemption determinations made by the Board of Governors of the Federal Reserve System prior to July 21, 2011, until and unless the Bureau makes and publishes any contrary determination. Effective October 1, 1983, the Board of Governors determined that the following provisions in the state law of Arizona are preempted by the Federal law:

i. Section 44–287 B.5—Disclosure of final cash price balance. This provision is preempted in those transactions in which the amount of the final cash price balance is the same as the Federal amount financed, since in such transactions the state law requires the use of a term different from the Federal term to represent the same amount.

ii. Section 44–287 B.6—Disclosure of finance charge. This provision is preempted in those transactions in which the amount of the finance charge is different from the amount of the Federal finance charge, since in such transactions the state law requires the use of the same term as the Federal law to represent a different amount.

iii. Section 44–287 B.7—Disclosure of the time balance. The time balance disclosure provision is preempted in those transactions in which the amount is the same as the amount of the Federal total of payments, since in such transactions the state law requires the use of a term different from the Federal term to represent the same amount.

9. *Preemption determination—Florida*. The Bureau recognizes state law preemption determinations made by the Board of Governors of the Federal Reserve System prior to July 21, 2011, until and unless the Bureau makes and publishes any contrary determination. Effective October 1, 1983, the Board of Governors determined that the following provisions in the state law of Florida are preempted by the Federal law:

i. Sections 520.07(2)(f) and 520.34(2)(f)—Disclosure of amount financed. This disclosure is preempted in those transactions in which the amount is different from the Federal amount financed, since in such transactions the state law requires the use of the same term as the Federal law to represent a different amount.

ii. Sections 520.07(2)(g), 520.34(2)(g), and 520.35(2)(d)—Disclosure of finance charge and a description of its components. The finance charge disclosure is preempted in those transactions in which the amount of the finance charge is different from the Federal amount, since in such transactions the state law requires the use of the same term as the Federal law to represent a different amount. The requirement to describe or itemize the components of the finance charge, which is also included in these provisions, is not preempted.

iii. Sections 520.07(2)(h) and 520.34(2)(h)—Disclosure of total of payments. The total of payments disclosure is preempted in those transactions in which the amount differs from the amount of the Federal total of payments, since in such transactions the state law requires the use of the same term as the Federal law to represent a different amount than the Federal law.

iv. Sections 520.07(2)(i) and 520.34(2)(i)—Disclosure of deferred payment price. This disclosure is preempted in those transactions in which the amount is the same as the Federal total sale price, since in such transactions the state law requires the use of a different term than the Federal law to represent the same amount as the Federal law.

10. *Preemption determination—Missouri*. The Bureau recognizes state law preemption determinations made by the Board of Governors of the Federal Reserve System prior to July 21, 2011, until and unless the Bureau makes and publishes any contrary determination. Effective October 1, 1983, the Board of Governors determined that the following provisions in the state law of Missouri are preempted by the Federal law:

i. Sections 365.070–6(9) and 408.260–5(6)—Disclosure of principal balance. This disclosure is preempted in those transactions in which the amount of the principal balance is the same as the Federal amount financed, since in such transactions the state law requires the use of a term different from the Federal term to represent the same amount.

ii. Sections 365.070–6(10) and 408.260–5(7)—Disclosure of time price differential and time charge, respectively. These disclosures are preempted in those transactions in which the amount is the same as the Federal finance charge, since in such transactions the state law requires the use of a term different from the Federal law to represent the same amount.

iii. Sections 365.070–2 and 408.260–2—Use of the terms *time price differential* and *time charge* in certain notices to the buyer. In those transactions in which the state disclosure of the time price differential or time charge is preempted, the use of the terms in this notice also is preempted. The notice itself is not preempted.

iv. Sections 365.070–6(11) and 408.260–5(8)—Disclosure of time balance. The time balance disclosure is preempted in those transactions in which the amount is the same as the amount of the Federal total of payments, since in such transactions the state law requires the use of a different term than the Federal law to represent the same amount.

v. Sections 365.070–6(12) and 408.260–5(9)—Disclosure of time sale price. This disclosure is preempted in those transactions in which the amount is the same as the Federal total sale price, since in such transactions the state law requires the use of a different term from the Federal law to represent the same amount.

11. *Preemption determination—Mississippi.* The Bureau recognizes state law preemption determinations made by the Board of Governors of the Federal Reserve System prior to July 21, 2011, until and unless the Bureau makes and publishes any contrary determination. Effective October 1, 1984, the Board of Governors determined that the following provision in the state law of Mississippi is preempted by the Federal law:

i. Section 63–19–31(2)(g)—Disclosure of finance charge. This disclosure is preempted in those cases in which the term *finance charge* would be used under state law to describe a different amount than the finance charge disclosed under Federal law.

12. *Preemption determination—South Carolina.* The Bureau recognizes state law preemption determinations made by the Board of Governors of the Federal Reserve System prior to July 21, 2011, until and unless the Bureau makes and publishes any contrary determination. Effective October 1, 1984, the Board of Governors determined that the following provision in the state law of South Carolina is preempted by the Federal law.

i. Section 37–10–102(c)—Disclosure of due-on-sale clause. This provision is preempted, but only to the extent that the creditor is required to include the disclosure with the segregated Federal disclosures. If the creditor may comply with the state law by placing the due-on-sale notice apart from the Federal disclosures, the state law is not preempted.

13. *Preemption determination—Arizona.* The Bureau recognizes state law preemption determinations made by the Board of Governors of the Federal Reserve System prior to July 21, 2011, until and unless the Bureau makes and publishes any contrary determination.

i. Effective October 1, 1986, the Board of Governors determined that the following provision in the state law of Arizona is preempted by the Federal law:

A. Section 6–621A.2—Use of the term *the total sum of* $_______ in certain notices provided to borrowers. This term describes the same item that is disclosed under Federal law as the *total of payments.* Since the state law requires the use of a different term than Federal law to describe the same item, the state-required term is preempted. The notice itself is not preempted.

ii. Note: The state disclosure notice that incorporated the above preempted term was amended on May 4, 1987, to provide that disclosures must now be made pursuant to the Federal disclosure provisions.

14. *Preemption determination—Indiana.* The Bureau recognizes state law preemption determinations made by the Board of Governors of the Federal Reserve System prior to July 21, 2011, until and unless the Bureau makes and publishes any contrary determination. Effective October 1, 1988, the Board of Governors determined that the following provision in the state law of Indiana is preempted by the Federal law:

i. Section 23–2–5–8—Inclusion of the loan broker's fees and charges in the calculation of, among other items, the finance charge and annual percentage rate disclosed to potential borrowers. This disclosure is inconsistent with section 106(a) and §1026.4(a) of the Federal statute and regulation, respectively, and is preempted in those instances where the use of the same term would disclose a different amount than that required to be disclosed under Federal law.

15. *Preemption determination—Wisconsin.* The Bureau recognizes state law preemption determinations made by the Board of Governors of the Federal Reserve System prior to July 21, 2011, until and unless the Bureau makes and publishes any contrary determination. Effective October 1, 1991, the Board of Governors determined that the following provisions in the state law of Wisconsin are preempted by the Federal law:

i. Section 422.308(1)—the disclosure of the annual percentage rate in cases where the amount of the annual percentage rate disclosed to consumers under the state law differs from the amount that would be disclosed under Federal law, since in those cases the state law requires the use of the same term as the Federal law to represent a different amount than the Federal law.

ii. Section 766.565(5)—the provision permitting a creditor to include in an open-end home equity agreement authorization to declare the account balance due and payable upon receiving notice of termination from a non-obligor spouse, since such provision is inconsistent with the purpose of the Federal law.

28(b) Equivalent Disclosure Requirements

1. *General.* A state disclosure may be substituted for a Federal disclosure only *after* the Bureau has made a finding of substantial similarity. Thus, the creditor may not unilaterally choose to make a state disclosure in place of a Federal disclosure, even if it believes that the state disclosure is substantially similar. Since the rule stated in §1026.28(b) does not extend to any requirement relating to the finance charge or annual percentage rate, no state provision on computation, description, or disclosure of these terms may be substituted for the Federal provision.

28(d) Special Rule for Credit and Charge Cards

1. *General.* The standard that applies to preemption of state laws as they affect

transactions of the type subject to §§1026.60 and 1026.9(e) differs from the preemption standards generally applicable under the Truth in Lending Act. The Fair Credit and Charge Card Disclosure Act fully preempts state laws relating to the disclosure of credit information in consumer credit or charge card applications or solicitations. (For purposes of this section, a single credit or charge card application or solicitation that may be used to open either an account for consumer purposes or an account for business purposes is deemed to be a "consumer credit or charge card application or solicitation.") For example, a state law requiring disclosure of credit terms in direct mail solicitations for consumer credit card accounts is preempted. A state law requiring disclosures in telephone applications for consumer credit card accounts also is preempted, even if it applies to applications initiated by the consumer rather than the issuer, because the state law relates to the disclosure of credit information in applications or solicitations within the general field of preemption, that is, consumer credit and charge cards.

2. *Limitations on field of preemption.* Preemption under the Fair Credit and Charge Card Disclosure Act does not extend to state laws applying to types of credit other than open-end consumer credit and charge card accounts. Thus, for example, a state law is not preempted as it applies to disclosures in credit and charge card applications and solicitations solely for business-purpose accounts. On the other hand, state credit disclosure laws will not apply to a single application or solicitation to open either an account for consumer purposes or an account for business purposes. Such "dual purpose" applications and solicitations are treated as "consumer credit or charge card applications or solicitations" under this section and state credit disclosure laws applicable to them are preempted. Preemption under this statute does not extend to state laws applicable to home equity plans; preemption determinations in this area are based on the Home Equity Loan Consumer Protection Act, as implemented in §1026.40 of the regulation.

3. *Laws not preempted.* State laws relating to disclosures concerning credit and charge cards other than in applications, solicitations, or renewal notices are not preempted under §1026.28(d). In addition, state laws regulating the terms of credit and charge card accounts are not preempted, nor are laws preempted that regulate the form or content of information unrelated to the information required to be disclosed under §§1026.60 and 1026.9(e). Finally, state laws concerning the enforcement of the requirements of §§1026.60 and 1026.9(e) and state laws prohibiting unfair or deceptive acts or practices concerning credit and charge card applications, solicitations and renewals are not preempted. Examples of laws that are not preempted include:

i. A state law that requires card issuers to offer a grace period or that prohibits certain fees in credit and charge card transactions.

ii. A state retail installment sales law or a state plain language law, except to the extent that it regulates the disclosure of credit information in applications, solicitations and renewals of accounts of the type subject to §§1026.60 and 1026.9(e).

iii. A state law requiring notice of a consumer's rights under antidiscrimination or similar laws or a state law requiring notice about credit information available from state authorities.

Section 1026.29—State Exemptions

29(a) General Rule

1. *Classes eligible.* The state determines the classes of transactions for which it will request an exemption, and makes its application for those classes. Classes might be, for example, all open-end credit transactions, all open-end and closed-end transactions, or all transactions in which the creditor is a bank.

2. *Substantial similarity.* The "substantially similar" standard requires that State statutory or regulatory provisions and State interpretations of those provisions be generally the same as the Federal Act and Regulation Z. This includes the requirement that State provisions for reimbursement to consumers for overcharges be at least equivalent to those required in section 108 of the Act. A State will be eligible for an exemption even if its law covers classes of transactions not covered by the Federal law. For example, if a State's law covers agricultural credit, this will not prevent the Bureau from granting an exemption for consumer credit, even though agricultural credit is not covered by the Federal law. For transactions subject to §1026.19(e) and (f), §1026.29(a)(1) requires that the State statutory or regulatory provisions and State interpretations of those provisions require disclosures that are generally the same as the disclosures required by §1026.19(e) and (f), with form and content as prescribed by §§1026.37 and 1026.38.

3. *Adequate enforcement.* The standard requiring adequate provision for enforcement generally means that appropriate state officials must be authorized to enforce the state law through procedures and sanctions comparable to those available to Federal enforcement agencies. Furthermore, state law must make adequate provision for enforcement of the reimbursement rules.

4. *Exemptions granted.* i. The Bureau recognizes exemptions granted by the Board of Governors of the Federal Reserve System prior to July 21, 2011, until and unless the Bureau makes and publishes any contrary determination. Effective October 1, 1982, the Board of Governors granted the following exemptions from portions of the revised Truth in Lending Act:

A. *Maine*. Credit or lease transactions subject to the Maine Consumer Credit Code and its implementing regulations are exempt from chapters 2, 4 and 5 of the Federal Act. (The exemption does not apply to transactions in which a Federally chartered institution is a creditor or lessor.)

B. *Connecticut*. Credit transactions subject to the Connecticut Truth in Lending Act are exempt from chapters 2 and 4 of the Federal Act. (The exemption does not apply to transactions in which a Federally chartered institution is a creditor.)

C. *Massachusetts*. Credit transactions subject to the Massachusetts Truth in Lending Act are exempt from chapters 2 and 4 of the Federal Act. (The exemption does not apply to transactions in which a Federally chartered institution is a creditor.)

D. *Oklahoma*. Credit or lease transactions subject to the Oklahoma Consumer Credit Code are exempt from chapters 2 and 5 of the Federal Act. (The exemption does not apply to sections 132 through 135 of the Federal Act, nor does it apply to transactions in which a Federally chartered institution is a creditor or lessor.)

E. *Wyoming*. Credit transactions subject to the Wyoming Consumer Credit Code are exempt from chapter 2 of the Federal Act. (The exemption does not apply to transactions in which a Federally chartered institution is a creditor.)

ii. Although RESPA and its implementing Regulation X do not provide procedures for granting State exemptions, for transactions subject to §1026.19(e) and (f), compliance with the requirements of §§1026.19(e) and (f), 1026.37, and 1026.38 satisfies the requirements of sections 4 and 5 of RESPA (other than the RESPA section 5(c) requirements regarding provision of a list of certified homeownership counselors). If such a transaction is subject to one of the State exemptions previously granted by the Board of Governors and noted in comment 29(a)–4.i above, however, then compliance with the requirements of any State laws and regulations incorporating the requirements of §§1026.19(e) and (f), 1026.37, and 1026.38 likewise satisfies the requirements of sections 4 and 5 of RESPA (other than the RESPA section 5(c) requirements regarding provision of a list of certified homeownership counselors) and the provisions of Regulation X (12 CFR part 1024) implementing those sections of RESPA.

29(b) Civil Liability

1. *Not eligible for exemption*. The provision that an exemption may not extend to sections 130 and 131 of the Act assures that consumers retain access to both Federal and state courts in seeking damages or civil penalties for violations, while creditors retain the defenses specified in those sections.

Section 1026.30—Limitation on Rates

1. *Scope of coverage*. i. The requirement of this section applies to consumer credit obligations secured by a dwelling (as dwelling is defined in §1026.2(a)(19)) in which the annual percentage rate may increase after consummation (or during the term of the plan, in the case of open-end credit) as a result of an increase in the interest rate component of the finance charge—whether those increases are tied to an index or formula or are within a creditor's discretion. The section applies to credit sales as well as loans. Examples of credit obligations subject to this section include:

A. Dwelling-secured credit obligations that require variable-rate disclosures under the regulation because the interest rate may increase during the term of the obligation.

B. Dwelling-secured open-end credit plans entered into before November 7, 1989 (the effective date of the home equity rules) that are not considered variable-rate obligations for purposes of disclosure under the regulation but where the creditor reserves the contractual right to increase the interest rate—periodic rate and corresponding annual percentage rate—during the term of the plan.

ii. In contrast, credit obligations in which there is no contractual right to increase the interest rate during the term of the obligation are not subject to this section. Examples include:

A. ''Shared-equity'' or ''shared-appreciation'' mortgage loans that have a fixed rate of interest and a shared-appreciation feature based on the consumer's equity in the mortgaged property. (The appreciation share is payable in a lump sum at a specified time.)

B. Dwelling-secured fixed-rate closed-end balloon-payment mortgage loans and dwelling-secured fixed-rate open-end plans with a stated term that the creditor may renew at maturity. (Contrast with the renewable balloon-payment mortgage instrument described in comment 17(c)(1)–11.)

C. Dwelling-secured fixed-rate closed-end multiple advance transactions in which each advance is disclosed as a separate transaction.

D. ''Price level adjusted mortgages'' or other indexed mortgages that have a fixed rate of interest but provide for periodic adjustments to payments and the loan balance to reflect changes in an index measuring prices or inflation.

iii. The requirement of this section does not apply to credit obligations entered into prior to December 9, 1987. Consequently, new advances under open-end credit plans existing prior to December 9, 1987, are not subject to this section.

2. *Refinanced obligations*. On or after December 9, 1987, when a credit obligation is refinanced, as defined in §1026.20(a), the new obligation is subject to this section if it is

dwelling-secured and allows for increases in the interest rate.

3. *Assumptions.* On or after December 9, 1987, when a credit obligation is assumed, as defined in §1026.20(b), the obligation becomes subject to this section if it is dwelling-secured and allows for increases in the interest rate.

4. *Modifications of obligations.* The modification of an obligation, regardless of when the obligation was entered into, is generally not covered by this section. For example, increasing the credit limit on a dwelling-secured, open-end plan with a variable interest rate entered into before the effective date of the rule does not make the obligation subject to this section. If, however, a security interest in a dwelling is added on or after December 9, 1987, to a credit obligation that allows for interest rate increases, the obligation becomes subject to this section. Similarly, if a variable interest rate feature is added to a dwelling-secured credit obligation, the obligation becomes subject to this section.

5. *Land trusts.* In some states, a land trust is used in residential real estate transactions. (See discussion in comment 3(a)–8.) If a consumer-purpose loan that allows for interest rate increases is secured by an assignment of a beneficial interest in a land trust that holds title to a consumer's dwelling, that loan is subject to this section.

6. *Relationship to other sections.* Unless otherwise provided for in the commentary to this section, other provisions of the regulation such as definitions, exemptions, rules and interpretations also apply to this section where appropriate. To illustrate:

i. An adjustable interest rate business-purpose loan is not subject to this section even if the loan is secured by a dwelling because such credit extensions are not subject to the regulation. (See generally §1026.3(a).)

ii. Creditors subject to this section are only those that fall within the definition of a creditor in §1026.2(a)(17).

7. *Consumer credit contract.* Creditors are required to specify a lifetime maximum interest rate in their credit contracts—the instrument that creates personal liability and generally contains the terms and conditions of the agreement (for example, a promissory note or home-equity line of credit agreement). In some states, the signing of a commitment letter may create a binding obligation, for example, constituting *consummation* as defined in §1026.2(a)(13). The maximum interest rate must be included in the credit contract, but a creditor may include the rate ceiling in the commitment instrument as well.

8. *Manner of stating the maximum interest rate.* The maximum interest rate must be stated in the credit contract either as a specific amount or in any other manner that would allow the consumer to easily ascertain, at the time of entering into the obligation, what the rate ceiling will be over the term of the obligation.

i. For example, the following statements would be sufficiently specific:

A. The maximum interest rate will not exceed X%.

B. The interest rate will never be higher than X percentage points above the initial rate of Y%.

C. The interest rate will not exceed X%, or X percentage points above [a rate to be determined at some future point in time], whichever is less.

D. The maximum interest rate will not exceed X%, or the state usury ceiling, whichever is less.

ii. The following statements would not comply with this section:

A. The interest rate will never be higher than X percentage points over the prevailing market rate.

B. The interest rate will never be higher than X percentage points above [a rate to be determined at some future point in time].

C. The interest rate will not exceed the state usury ceiling which is currently X%.

iii. A creditor may state the maximum rate in terms of a maximum annual percentage rate that may be imposed. Under an open-end credit plan, this normally would be the corresponding annual percentage rate. (*See generally* §1026.6(a)(1)(ii) and (b)(4)(i)(A).)

9. *Multiple interest rate ceilings.* Creditors are not prohibited from setting multiple interest rate ceilings. For example, on loans with multiple variable-rate features, creditors may establish a maximum interest rate for each feature. To illustrate, in a variable-rate loan that has an option to convert to a fixed rate, a creditor may set one maximum interest rate for the initially imposed index-based variable-rate feature and another for the conversion option. Of course, a creditor may establish one maximum interest rate applicable to all features.

10. *Interest rate charged after default.* State law may allow an interest rate after default higher than the contract rate in effect at the time of default; however, the interest rate after default is subject to a maximum interest rate set forth in a credit obligation that is otherwise subject to this section. This rule applies only in situations in which a post-default agreement is still considered part of the original obligation.

11. *Increasing the maximum interest rate—general rule.* Generally, a creditor may not increase the maximum interest rate originally set on a credit obligation subject to this section unless the consumer and the creditor enter into a new obligation. Therefore, under an open-end plan, a creditor may not increase the rate ceiling imposed merely because there is an increase in the credit

limit. If an open-end plan is closed and another opened, a new rate ceiling may be imposed. Furthermore, where an open-end plan has a fixed maturity and a creditor renews the plan at maturity, or enters into a closed-end credit transaction, a new maximum interest rate may be set at that time. If the open-end plan provides for a repayment phase, the maximum interest rate cannot be increased when the repayment phase begins unless the agreement provided for such an increase. For a closed-end credit transaction, a new maximum interest rate may be set only if the transaction is satisfied and replaced by a new obligation. (The exceptions in §1026.20(a)(1)–(5) which limit what transactions are considered refinancings for purposes of disclosure do not apply with respect to increasing a rate ceiling that has been imposed; if a transaction is satisfied and replaced, the rate ceiling may be increased.)

12. *Increasing the maximum interest rate—assumption of an obligation.* If an obligation subject to this section is assumed by a new obligor and the original obligor is released from liability, the maximum interest rate set on the obligation may be increased as part of the assumption agreement. (This rule applies whether or not the transaction constitutes an assumption as defined in §1026.20(b).)

Subpart E—Special Rules for Certain Home Mortgage Transactions

Section 1026.31—General Rules

31(c) Timing of Disclosure

1. *Furnishing disclosures.* Disclosures are considered furnished when received by the consumer.

31(c)(1) Disclosures for high-cost mortgages.

1. *Pre-consummation or account opening waiting period.* A creditor must furnish §1026.32 disclosures at least three business days prior to consummation for a closed-end, high-cost mortgage and at least three business days prior to account opening for an open-end, high-cost mortgage. Under §1026.32, "business day" has the same meaning as the rescission rule in comment 2(a)(6)–2—all calendar days except Sundays and the Federal legal holidays listed in 5 U.S.C. 6103(a). However, while the disclosure rule under §§1026.15 and 1026.23 extends to midnight of the third business day, the rule under §1026.32 does not. For example, under §1026.32, if disclosures were provided on a Friday, consummation or account opening could occur any time on Tuesday, the third business day following receipt of the disclosures. If the timing of the rescission rule were to be used, consummation or account opening could not occur until after midnight on Tuesday.

31(c)(1)(i) Change in Terms

1. *Redisclosure required.* Creditors must provide new disclosures when a change in terms makes disclosures previously provided under §1026.32(c) inaccurate, including disclosures based on and labeled as an estimate. A change in terms may result from a formal written agreement or otherwise.

2. *Premiums or other charges financed at consummation or account opening.* If the consumer finances the payment of premiums or other charges as permitted under §1026.34(a)(10), and as a result the monthly payment differs from what was previously disclosed under §1026.32, redisclosure is required and a new three-day waiting period applies.

31(c)(1)(ii) Telephone disclosures.

1. *Telephone disclosures.* Disclosures by telephone must be furnished at least three business days prior to consummation or account opening, as applicable, calculated in accordance with the timing rules under §1026.31(c)(1).

31(c)(1)(iii) Consumer's waiver of waiting period before consummation or account opening.

31(c)(1)(iii) Consumer's waiver of waiting period before consummation or account opening.

1. *Modification or waiver.* A consumer may modify or waive the right to the three-day waiting period only after receiving the disclosures required by §1026.32 and only if the circumstances meet the criteria for establishing a bona fide personal financial emergency under §1026.23(e). Whether these criteria are met is determined by the facts surrounding individual situations. The imminent sale of the consumer's home at foreclosure during the three-day period is one example of a bona fide personal financial emergency. Each consumer entitled to the three-day waiting period must sign the handwritten statement for the waiver to be effective.

31(c)(2) Disclosures for Reverse Mortgages

1. *Business days.* For purposes of providing reverse mortgage disclosures, "business day" has the same meaning as in comment 31(c)(1)–1—all calendar days except Sundays and the Federal legal holidays listed in 5 U.S.C. 6103(a). This means if disclosures are provided on a Friday, consummation could occur any time on Tuesday, the third business day following receipt of the disclosures.

2. *Open-end plans.* Disclosures for open-end reverse mortgages must be provided at least three business days before the first transaction under the plan (*see* §1026.5(b)(1)).

31(d) Basis of Disclosures and Use of Estimates

1. *Redisclosure.* Section 1026.31(d) allows the use of estimates when information necessary for an accurate disclosure is unknown to the creditor, provided that the disclosure is

clearly identified as an estimate. For purposes of Subpart E, the rule in §1026.31(c)(1)(i) requiring new disclosures when the creditor changes terms also applies to disclosures labeled as estimates.

31(d)(3) Per-Diem Interest

1. *Per-diem interest.* This paragraph applies to the disclosure of any numerical amount (such as the finance charge, annual percentage rate, or payment amount) that is affected by the amount of the per-diem interest charge that will be collected at consummation. If the amount of per-diem interest used in preparing the disclosures for consummation is based on the information known to the creditor at the time the disclosure document is prepared, the disclosures are considered accurate under this rule, and affected disclosures are also considered accurate, even if the disclosures were not labeled as estimates. (See comment 17(c)(2)(ii)–1 generally.)

31(h) Corrections and unintentional violations.

1. *Notice requirements.* Notice of a violation pursuant to §1026.31(h)(1) or (2) should be in writing. The notice should make the consumer aware of the choices available under §1026.31(h)(1)(iii) and (2)(iii). For notice to be adequate, the consumer should have at least 60 days in which to consider the available options and communicate a choice to the creditor or assignee.

2. *Reasonable time.* To claim the benefit of §1026.31(h), a creditor or assignee must implement appropriate restitution and the consumer's elected adjustment within a reasonable time after the consumer provides notice of that election to the creditor or assignee. What length of time is reasonable will depend on what changes to a loan or credit plan's documentation, disclosure, or terms are necessary to effectuate the adjustment. In general, implementing appropriate restitution and completing an adjustment within 30 days of the consumer's providing notice of the election can be considered reasonable.

Section 1026.32—Requirements for High-Cost Mortgages

32(a) Coverage

Paragraph 32(a)(1).

1. The term *high-cost mortgage* includes both a closed-end credit transaction and an open-end credit plan secured by the consumer's principal dwelling. For purposes of determining coverage under §1026.32, an open-end consumer credit transaction is the account opening of an open-end credit plan. An advance of funds or a draw on the credit line under an open-end credit plan subsequent to account opening does not constitute an open-end ''transaction.''

Paragraph 32(a)(1)(i).

1. *Average prime offer rate. High-cost mortgages* include closed- and open-end consumer credit transactions secured by the consumer's principal dwelling with an annual percentage rate that exceeds the average prime offer rate for a comparable transaction as of the date the interest rate is set by the specified amount. The term ''average prime offer rate'' is defined in §1026.35(a)(2).

2. *Comparable transaction.* Guidance for determining a comparable transaction is set forth in comments 35(a)(1)–1 and 35(a)(2)–2 and –3, which direct creditors to published tables of average prime offer rates for fixed- and variable-rate closed-end credit transactions. Creditors opening open-end credit plans must compare the annual percentage rate for the plan to the average prime offer rate for the most closely comparable closed-end transaction. To identify the most closely comparable closed-end transaction, the creditor should identify whether the credit plan is fixed- or variable-rate; if the plan is fixed-rate, the term of the plan to maturity; if the plan is variable-rate, the duration of any initial, fixed-rate period; and the date the interest rate for the plan is set. If a fixed-rate plan has no definite plan length, a creditor must use the average prime offer rate for a 30-year fixed-rate loan. If a variable-rate plan has an optional, fixed-rate feature, a creditor must use the rate table for variable-rate transactions. If a variable-rate plan has an initial, fixed-rate period that is not in whole years, a creditor must identify the most closely-comparable transaction by using the number of whole years closest to the actual fixed-rate period. For example, if a variable-rate plan has an initial fixed-rate period of 20 months, a creditor must use the average prime offer rate for a two-year adjustable-rate loan. If a variable-rate plan has no initial fixed-rate period, or if it has an initial fixed-rate period of less than one year, a creditor must use the average prime offer rate for a one-year adjustable-rate loan. Thus, for example, if the initial fixed-rate period is six months, a creditor must use the average prime offer rate for a one-year adjustable-rate loan.

3. *Rate set.* Comment 35(a)(1)–2 provides guidance for determining the average prime offer rate in effect on the date that the interest rate for the transaction is set.

Paragraph 32(a)(1)(i)(B).

1. *Loan amount less than $50,000.* The creditor must determine whether to apply the APR threshold in §1026.32(a)(1)(i)(B) based on the loan amount, which is the face amount of the note.

Paragraph 32(a)(1)(ii).

1. *Annual adjustment of $1,000 amount.* The $1,000 figure in §1026.32(a)(1)(ii)(B) is adjusted annually on January 1 by the annual percentage change in the CPI that was in effect on the preceding June 1. The Bureau will

publish adjustments after the June figures become available each year.

i. For 2015, $1,020, reflecting a 2 percent increase in the CPI–U from June 2013 to June 2014, rounded to the nearest whole dollar.

ii. For 2016, $1,017, reflecting a 0.2 percent decrease in the CPI–U from June 2014 to June 2015, rounded to the nearest whole dollar.

iii. For 2017, $1,029, reflecting a 1.1 percent increase in the CPI–U from June 2015 to June 2016, rounded to the nearest whole dollar.

iv. For 2018, $1,052, reflecting a 2.2 percent increase in the CPI–U from June 2016 to June 2017, rounded to the nearest whole dollar.

v. For 2019, $1,077, reflecting a 2.5 percent increase in the CPI–U from June 2017 to June 2018, rounded to the nearest whole dollar.

vi. For 2020, $1,099, reflecting a 2 percent increase in the CPI–U from June 2018 to June 2019, rounded to the nearest whole dollar.

vii. For 2021, $1,103, reflecting a 0.3 percent increase in the CPI–U from June 2019 to June 2020, rounded to the nearest whole dollar.

viii. For 2022, $1,148, reflecting a 4.2 percent increase in the CPI–U from June 2020 to June 2021, rounded to the nearest whole dollar.

ix. For 2023, $1,243, reflecting an 8.3 percent increase in the CPI–U from June 2021 to June 2022, rounded to the nearest whole dollar.

x. For 2024, $1,305, reflecting a 4.9 percent increase in the CPI–U from June 2022 to June 2023, rounded to the nearest whole dollar.

2. *Historical adjustment of $400 amount.* Prior to January 10, 2014, a mortgage loan was covered by §1026.32 if the total points and fees payable by the consumer at or before loan consummation exceeded the greater of $400 or 8 percent of the total loan amount. The $400 figure was adjusted annually on January 1 by the annual percentage change in the CPI that was in effect on the preceding June 1, as follows:

i. For 1996, $412, reflecting a 3 percent increase in the CPI–U from June 1994 to June 1995, rounded to the nearest whole dollar.

ii. For 1997, $424, reflecting a 2.9 percent increase in the CPI–U from June 1995 to June 1996, rounded to the nearest whole dollar.

iii. For 1998, $435, reflecting a 2.5 percent increase in the CPI–U from June 1996 to June 1997, rounded to the nearest whole dollar.

iv. For 1999, $441, reflecting a 1.4 percent increase in the CPI–U from June 1997 to June 1998, rounded to the nearest whole dollar.

v. For 2000, $451, reflecting a 2.3 percent increase in the CPI–U from June 1998 to June 1999, rounded to the nearest whole dollar.

vi. For 2001, $465, reflecting a 3.1 percent increase in the CPI–U from June 1999 to June 2000, rounded to the nearest whole dollar.

vii. For 2002, $480, reflecting a 3.27 percent increase in the CPI–U from June 2000 to June 2001, rounded to the nearest whole dollar.

viii. For 2003, $488, reflecting a 1.64 percent increase in the CPI–U from June 2001 to June 2002, rounded to the nearest whole dollar.

ix. For 2004, $499, reflecting a 2.22 percent increase in the CPI–U from June 2002 to June 2003, rounded to the nearest whole dollar.

x. For 2005, $510, reflecting a 2.29 percent increase in the CPI–U from June 2003 to June 2004, rounded to the nearest whole dollar.

xi. For 2006, $528, reflecting a 3.51 percent increase in the CPI–U from June 2004 to June 2005, rounded to the nearest whole dollar.

xii. For 2007, $547, reflecting a 3.55 percent increase in the CPI–U from June 2005 to June 2006, rounded to the nearest whole dollar.

xiii. For 2008, $561, reflecting a 2.56 percent increase in the CPI–U from June 2006 to June 2007, rounded to the nearest whole dollar.

xiv. For 2009, $583, reflecting a 3.94 percent increase in the CPI–U from June 2007 to June 2008, rounded to the nearest whole dollar.

xv. For 2010, $579, reflecting a 0.74 percent decrease in the CPI–U from June 2008 to June 2009, rounded to the nearest whole dollar.

xvi. For 2011, $592, reflecting a 2.2 percent increase in the CPI–U from June 2009 to June 2010, rounded to the nearest whole dollar.

xvii. For 2012, $611, reflecting a 3.2 percent increase in the CPI–U from June 2010 to June 2011, rounded to the nearest whole dollar.

xviii. For 2013, $625, reflecting a 2.3 percent increase in the CPI–U from June 2011 to June 2012, rounded to the nearest whole dollar.

xix. For 2014, $632, reflecting a 1.1 percent increase in the CPI–U from June 2012 to June 2013, rounded to the nearest whole dollar.

3. *Applicable threshold.* For purposes of §1026.32(a)(1)(ii), a creditor must determine the applicable points and fees threshold based on the face amount of the note (or, in the case of an open-end credit plan, the credit limit for the plan when the account is opened). However, the creditor must apply the allowable points and fees percentage to the ''total loan amount,'' as defined in §1026.32(b)(4). For closed-end credit transactions, the total loan amount may be different than the face amount of the note. The $20,000 amount in §1026.32(a)(1)(ii)(A) and (B) is adjusted annually on January 1 by the annual percentage change in the CPI that was in effect on the preceding June 1.

i. For 2015, $20,391, reflecting a 2 percent increase in the CPI–U from June 2013 to June 2014, rounded to the nearest whole dollar.

ii. For 2016, $20,350, reflecting a .2 percent decrease in the CPI–U from June 2014 to June 2015, rounded to the nearest whole dollar.

iii. For 2017, $20,579, reflecting a 1.1 percent increase in the CPI–U from June 2015 to June 2016, rounded to the nearest whole dollar.

iv. For 2018, $21,032, reflecting a 2.2 percent increase in the CPI–U from June 2016 to June 2017, rounded to the nearest whole dollar.

v. For 2019, $21,549, reflecting a 2.5 percent increase in the CPI–U from June 2017 to June 2018, rounded to the nearest whole dollar.

vi. For 2020, $21,980, reflecting a 2 percent increase in the CPI–U from June 2018 to June 2019, rounded to the nearest whole dollar.

vii. For 2021, $22,052 reflecting a 0.3 percent increase in the CPI–U from June 2019 to June 2020, rounded to the nearest whole dollar.

viii. For 2022, $22,969 reflecting a 4.2 percent increase in the CPI–U from June 2020 to June 2021, rounded to the nearest whole dollar.

ix. For 2023, $24,866 reflecting an 8.3 percent increase in the CPI–U from June 2021 to June 2022, rounded to the nearest whole dollar.

x. For 2024, $26,092, reflecting a 4.9 percent increase in the CPI–U from June 2022 to June 2023, rounded to the nearest whole dollar.

Paragraph 32(a)(1)(iii).

1. *Maximum period and amount.* Section 1026.32(a)(1)(iii) provides that a closed-end credit transaction or an open-end credit plan is a high-cost mortgage if, under the terms of the loan contract or open-end credit agreement, a creditor can charge either a prepayment penalty more than 36 months after consummation or account opening, or total prepayment penalties that exceed 2 percent of any amount prepaid. Section 1026.32(a)(1)(iii) applies only for purposes of determining whether a transaction is subject to the high-cost mortgage requirements and restrictions in §1026.32(c) and (d) and §1026.34. However, if a transaction is subject to those requirements and restrictions by operation of any provision of §1026.32(a)(1), including by operation of §1026.32(a)(1)(iii), then the transaction may not include a prepayment penalty. *See* §1026.32(d)(6). As a result, §1026.32(a)(1)(iii) effectively establishes a maximum period during which a prepayment penalty may be imposed, and a maximum prepayment penalty amount that may be imposed, on a closed-end credit transaction or open-end credit plan (other than such a mortgage as described in §1026.32(a)(2)) secured by a consumer's principal dwelling. Closed-end credit transactions covered by §1026.43 are subject to the additional prepayment penalty restrictions set forth in §1026.43(g).

2. *Examples; open-end credit.* If the terms of an open-end credit agreement allow for a prepayment penalty that exceeds 2 percent of the initial credit limit for the plan, the agreement will be deemed to be a transaction with a prepayment penalty that exceeds 2 percent of the "amount prepaid" within the meaning of §1026.32(a)(1)(iii). The following examples illustrate how to calculate whether the terms of an open-end credit agreement comply with the maximum prepayment penalty period and amounts described in §1026.32(a)(1)(iii).

i. Assume that the terms of a home-equity line of credit with an initial credit limit of $10,000 require the consumer to pay a $500 flat fee if the consumer terminates the plan less than 36 months after account opening. The $500 fee constitutes a prepayment penalty under §1026.32(b)(6)(ii), and the penalty is greater than 2 percent of the $10,000 initial credit limit, which is $200. Under §1026.32(a)(1)(iii), the plan is a high-cost mortgage subject to the requirements and restrictions set forth in §§1026.32 and 1026.34.

ii. Assume that the terms of a home-equity line of credit with an initial credit limit of $10,000 and a ten-year term require the consumer to pay a $200 flat fee if the consumer terminates the plan prior to its normal expiration. The $200 prepayment penalty does not exceed 2 percent of the initial credit limit, but the terms of the agreement permit the creditor to charge the fee more than 36 months after account opening. Thus, under §1026.32(a)(1)(iii), the plan is a high-cost mortgage subject to the requirements and restrictions set forth in §§1026.32 and 1026.34.

iii. Assume that, under the terms of a home-equity line of credit with an initial credit limit of $150,000, the creditor may charge the consumer any closing costs waived by the creditor if the consumer terminates the plan less than 36 months after account opening. Assume also that the creditor waived closing costs of $1,000. Bona fide third-party charges comprised $800 of the $1,000 in waived closing costs, and origination charges retained by the creditor or its affiliate comprised the remaining $200. Under §1026.32(b)(6)(ii), the $800 in bona fide third-party charges is not a prepayment penalty, while the $200 for the creditor's own originations costs is a prepayment penalty. The total prepayment penalty of $200 is less than 2 percent of the initial $150,000 credit limit, and the penalty does not apply if the consumer terminates the plan more than 36 months after account opening. Thus, the plan is not a high-cost mortgage under §1026.32(a)(1)(iii).

32(a)(2) Exemptions.

Paragraph 32(a)(2)(ii).

1. *Construction-permanent loans.* Section 1026.32 does not apply to a transaction to finance the initial construction of a dwelling. This exemption applies to a construction-only loan as well as to the construction phase of a construction-to-permanent loan. Section 1026.32 may apply, however, to permanent financing that replaces a construction loan, whether the permanent financing is extended by the same or a different creditor. When a construction loan may be permanently financed by the same creditor, §1026.17(c)(6)(ii) permits the creditor to give either one combined disclosure for both the construction financing and the permanent financing, or a separate set of disclosures for each of the two phases as though they were two separate transactions. *See also* comment 17(c)(6)–2. Section 1026.17(c)(6)(ii) addresses only how a creditor may elect to disclose a construction to permanent transaction. Which disclosure option a creditor elects under §1026.17(c)(6)(ii) does not affect the determination of whether the permanent phase of the transaction is subject to §1026.32.

When the creditor discloses the two phases as separate transactions, the annual percentage rate for the permanent phase must be compared to the average prime offer rate for a transaction that is comparable to the permanent financing to determine coverage under §1026.32. Likewise, a single amount of points and fees, also reflecting the appropriate charges from the permanent phase, must be calculated and compared with the total loan amount to determine coverage under §1026.32. When the creditor discloses the two phases as a single transaction, a single annual percentage rate, reflecting the appropriate charges from both phases, must be calculated for the transaction in accordance with §1026.32(a)(3) and appendix D to part 1026. This annual percentage rate must be compared to the average prime offer rate for a transaction that is comparable to the permanent financing to determine coverage under §1026.32. Likewise, a single amount of points and fees, also reflecting the appropriate charges from both phases of the transaction, must be calculated and compared with the total loan amount to determine coverage under §1026.32. If the transaction is determined to be a high-cost mortgage, only the permanent phase is subject to the requirements of §§1026.32 and 1026.34.

Paragraph 32(a)(2)(iii).

1. *Housing Finance Agency.* For purposes of §1026.32(a)(2)(iii), a Housing Finance Agency means a housing finance agency as defined in 24 CFR 266.5.

32(a)(3) Determination of annual percentage rate.

1. *In general.* The guidance set forth in the commentary to §1026.17(c)(1) and in §1026.40 addresses calculation of the annual percentage rate disclosures for closed-end credit transactions and open-end credit plans, respectively. Section 1026.32(a)(3) requires a different calculation of the annual percentage rate solely to determine coverage under §1026.32(a)(1)(i).

2. *Open-end credit.* The annual percentage rate for an open-end credit plan must be determined in accordance with §1026.32(a)(3), regardless of whether there is an advance of funds at account opening. Section 1026.32(a)(3) does not require the calculation of the annual percentage rate for any extensions of credit subsequent to account opening. Any draw on the credit line subsequent to account opening is not treated as a separate transaction for purposes of determining annual percentage rate threshold coverage.

3. *Rates that vary; index rate plus maximum margin.* i. Section 1026.32(a)(3)(ii) applies in the case of a closed- or open-end credit transaction when the interest rate for the transaction varies solely in accordance with an index. For purposes of §1026.32(a)(3)(ii), a transaction's interest rate varies in accordance with an index even if the transaction has an initial rate that is not determined by the index used to make later interest rate adjustments provided that, following the first rate adjustment, the interest rate for the transaction varies solely in accordance with an index.

ii. In general, for transactions subject to §1026.32(a)(3)(ii), the annual percentage rate is determined by adding the index rate in effect on the date that the interest rate for the transaction is set to the maximum margin for the transaction, as set forth in the agreement for the loan or plan. In some cases, a transaction subject to §1026.32(a)(3)(ii) may have an initial rate that is a premium rate and is higher than the index rate plus the maximum margin as of the date the interest rate for the transaction is set. In such cases, the annual percentage rate is determined based on the initial ''premium'' rate.

iii. The following examples illustrate the rule:

A. Assume that the terms of a closed-end, adjustable-rate mortgage loan provide for a fixed, initial interest rate of 2 percent for two years following consummation, after which the interest rate will adjust annually in accordance with an index plus a 2 percent margin. Also assume that the applicable index is 3 percent as of the date the interest rate for the transaction is set, and a lifetime interest rate cap of 15 percent applies to the transaction. Pursuant to §1026.32(a)(3)(ii), for purposes of determining the annual percentage rate for §1026.32(a)(1)(i), the interest rate for the transaction is 5 percent (3 percent index rate plus 2 percent margin).

B. Assume the same transaction terms set forth in paragraph 3.iii.A, except that an initial interest rate of 6 percent applies to the transaction. Pursuant to §1026.32(a)(3)(ii), for purposes of determining the annual percentage rate for §1026.32(a)(1)(i), the interest rate for the transaction is 6 percent.

C. Assume that the terms of an open-end credit agreement with a five-year draw period and a five-year repayment period provide for a fixed, initial interest rate of 2 percent for the first year of the repayment period, after which the interest rate will adjust annually pursuant to a publicly-available index outside the creditor's control, in accordance with the limitations applicable to open-end credit plans in §1026.40(f). Also assume that, pursuant to the terms of the open-end credit agreement, a margin of 2 percent applies because the consumer is employed by the creditor, but that the margin will increase to 4 percent if the consumer's employment with the creditor ends. Finally, assume that the applicable index rate is 3.5 percent as of the date the interest rate for the transaction is set, and a lifetime interest rate cap of 15 percent applies to the transaction. Pursuant to §1026.32(a)(3)(ii), for purposes of determining the annual percentage rate for §1026.32(a)(1)(i), the interest rate for the transaction is 7.5 percent (3.5 percent index rate plus 4 percent maximum margin).

D. Assume the same transaction terms set forth in paragraph 3.iii.C, except that an initial interest rate of 8 percent applies to the transaction. Pursuant to §1026.32(a)(3)(ii), for purposes of determining the annual percentage rate for §1026.32(a)(1)(i), the interest rate for the transaction is 8 percent.

4. *Rates that vary other than in accordance with an index.* Section 1026.32(a)(3)(iii) applies when the interest rate applicable to a closed- or open-end transaction may or will vary, except as described in §1026.32(a)(3)(ii). Section 1026.32(a)(3)(iii) thus applies where multiple fixed rates apply to a transaction, such as in a step-rate mortgage. For example, assume the following interest rates will apply to a transaction: 3 percent for the first six months, 4 percent for the next 10 years, and 5 percent for the remaining loan term. In this example, §1026.32(a)(3)(iii) would be used to determine the interest rate, and 5 percent would be the maximum interest rate applicable to the transaction used to determine the annual percentage rate for purposes of §1026.32(a)(1)(i). Section 1026.32(a)(3)(iii) also applies to any other adjustable-rate loan where the interest rate may vary but according to a formula other than the sum of an index and a margin.

5. *Fixed-rate and -term payment options.* If an open-end credit plan has only a fixed rate during the draw period, a creditor must use the interest rate applicable to that feature to determine the annual percentage rate, as required by §1026.32(a)(3)(i). However, if an open-end credit plan has a variable rate, but also offers a fixed-rate and -term payment option during the draw period, §1026.32(a)(3) requires a creditor to use the terms applicable to the variable-rate feature for determining the annual percentage rate, as described in §1026.32(a)(3)(ii).

32(b) Definitions.

32(b) Definitions

Paragraph 32(b)(1).

1. *Known at or before consummation.* Section 1026.32(b)(1) includes in points and fees for closed-end credit transactions those items listed in §1026.32(b)(1)(i) through (vi) that are known at or before consummation. The following examples clarify how to determine whether a charge or fee is known at or before consummation.

i. *General.* In general, a charge or fee is ‘‘known at or before consummation’’ if the creditor knows at or before consummation that the charge or fee will be imposed in connection with the transaction, even if the charge or fee is scheduled to be paid after consummation. Thus, for example, if the creditor charges the consumer $400 for an appraisal conducted by an affiliate of the creditor, the $400 is included in points and fees, even if the consumer finances it and repays it over the loan term, because the creditor knows at or before consummation that the charge or fee is imposed in connection with the transaction. By contrast, if a creditor does not know whether a charge or fee will be imposed, it is not included in points and fees. For example, charges or fees that the creditor may impose if the consumer seeks to modify a loan after consummation are not included in points and fees, because the creditor does not know at or before consummation whether the consumer will seek to modify the loan and therefore incur the fees or charges.

ii. *Prepayment penalties.* Notwithstanding the guidance in comment 32(b)(1)-1.i, under §1026.32(b)(1)(v) the maximum prepayment penalty that may be charged or collected under the terms of the mortgage loan is included in points and fees because the amount of the maximum prepayment penalty that may be charged or collected is known at or before consummation.

iii. *Certain mortgage and credit insurance premiums.* Notwithstanding the guidance in comment 32(b)(1)-1.i, under §1026.32(b)(1)(i)(C)(*1*) and (iii) premiums and charges for private mortgage insurance and credit insurance that are payable after consummation are not included in points and fees, even if the amounts of such premiums and charges are known at or before consummation.

2. *Charges paid by parties other than the consumer.* Under §1026.32(b)(1), points and fees may include charges paid by third parties in addition to charges paid by the consumer. Specifically, charges paid by third parties that fall within the definition of points and fees set forth in §1026.32(b)(1)(i) through (vi) are included in points and fees. In calculating points and fees in connection with a transaction, creditors may rely on written statements from the consumer or third party paying for a charge, including the seller, to determine the source and purpose of any third-party payment for a charge.

i. *Examples—included in points and fees.* A creditor's origination charge paid by a consumer's employer on the consumer's behalf that is included in the finance charge as defined in §1026.4(a) or (b), must be included in points and fees under §1026.32(b)(1)(i), unless other exclusions under §1026.4 or §1026.32(b)(1)(i)(A) through (F) apply. In addition, consistent with comment 32(b)(1)(i)–1, a third-party payment of an item excluded from the finance charge under a provision of §1026.4, while not included in the total points and fees under §1026.32(b)(1)(i), may be included under §1026.32(b)(1)(ii) through (vi). For example, a payment by a third party of a creditor-imposed fee for an appraisal performed by an employee of the creditor is included in points and fees under §1026.32(b)(1)(iii). *See* comment 32(b)(1)(i)–1.

ii. *Examples—not included in points and fees.* A charge paid by a third party is not included in points and fees under §1026.32(b)(1)(i) if the exclusions to points and fees in §1026.32(b)(1)(i)(A) through (F) apply. For example, certain bona fide third-party charges not retained by the creditor, loan originator, or an affiliate of either are excluded from points and fees under §1026.32(b)(1)(i)(D), regardless of whether those charges are paid by a third party or the consumer.

iii. *Seller's points.* Seller's points, as described in §1026.4(c)(5) and commentary, are excluded from the finance charge and thus are not included in points and fees under §1026.32(b)(1)(i). However, charges paid by the seller for items listed in §1026.32(b)(1)(ii) through (vi) are included in points and fees.

iv. *Creditor-paid charges.* Charges that are paid by the creditor, other than loan originator compensation paid by the creditor that is required to be included in points and fees under §1026.32(b)(1)(ii), are excluded from points and fees. *See* §§1026.32(b)(1)(i)(A), 1026.4(a), and comment 4(a)–(2).

Paragraph 32(b)(1)(i).

1. *General.* Section 1026.32(b)(1)(i) includes in the total ''points and fees'' items included in the finance charge under §1026.4(a) and (b). However, certain items that may be included in the finance charge are excluded from points and fees under §1026.32(b)(1)(i)(A) through (F). Items excluded from the finance charge under other provisions of §1026.4 are not included in the total points and fees under §1026.32(b)(1)(i), but may be included in points and fees under §1026.32(b)(1)(ii) through (vi). To illustrate: A fee imposed by the creditor for an appraisal performed by an employee of the creditor meets the definition of ''finance charge'' under §1026.4(a) as ''any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit.'' However, §1026.4(c)(7) specifies that appraisal fees are not included in the finance charge. A fee imposed by the creditor for an appraisal performed by an employee of the creditor therefore would not be included in the finance charge and would not be counted in points and fees under §1026.32(b)(1)(i). Section 1026.32(b)(1)(iii), however, expressly includes in points and fees items listed in §1026.4(c)(7) (including appraisal fees) if the creditor receives compensation in connection with the charge. A creditor would receive compensation for an appraisal performed by its own employee. Thus, the appraisal fee in this example must be included in the calculation of points and fees.

Paragraph 32(b)(1)(i)(B).

1. *Federal and State mortgage insurance premiums and guaranty fees.* Under §1026.32(b)(1)(i)(B), mortgage insurance premiums or guaranty fees in connection with a Federal or State agency program are excluded from points and fees, even though they are included in the finance charge under §1026.4(a) and (b). For example, if a consumer is required to pay a $2,000 mortgage insurance premium for a loan insured by the Federal Housing Administration, the $2,000 must be included in the finance charge but is not counted in points and fees. Similarly, if a consumer pays a 2 percent funding fee for a loan guaranteed by the U.S. Department of Veterans Affairs or through the U.S Department of Agriculture's Rural Development Single Family Housing Guaranteed Loan Program, the fee is included in the finance charge but is not included in points and fees.

Paragraph 32(b)(1)(i)(C).

1. *Private mortgage insurance premiums.* i. *Payable after consummation.* Under §1026.32(b)(1)(i)(C)(*1*), private mortgage insurance premiums payable after consummation are excluded from points and fees.

ii. *Payable at or before consummation.* A. *General.* Under §1026.32(b)(1)(i)(C)(*2*), private mortgage insurance premiums payable at or before consummation (*i.e.*, single or up-front premiums) may be excluded from points and fees, even though they are included in the finance charge under §1026.4(a) and (b). However, the portion of the premium that exceeds the amount payable under policies in effect at the time of origination under section 203(c)(2)(A) of the National Housing Act (12 U.S.C. 1709(c)(2)(A)) is included in points and fees. To determine whether any portion of the premium exceeds the amount payable under policies in effect at the time of origination under section 203(c)(2)(A) of the National Housing Act, a creditor references the premium amount that would be payable for the transaction under that Act, as implemented by applicable regulations and other written authorities issued by the Federal Housing Administration (such as Mortgagee Letters), even if the transaction would not qualify to be insured under that Act (including, for example, because the principal amount exceeds the maximum insurable under that Act).

B. *Non-refundable premiums.* To qualify for the exclusion from points and fees, private mortgage insurance premiums payable at or before consummation must be required to be refunded on a pro rata basis and the refund must be automatically issued upon notification of the satisfaction of the underlying mortgage loan.

C. *Example.* Assume that a $3,000 private mortgage insurance premium charged on a closed-end mortgage loan is payable at or before closing and is required to be refunded on a pro rata basis and that the refund is automatically issued upon notification of the satisfaction of the underlying mortgage loan. Assume also that the maximum premium allowable under the National Housing

Act is $2,000. In this case, the creditor could exclude $2,000 from points and fees but would have to include the $1,000 that exceeds the allowable premium under the National Housing Act. However, if the $3,000 private mortgage insurance premium were not required to be refunded on a pro rata basis or if the refund were not automatically issued upon notification of the satisfaction of the underlying mortgage loan, the entire $3,000 premium would be included in points and fees.

2. *Method of paying private mortgage insurance premiums.* The portion of any private mortgage insurance premiums payable at or before consummation that does not qualify for an exclusion from points and fees under §1026.32(b)(1)(i)(C)(*2*) must be included in points and fees for purposes of §1026.32(b)(1)(i) whether paid in cash or financed and whether the insurance is optional or required.

Paragraph 32(b)(1)(i)(D).

1. *Charges not retained by the creditor, loan originator, or an affiliate of either.* In general, a creditor is not required to count in points and fees any bona fide third-party charge not retained by the creditor, loan originator, or an affiliate of either. For example, if bona fide charges are imposed by a third-party settlement agent and are not retained by the creditor, loan originator, or an affiliate of either, those charges are not included in points and fees, even if those charges are included in the finance charge under §1026.4(a)(2). The term *loan originator* has the same meaning as in §1026.36(a)(1).

2. *Private mortgage insurance.* The exclusion for bona fide third-party charges not retained by the creditor, loan originator, or an affiliate of either is limited by §1026.32(b)(1)(i)(C) in the general definition of ''points and fees.'' Section 1026.32(b)(1)(i)(C) requires inclusion in points and fees of premiums or other charges payable at or before consummation for any private guaranty or insurance protecting the creditor against the consumer's default or other credit loss to the extent that the premium or charge exceeds the amount payable under policies in effect at the time of origination under section 203(c)(2)(A) of the National Housing Act (12 U.S.C. 1709(c)(2)(A)). These premiums or charges must also be included if the premiums or charges are not required to be refundable on a pro-rated basis, or the refund is not required to be automatically issued upon notification of the satisfaction of the underlying mortgage loan. Under these circumstances, even if the premiums or other charges are not retained by the creditor, loan originator, or an affiliate of either, they must be included in the points and fees calculation for qualified mortgages. See comments 32(b)(1)(i)(c)–1 and –2 for further discussion of including private mortgage insurance premiums payable at or before consummation in the points and fees calculation.

3. *Real estate-related fees.* The exclusion for bona fide third-party charges not retained by the creditor, loan originator, or an affiliate of either is limited by §1026.32(b)(1)(iii) in the general definition of points and fees. Section 1026.32(b)(1)(iii) requires inclusion in points and fees of items listed in §1026.4(c)(7) unless the charge is reasonable, the creditor receives no direct or indirect compensation in connection with the charge, and the charge is not paid to an affiliate of the creditor. If a charge is required to be included in points and fees under §1026.32(b)(1)(iii), it may not be excluded under §1026.32(b)(1)(i)(D), even if the criteria for exclusion in §1026.32(b)(1)(i)(D) are satisfied.

4. *Credit insurance.* The exclusion for bona fide third-party charges not retained by the creditor, loan originator, or an affiliate of either is limited by §1026.32(b)(1)(iv) in the general definition of points and fees. Section 1026.32(b)(1)(iv) requires inclusion in points and fees of premiums and other charges for credit insurance and certain other types of insurance. If a charge is required to be included in points and fees under §1026.32(b)(1)(iv), it may not be excluded under §1026.32(b)(1)(i)(D), even if the criteria for exclusion in §1026.32(b)(1)(i)(D) are satisfied.

Paragraph 32(b)(1)(i)(E).

1. *Bona fide discount point.* The term *bona fide discount point* is defined in §1026.32(b)(3).

2. *Average prime offer rate.* The average prime offer rate for purposes of paragraph (b)(1)(i)(E) of this section is the average prime offer rate that applies to a comparable transaction as of the date the discounted interest rate for the transaction is set. For the meaning of ''comparable transaction,'' refer to comment 35(a)(2)-2. The table of average prime offer rates published by the Bureau indicates how to identify the comparable transaction. *See* comment 35(a)(2)-2.

3. *Example.* Assume a transaction that is a first-lien, purchase-money home mortgage with a fixed interest rate and a 30-year term. Assume also that the consumer locks in an interest rate of 6 percent on May 1, 2014 that was discounted from a rate of 6.5 percent because the consumer paid two discount points. Finally, assume that the average prime offer rate as of May 1, 2014 for home mortgages with a fixed interest rate and a 30-year term is 5.5 percent. The creditor may exclude two bona fide discount points from the points and fees calculation because the rate from which the discounted rate was derived (6.5 percent) exceeded the average prime offer rate for a comparable transaction as of the date the rate on the transaction was set (5.5 percent) by only 1 percentage point.

Paragraph 32(b)(1)(i)(F).

1. *Bona fide discount point and average prime offer rate.* Comments 32(b)(1)(i)(E)–1 and –2 provide guidance concerning the definition of *bona fide discount point* and *average prime offer rate,* respectively.

2. *Example.* Assume a transaction that is a first-lien, purchase-money home mortgage with a fixed interest rate and a 30-year term. Assume also that the consumer locks in an interest rate of 6 percent on May 1, 2014, that was discounted from a rate of 7 percent because the consumer paid four discount points. Finally, assume that the average prime offer rate as of May 1, 2014, for home mortgages with a fixed interest rate and a 30-year term is 5 percent. The creditor may exclude one discount point from the points and fees calculation because the rate from which the discounted rate was derived (7 percent) exceeded the average prime offer rate for a comparable transaction as of the date the rate on the transaction was set (5 percent) by only 2 percentage points.

Paragraph 32(b)(1)(ii).

1. *Loan originator compensation—general.* Compensation paid by a consumer or creditor to a loan originator, other than an employee of the creditor, is included in the calculation of points and fees for a transaction, provided that such compensation can be attributed to that particular transaction at the time the interest rate is set. Compensation paid to an employee of a creditor is not included in points and fees. Loan originator compensation includes amounts the loan originator retains and is not dependent on the label or name of any fee imposed in connection with the transaction.

2. *Loan originator compensation—attributable to a particular transaction.* Loan originator compensation is compensation that is paid by a consumer or creditor to a loan originator that can be attributed to that particular transaction. The amount of compensation that can be attributed to a particular transaction is the dollar value of compensation that the loan originator will receive if the transaction is consummated. As explained in comment 32(b)(1)(ii)–3, the amount of compensation that a loan originator will receive is calculated as of the date the interest rate is set and includes compensation that is paid before, at, or after consummation.

3. *Loan originator compensation—timing.* Compensation paid to a loan originator that can be attributed to a transaction must be included in the points and fees calculation for that loan regardless of whether the compensation is paid before, at, or after consummation. The amount of loan originator compensation that can be attributed to a transaction is determined as of the date the interest rate is set. Thus, loan originator compensation for a transaction includes compensation that can be attributed to that transaction at the time the creditor sets the interest rate for the transaction, even if that compensation is not paid until after consummation.

4. *Loan originator compensation—calculating loan originator compensation in connection with other charges or payments included in the finance charge or made to loan originators.* i. *Consumer payments to mortgage brokers.* As provided in §1026.32(b)(1)(ii)(A), consumer payments to a mortgage broker already included in the points and fees calculation under §1026.32(b)(1)(i) need not be counted again under §1026.32(b)(1)(ii). For example, assume a consumer pays a mortgage broker a $3,000 fee for a transaction. The $3,000 mortgage broker fee is included in the finance charge under §1026.4(a)(3). Because the $3,000 mortgage broker fee is already included in points and fees under §1026.32(b)(1)(i), it is not counted again under §1026.32(b)(1)(ii).

ii. *Payments by a mortgage broker to its individual loan originator employee.* As provided in §1026.32(b)(1)(ii)(B), compensation paid by a mortgage broker to its individual loan originator employee is not included in points and fees under §1026.32(b)(1)(ii). For example, assume a consumer pays a $3,000 fee to a mortgage broker, and the mortgage broker pays a $1,500 commission to its individual loan originator employee for that transaction. The $3,000 mortgage broker fee is included in points and fees, but the $1,500 commission is not included in points and fees because it has already been included in points and fees as part of the $3,000 mortgage broker fee.

iii. *Creditor's origination fees—loan originator not employed by creditor.* Compensation paid by a creditor to a loan originator who is not employed by the creditor is included in the calculation of points and fees under §1026.32(b)(1)(ii). Such compensation is included in points and fees in addition to any origination fees or charges paid by the consumer to the creditor that are included in points and fees under §1026.32(b)(1)(i). For example, assume that a consumer pays to the creditor a $3,000 origination fee and that the creditor pays a mortgage broker $1,500 in compensation attributed to the transaction. Assume further that the consumer pays no other charges to the creditor that are included in points and fees under §1026.32(b)(1)(i) and that the mortgage broker receives no other compensation that is included in points and fees under §1026.32(b)(1)(ii). For purposes of calculating points and fees, the $3,000 origination fee is included in points and fees under §1026.32(b)(1)(i) and the $1,500 in loan originator compensation is included in points and fees under §1026.32(b)(1)(ii), equaling $4,500 in total points and fees, provided that no other points and fees are paid or compensation received.

5. *Loan originator compensation—calculating loan originator compensation in manufactured*

home transactions. i. If a manufactured home retailer qualifies as a loan originator under §1026.36(a)(1), then compensation that is paid by a consumer or creditor to the retailer for loan origination activities and that can be attributed to the transaction at the time the interest rate is set must be included in points and fees. For example, assume a manufactured home retailer takes a residential mortgage loan application and is entitled to receive at consummation a $1,000 commission from the creditor for taking the mortgage loan application. The $1,000 commission is loan originator compensation that must be included in points and fees.

ii. If the creditor has knowledge that the sales price of a manufactured home includes loan originator compensation, then such compensation can be attributed to the transaction at the time the interest rate is set and therefore is included in points and fees under §1026.32(b)(1)(ii). However, the creditor is not required to investigate the sales price of a manufactured home to determine if the sales price includes loan originator compensation.

iii. As provided in §1026.32(b)(1)(ii)(D), compensation paid by a manufactured home retailer to its employees is not included in points and fees under §1026.32(b)(1)(ii).

ii. If the creditor has knowledge that the sales price of a manufactured home includes loan originator compensation, then such compensation can be attributed to the transaction at the time the interest rate is set and therefore is included in points and fees under §1026.32(b)(1)(ii). However, the creditor is not required to investigate the sales price of a manufactured home to determine if the sales price includes loan originator compensation.

iii. As provided in §1026.32(b)(1)(ii)(D), compensation paid by a manufactured home retailer to its employees is not included in points and fees under §1026.32(b)(1)(ii).

Paragraph 32(b)(1)(iii).

1. *Other charges*. Section 1026.32(b)(1)(iii) defines points and fees to include all items listed in §1026.4(c)(7), other than amounts held for the future payment of taxes, unless certain exclusions apply. An item listed in §1026.4(c)(7) may be excluded from the points and fees calculation if the charge is reasonable; the creditor receives no direct or indirect compensation from the charge; and the charge is not paid to an affiliate of the creditor. For example, a reasonable fee paid by the consumer to an independent, third-party appraiser may be excluded from the points and fees calculation (assuming no compensation is paid to the creditor or its affiliate and no charge is paid to an affiliate). By contrast, a fee paid by the consumer for an appraisal performed by the creditor must be included in the calculation, even though the fee may be excluded from the finance charge if it is bona fide and reasonable in amount.

Paragraph 32(b)(1)(iv).

1. *Credit insurance and debt cancellation or suspension coverage*. In determining points and fees for purposes of §1026.32(b)(1), premiums paid at or before consummation for credit insurance or any debt cancellation or suspension agreement or contract are included in points and fees whether they are paid in cash or, if permitted by applicable law, financed and whether the insurance or coverage is optional or required. Such charges are also included whether the amount represents the entire premium or payment for the coverage or an initial payment.

2. *Credit property insurance*. Credit property insurance includes insurance against loss of or damage to personal property, such as a houseboat or manufactured home. Credit property insurance covers the creditor's security interest in the property. Credit property insurance does not include homeowners' insurance, which, unlike credit property insurance, typically covers not only the dwelling but its contents and protects the consumer's interest in the property.

3. *Life, accident, health, or loss-of-income insurance*. Premiums or other charges for these types of insurance are included in points and fees only if the creditor is a beneficiary. If the consumer or another person designated by the consumer is the sole beneficiary, then the premiums or other charges are not included in points and fees.

Paragraph 32(b)(2).

1. See comment 32(b)(1)–2 for guidance concerning the inclusion in points and fees of charges paid by parties other than the consumer.

Paragraph 32(b)(2)(i).

1. *Finance charge*. The points and fees calculation under §1026.32(b)(2) generally does not include items that are included in the finance charge but that are not known until after account opening, such as minimum monthly finance charges or charges based on account activity or inactivity. Transaction fees also generally are not included in the points and fees calculation, except as provided in §1026.32(b)(2)(vi). See comments 32(b)(1)–1 and 32(b)(1)(i)–1 for additional guidance concerning the calculation of points and fees.

Paragraph 32(b)(2)(i)(B).

1. See comment 32(b)(1)(i)(B)–1 for further guidance concerning the exclusion of mortgage insurance premiums payable in connection with any Federal or State agency program.

Paragraph 32(b)(2)(i)(C).

1. See comment 32(b)(1)(i)(C)–1 and –2 for further guidance concerning the exclusion of mortgage insurance premiums payable for any guaranty or insurance that protects the creditor against the consumer's default or

other credit loss and that is not in connection with any Federal or State agency program.

Paragraph 32(b)(2)(i)(D).

1. For purposes of §1026.32(b)(2)(i)(D), the term *loan originator* means a loan originator as that term is defined in §1026.36(a)(1), without regard to §1026.36(a)(2). See comments 32(b)(1)(i)(D)–1 through –4 for further guidance concerning the exclusion of bona fide third-party charges from points and fees.

Paragraph 32(b)(2)(i)(E).

1. See comments 32(b)(1)(i)(E)–1 through –3 for further guidance concerning the exclusion of up to two bona fide discount points from points and fees.

Paragraph 32(b)(2)(i)(F).

1. See comments 32(b)(1)(i)(F)–1 and –2 for further guidance concerning the exclusion of up to one bona fide discount point from points and fees.

Paragraph 32(b)(2)(ii).

1. For purposes of §1026.32(b)(2)(ii), the term *loan originator* means a loan originator as that term is defined in §1026.36(a)(1), without regard to §1026.36(a)(2). See the commentary to §1026.32(b)(1)(ii) for additional guidance concerning the inclusion of loan originator compensation in points and fees.

Paragraph 32(b)(2)(iii).

1. *Other charges.* See comment 32(b)(1)(iii)–1 for further guidance concerning the inclusion of items listed in §1026.4(c)(7) in points and fees.

Paragraph 32(b)(2)(iv).

1. *Credit insurance and debt cancellation or suspension coverage.* See comments 32(b)(1)(iv)–1 through –3 for further guidance concerning the inclusion of premiums for credit insurance and debt cancellation or suspension coverage in points and fees.

Paragraph 32(b)(2)(vii).

1. *Participation fees.* Fees charged for participation in a credit plan must be included in the points and fees calculation for purposes of §1026.32 if payable at or before account opening. These fees include annual fees or other periodic fees that must be paid as a condition of access to the plan itself. See commentary to §1026.4(c)(4) for a description of these fees.

Paragraph 32(b)(2)(viii).

1. *Transaction fees to draw down the credit line.* Section 1026.32(b)(2)(viii) requires creditors in open-end credit plans to include in points and fees any transaction fee, including any per-transaction fee, that will be charged for a draw on the credit line. Section 1026.32(b)(2)(viii) requires the creditor to assume that the consumer will make at least one draw during the term of the credit plan. Thus, if the terms of the open-end credit plan permit the creditor to charge a $10 transaction fee each time the consumer draws on the credit line, §1026.32(b)(2)(viii) requires the creditor to include one $10 charge in the points and fees calculation.

2. *Fixed-rate loan option.* If the terms of an open-end credit plan permit a consumer to draw on the credit line using either a variable-rate feature or a fixed-rate feature, §1026.32(b)(2)(viii) requires the creditor to use the terms applicable to the variable-rate feature for determining the transaction fee that must be included in the points and fees calculation.

32(b)(3) Bona fide discount point.

32(b)(3)(i) Closed-end credit.

1. *Definition of bona fide discount point.* Section 1026.32(b)(3) provides that, to be bona fide, a discount point must reduce the interest rate based on a calculation that is consistent with established industry practices for determining the amount of reduction in the interest rate or time-price differential appropriate for the amount of discount points paid by the consumer. To satisfy this standard, a creditor may show that the reduction is reasonably consistent with established industry norms and practices for secondary mortgage market transactions. For example, a creditor may rely on pricing in the to-be-announced (TBA) market for mortgage-backed securities (MBS) to establish that the interest rate reduction is consistent with the compensation that the creditor could reasonably expect to receive in the secondary market. The creditor may also establish that its interest rate reduction is consistent with established industry practices by showing that its calculation complies with requirements prescribed in Fannie Mae or Freddie Mac guidelines for interest rate reductions from bona fide discount points. For example, assume that the Fannie Mae Single-Family Selling Guide or the Freddie Mac Single Family Seller/Servicer Guide imposes a cap on points and fees but excludes from the cap discount points that result in a bona fide reduction in the interest rate. Assume the guidelines require that, for a discount point to be bona fide so that it would not count against the cap, a discount point must result in at least a 25 basis point reduction in the interest rate. Accordingly, if the creditor offers a 25 basis point interest rate reduction for a discount point and the requirements of §1026.32(b)(1)(i)(E) or (F) are satisfied, the discount point is bona fide and is excluded from the calculation of points and fees.

32(b)(4) Total loan amount.

32(b)(4)(i) Closed-end credit.

1. *Total loan amount; examples.* Below are several examples showing how to calculate the total loan amount for closed-end mortgage loans, each using a $10,000 amount borrowed, a $300 appraisal fee, and $400 in prepaid finance charges. A $500 single premium for optional credit unemployment insurance is used in one example.

i. If the consumer finances a $300 fee for a creditor-conducted appraisal and pays $400 in prepaid finance charges at closing, the amount financed under §1026.18(b) is $9,900 ($10,000 plus the $300 appraisal fee that is paid to and financed by the creditor, less $400 in prepaid finance charges). The $300 appraisal fee paid to the creditor is added to other points and fees under §1026.32(b)(1)(iii). It is deducted from the amount financed ($9,900) to derive a total loan amount of $9,600.

ii. If the consumer pays the $300 fee for the creditor-conducted appraisal in cash at closing, the $300 is included in the points and fees calculation because it is paid to the creditor. However, because the $300 is not financed by the creditor, the fee is not part of the amount financed under §1026.18(b). In this case, the amount financed is the same as the total loan amount: $9,600 ($10,000, less $400 in prepaid finance charges).

iii. If the consumer finances a $300 fee for an appraisal conducted by someone other than the creditor or an affiliate, the $300 fee is not included with other points and fees under §1026.32(b)(1)(iii). In this case, the amount financed is the same as the total loan amount: $9,900 ($10,000 plus the $300 fee for an independently-conducted appraisal that is financed by the creditor, less the $400 paid in cash and deducted as prepaid finance charges).

iv. If the consumer finances a $300 fee for a creditor-conducted appraisal and a $500 single premium for optional credit unemployment insurance, and pays $400 in prepaid finance charges at closing, the amount financed under §1026.18(b) is $10,400 ($10,000, plus the $300 appraisal fee that is paid to and financed by the creditor, plus the $500 insurance premium that is financed by the creditor, less $400 in prepaid finance charges). The $300 appraisal fee paid to the creditor is added to other points and fees under §1026.32(b)(1)(ii), and the $500 insurance premium is added under 1026.32(b)(1)(iv). The $300 and $500 costs are deducted from the amount financed ($10,400) to derive a total loan amount of $9,600.

32(b)(6) Prepayment penalty.

1. *Examples of prepayment penalties; closed-end credit transactions.* For purposes of §1026.32(b)(6)(i), the following are examples of prepayment penalties:

i. A charge determined by treating the loan balance as outstanding for a period of time after prepayment in full and applying the interest rate to such ''balance,'' even if the charge results from interest accrual amortization used for other payments in the transaction under the terms of the loan contract. ''Interest accrual amortization'' refers to the method by which the amount of interest due for each period (*e.g.*, month) in a transaction's term is determined. For example, ''monthly interest accrual amortization'' treats each payment as made on the scheduled, monthly due date even if it is actually paid early or late (until the expiration of any grace period). Thus, under the terms of a loan contract providing for monthly interest accrual amortization, if the amount of interest due on May 1 for the preceding month of April is $3,000, the loan contract will require payment of $3,000 in interest for the month of April whether the payment is made on April 20, on May 1, or on May 10. In this example, if the consumer prepays the loan in full on April 20 and if the accrued interest as of that date is $2,000, then assessment of a charge of $3,000 constitutes a prepayment penalty of $1,000 because the amount of interest actually earned through April 20 is only $2,000.

ii. A fee, such as an origination or other loan closing cost, that is waived by the creditor on the condition that the consumer does not prepay the loan. However, the term prepayment penalty does not include a waived bona fide third-party charge imposed by the creditor if the consumer pays all of a covered transaction's principal before the date on which the principal is due sooner than 36 months after consummation. For example, assume that at consummation, the creditor waives $3,000 in closing costs to cover bona fide third-party charges but the terms of the loan agreement provide that the creditor may recoup the $3,000 in waived charges if the consumer repays the entire loan balance sooner than 36 months after consummation. The $3,000 charge is not a prepayment penalty. In contrast, for example, assume that at consummation, the creditor waives $3,000 in closing costs to cover bona fide third-party charges but the terms of the loan agreement provide that the creditor may recoup $4,500, in part to recoup waived charges, if the consumer repays the entire loan balance sooner than 36 months after consummation. The $3,000 that the creditor may impose to cover the waived bona fide third-party charges is not a prepayment penalty, but the additional $1,500 charge is a prepayment penalty and subject to the restrictions under §1026.43(g).

iii. A minimum finance charge in a simple interest transaction.

iv. Computing a refund of unearned interest by a method that is less favorable to the consumer than the actuarial method, as defined by section 933(d) of the Housing and Community Development Act of 1992, 15 U.S.C. 1615(d). For purposes of computing a refund of unearned interest, if using the actuarial method defined by applicable State law results in a refund that is greater than the refund calculated by using the method described in section 933(d) of the Housing and Community Development Act of 1992, creditors should use the State law definition in determining if a refund is a prepayment penalty.

2. *Fees that are not prepayment penalties; closed-end credit transactions.* For purposes of

§1026.32(b)(6)(i), fees that are not prepayment penalties include, for example:

i. Fees imposed for preparing and providing documents when a loan is paid in full if such fees are imposed whether or not the loan is prepaid. Examples include a loan payoff statement, a reconveyance document, or another document releasing the creditor's security interest in the dwelling that secures the loan.

ii. Loan guarantee fees.

3. *Examples of prepayment penalties; open-end credit.* For purposes of §1026.32(b)(6)(ii), the term *prepayment penalty* includes a charge, including a waived closing cost, imposed by the creditor if the consumer terminates the open-end credit plan prior to the end of its term. This includes a charge imposed if the consumer terminates the plan outright or, for example, if the consumer terminates the plan in connection with obtaining a new loan or plan with the current holder of the existing plan, a servicer acting on behalf of the current holder, or an affiliate of either. However, the term *prepayment penalty* does not include a waived bona fide third-party charge imposed by the creditor if the consumer terminates the open-end credit plan during the first 36 months after account opening.

4. *Fees that are not prepayment penalties; open-end credit.* For purposes of §1026.32(b)(6)(ii), fees that are not prepayment penalties include, for example:

i. Fees imposed for preparing and providing documents when an open-end credit plan is terminated, if such fees are imposed whether or not the consumer terminates the plan prior to the end of its term. Examples include a payoff statement, a reconveyance document, or another document releasing the creditor's security interest in the dwelling that secures the line of credit.

ii. Loan guarantee fees.

iii. Any fee that the creditor may impose in lieu of termination and acceleration under comment 40(f)(2)–2.

32(c)(2) Annual percentage rate.

1. *Disclosing annual percentage rate for open-end high-cost mortgages.* In disclosing the annual percentage rate for an open-end, high-cost mortgage under §1026.32(c)(2), creditors must comply with §1026.6(a)(1). If a fixed-rate, discounted introductory or initial interest rate is offered on the transaction, §1026.32(c)(2) requires a creditor to disclose the annual percentage rate of the fixed-rate, discounted introductory or initial interest rate feature, and the rate that would apply when the feature expires.

32(c)(3) Regular payment; minimum periodic payment example; balloon payment.

1. *Balloon payment.* Except as provided in §1026.32(d)(1)(ii) and (iii), a mortgage transaction subject to this section may not include a payment schedule that results in a balloon payment.

Paragraph 32(c)(3)(i).

1. *General.* The regular payment is the amount due from the consumer at regular intervals, such as monthly, bimonthly, quarterly, or annually. There must be at least two payments, and the payments must be in an amount and at such intervals that they fully amortize the amount owed. In disclosing the regular payment, creditors may rely on the rules set forth in §1026.18(g); however, the amounts for voluntary items, such as credit life insurance, may be included in the regular payment disclosure only if the consumer has previously agreed to the amounts.

i. If the loan has more than one payment level, the regular payment for each level must be disclosed. For example:

A. In a 30-year graduated payment mortgage where there will be payments of $300 for the first 120 months, $400 for the next 120 months, and $500 for the last 120 months, each payment amount must be disclosed, along with the length of time that the payment will be in effect.

B. If interest and principal are paid at different times, the regular amount for each must be disclosed.

C. In discounted or premium variable-rate transactions where the creditor sets the initial interest rate and later rate adjustments are determined by an index or formula, the creditor must disclose both the initial payment based on the discount or premium and the payment that will be in effect thereafter. Additional explanatory material which does not detract from the required disclosures may accompany the disclosed amounts. For example, if a monthly payment is $250 for the first six months and then increases based on an index and margin, the creditor could use language such as the following: ''Your regular monthly payment will be $250 for six months. After six months your regular monthly payment will be based on an index and margin, which currently would make your payment $350. Your actual payment at that time may be higher or lower.''

32(c)(4) Variable-rate.

1. *Calculating ''worst-case'' payment example.* For a closed-end credit transaction, creditors may rely on instructions in §1026.19(b)(2)(viii)(B) for calculating the maximum possible increases in rates in the shortest possible timeframe, based on the face amount of the note (not the hypothetical loan amount of $10,000 required by §1026.19(b)(2)(viii)(B)). The creditor must provide a maximum payment for each payment level, where a payment schedule provides for more than one payment level and more than one maximum payment amount is possible. For an open-end credit plan, the maximum monthly payment must be based on the following assumptions:

i. The consumer borrows the full credit line at account opening with no additional extensions of credit.

ii. The consumer makes only minimum periodic payments during the draw period and any repayment period.

iii. If the annual percentage rate may increase during the plan, the maximum annual percentage rate that is included in the contract, as required by §1026.30, applies to the plan at account opening.

32(c)(5) Amount Borrowed

1. *Optional insurance; debt-cancellation coverage.* This disclosure is required when the amount borrowed in a refinancing includes premiums or other charges for credit life, accident, health, or loss-of-income insurance, or debt-cancellation coverage (whether or not the debt-cancellation coverage is insurance under applicable law) that provides for cancellation of all or part of the consumer's liability in the event of the loss of life, health, or income or in the case of accident. See comment 4(d)(3)–2 and comment app. G and H–2 regarding terminology for debt-cancellation coverage.

Paragraph 32(d) Limitations

1. *Additional prohibitions applicable under other sections.* Section 1026.34 sets forth certain prohibitions in connection with high-cost mortgages, in addition to the limitations in §1026.32(d). Further, §1026.35(b) prohibits certain practices in connection with closed-end transactions that meet the coverage test in §1026.35(a). Because the coverage test in §1026.35(a) is generally broader than the coverage test in §1026.32(a), most closed-end high-cost mortgages are also subject to the prohibitions set forth in §1026.35(b) (such as escrows), in addition to the limitations in §1026.32(d).

32(d)(1)(i) Balloon Payment

1. *Regular periodic payments.* The repayment schedule for a high-cost mortgage must fully amortize the outstanding principal balance through ''regular periodic payments.'' A payment is a ''regular periodic payment'' if it is not more than two times the amount of other payments. For purposes of open-end credit plans, the term ''regular periodic payment'' or ''periodic payment'' means the required minimum periodic payment.

2. *Repayment period.* If the terms of an open-end credit plan provide for a repayment period during which no further draws may be taken, the limitations in §1026.32(d)(1)(i) apply to regular periodic payments required by the credit plan during the draw period, but do not apply to any adjustment in the regular periodic payment that results from the transition from the credit plan's draw period to its repayment period. Further, the limitation on balloon payments in §1026.32(d)(1)(i) does not preclude increases in regular periodic payments that result solely from the initial draw or additional draws on the credit line during the draw period.

3. *No repayment period.* If the terms of an open-end credit plan do not provide for a repayment period, the repayment schedule must fully amortize any outstanding principal balance in the draw period through regular periodic payments. However, the limitation on balloon payments in §1026.32(d)(1)(i) does not preclude increases in regular periodic payments that result solely from the initial draw or additional draws on the credit line during the draw period.

32(d)(2) Negative Amortization

1. *Negative amortization.* The prohibition against negative amortization in a high-cost mortgage does not preclude reasonable increases in the principal balance that result from events permitted by the legal obligation unrelated to the payment schedule. For example, when a consumer fails to obtain property insurance and the creditor purchases insurance, the creditor may add a reasonable premium to the consumer's principal balance, to the extent permitted by applicable law and the consumer's legal obligation.

32(d)(4) Increased Interest Rate

1. *Variable-rate transactions.* The limitation on interest rate increases does not apply to rate increases resulting from changes in accordance with the legal obligation in a variable-rate transaction, even if the increase occurs after default by the consumer.

32(d)(5) Rebates

1. *Calculation of refunds.* The limitation applies only to refunds of precomputed (such as add-on) interest and not to any other charges that are considered finance charges under §1026.4 (for example, points and fees paid at closing). The calculation of the refund of interest includes odd-days interest, whether paid at or after consummation.

32(d)(8) Acceleration of debt.

Paragraph 32(d)(8)(i).

1. *Fraud or material misrepresentation.* A creditor may terminate a loan or open-end credit agreement and accelerate the balance if there has been fraud or material misrepresentation by the consumer in connection with the loan or open-end credit agreement. What constitutes fraud or misrepresentation is determined by applicable State law and may include acts of omission as well as overt acts, as long as any necessary intent on the part of the consumer exists.

Paragraph 32(d)(8)(ii)

1. *Failure to meet repayment terms.* A creditor may terminate a loan or open-end credit agreement and accelerate the balance when

the consumer fails to meet the repayment terms resulting in a default in payment under the agreement; a creditor may do so, however, only if the consumer actually fails to make payments resulting in a default in the agreement. For example, a creditor may not terminate and accelerate if the consumer, in error, sends a payment to the wrong location, such as a branch rather than the main office of the creditor. If a consumer files for or is placed in bankruptcy, the creditor may terminate and accelerate under §1026.32(d)(8)(ii) if the consumer fails to meet the repayment terms resulting in a default of the agreement. Section 1026.32(d)(8)(ii) does not override any State or other law that requires a creditor to notify a consumer of a right to cure, or otherwise places a duty on the creditor before it can terminate a loan or open-end credit agreement and accelerate the balance.

Paragraph 32(d)(8)(iii)

1. *Impairment of security.* A creditor may terminate a loan or open-end credit agreement and accelerate the balance if the consumer's action or inaction adversely affects the creditor's security for the loan, or any right of the creditor in that security. Action or inaction by third parties does not, in itself, permit the creditor to terminate and accelerate.

2. *Examples.* i. A creditor may terminate and accelerate, for example, if:

A. The consumer transfers title to the property or sells the property without the permission of the creditor.

B. The consumer fails to maintain required insurance on the dwelling.

C. The consumer fails to pay taxes on the property.

D. The consumer permits the filing of a lien senior to that held by the creditor.

E. The sole consumer obligated on the credit dies.

F. The property is taken through eminent domain.

G. A prior lienholder forecloses.

ii. By contrast, the filing of a judgment against the consumer would be cause for termination and acceleration only if the amount of the judgment and collateral subject to the judgment is such that the creditor's security is adversely and materially affected in violation of the loan or open-end credit agreement. If the consumer commits waste or otherwise destructively uses or fails to maintain the property, including demolishing or removing structures from the property, such that the action adversely affects the security in a material way, the loan or open-end credit agreement may be terminated and the balance accelerated. Illegal use of the property by the consumer would permit termination and acceleration if it subjects the property to seizure. If one of two consumers obligated on a loan dies, the creditor may terminate the loan and accelerate the balance if the security is adversely affected. If the consumer moves out of the dwelling that secures the loan and that action adversely affects the security in a material way, the creditor may terminate a loan or open-end credit agreement and accelerate the balance.

Section 1026.33—Requirements for Reverse Mortgages

33(a) Definition

1. *Nonrecourse transaction.* A nonrecourse reverse mortgage transaction limits the homeowner's liability to the proceeds of the sale of the home (or any lesser amount specified in the credit obligation). If a transaction structured as a closed-end reverse mortgage transaction allows recourse against the consumer, and the annual percentage rate or the points and fees exceed those specified under §1026.32(a)(1), the transaction is subject to all the requirements of §1026.32, including the limitations concerning balloon payments and negative amortization.

Paragraph 33(a)(2)

1. *Default.* Default is not defined by the statute or regulation, but rather by the legal obligation between the parties and state or other law.

2. *Definite term or maturity date.* To meet the definition of a reverse mortgage transaction, a creditor cannot require any principal, interest, or shared appreciation or equity to be due and payable (other than in the case of default) until after the consumer's death, transfer of the dwelling, or the consumer ceases to occupy the dwelling as a principal dwelling. Some state laws require legal obligations secured by a mortgage to specify a definite maturity date or term of repayment in the instrument. An obligation may state a definite maturity date or term of repayment and still meet the definition of a reverse-mortgage transaction if the maturity date or term of repayment used would not operate to cause maturity prior to the occurrence of any of the maturity events recognized in the regulation. For example, some reverse mortgage programs specify that the final maturity date is the borrower's 150th birthday; other programs include a shorter term but provide that the term is automatically extended for consecutive periods if none of the other maturity events has yet occurred. These programs would be permissible.

33(c) Projected Total Cost of Credit

33(c)(1) Costs to Consumer

1. *Costs and charges to consumer—relation to finance charge.* All costs and charges to the consumer that are incurred in a reverse mortgage transaction are included in the

projected total cost of credit, and thus in the total annual loan cost rates, whether or not the cost or charge is a finance charge under §1026.4.

2. *Annuity costs.* As part of the credit transaction, some creditors require or permit a consumer to purchase an annuity that immediately—or at some future time—supplements or replaces the creditor's payments. The amount paid by the consumer for the annuity is a cost to the consumer under this section, regardless of whether the annuity is purchased through the creditor or a third party, or whether the purchase is mandatory or voluntary. For example, this includes the costs of an annuity that a creditor offers, arranges, assists the consumer in purchasing, or that the creditor is aware the consumer is purchasing as a part of the transaction.

3. *Disposition costs excluded.* Disposition costs incurred in connection with the sale or transfer of the property subject to the reverse mortgage are not included in the costs to the consumer under this paragraph. (However, see the definition of Val_nin appendix K to the regulation to determine the effect certain disposition costs may have on the total annual loan cost rates.)

Paragraph 33(c)(2) Payments to Consumer

1. *Payments upon a specified event.* The projected total cost of credit should not reflect contingent payments in which a credit to the outstanding loan balance or a payment to the consumer's estate is made upon the occurrence of an event (for example, a ''death benefit'' payable if the consumer's death occurs within a certain period of time). Thus, the table of total annual loan cost rates required under §1026.33(b)(2) would not reflect such payments. At its option, however, a creditor may put an asterisk, footnote, or similar type of notation in the table next to the applicable total annual loan cost rate, and state in the body of the note, apart from the table, the assumption upon which the total annual loan cost is made and any different rate that would apply if the contingent benefit were paid.

33(c)(3) Additional Creditor Compensation

1. *Shared appreciation or equity.* Any shared appreciation or equity that the creditor is entitled to receive pursuant to the legal obligation must be included in the total cost of a reverse mortgage loan. For example, if a creditor agrees to a reduced interest rate on the transaction in exchange for a portion of the appreciation or equity that may be realized when the dwelling is sold, that portion is included in the projected total cost of credit.

33(c)(4) Limitations on Consumer Liability

1. *In general.* Creditors must include any limitation on the consumer's liability (such as a nonrecourse limit or an equity conservation agreement) in the projected total cost of credit. These limits and agreements protect a portion of the equity in the dwelling for the consumer or the consumer's estate. For example, the following are limitations on the consumer's liability that must be included in the projected total cost of credit:

i. A limit on the consumer's liability to a certain percentage of the projected value of the home.

ii. A limit on the consumer's liability to the net proceeds from the sale of the property subject to the reverse mortgage.

2. *Uniform assumption for ''net proceeds'' recourse limitations.* If the legal obligation between the parties does not specify a percentage for the ''net proceeds'' liability of the consumer, for purposes of the disclosures required by §1026.33, a creditor must assume that the costs associated with selling the property will equal 7 percent of the projected sale price (see the definition of the Val_n symbol under appendix K(b)(6)).

Section 1026.34—Prohibited Acts or Practices in Connection With High-Cost Mortgages

34(a) Prohibited Acts or Practices for High-Cost Mortgages

34(a)(1) Home-Improvement Contracts

Paragraph 34(a)(1)(i)

1. *Joint payees.* If a creditor pays a contractor with an instrument jointly payable to the contractor and the consumer, the instrument must name as payee each consumer who is primarily obligated on the note.

34(a)(2) Notice to Assignee

1. *Subsequent sellers or assignors.* Any person, whether or not the original creditor, that sells or assigns a mortgage subject to §1026.32 must furnish the notice of potential liability to the purchaser or assignee.

2. *Format.* While the notice of potential liability need not be in any particular format, the notice must be prominent. Placing it on the face of the note, such as with a stamp, is one means of satisfying the prominence requirement.

3. *Assignee liability.* Pursuant to section 131(d) of the Act, the Act's general holder-in-due course protections do not apply to purchasers and assignees of loans covered by §1026.32. For such loans, a purchaser's or other assignee's liability for all claims and defenses that the consumer could assert against the creditor is not limited to violations of the Act.

34(a)(3) Refinancings Within One-Year Period

1. *In the borrower's interest.* The determination of whether or not a refinancing covered by §1026.34(a)(3) is in the borrower's interest

is based on the totality of the circumstances, at the time the credit is extended. A written statement by the borrower that ''this loan is in my interest'' alone does not meet this standard.

i. A refinancing would be in the borrower's interest if needed to meet the borrower's ''bona fide personal financial emergency'' (see generally §1026.23(e) and §1026.31(c)(1)(iii)).

ii. In connection with a refinancing that provides additional funds to the borrower, in determining whether a loan is in the borrower's interest consideration should be given to whether the loan fees and charges are commensurate with the amount of new funds advanced, and whether the real estate-related charges are bona fide and reasonable in amount (see generally §1026.4(c)(7)).

2. *Application of the one-year refinancing prohibition to creditors and assignees.* The prohibition in §1026.34(a)(3) applies where an extension of credit subject to §1026.32 is refinanced into another loan subject to §1026.32. The prohibition is illustrated by the following examples. Assume that Creditor A makes a loan subject to §1026.32 on January 15, 2003, secured by a first lien; this loan is assigned to Creditor B on February 15, 2003:

i. Creditor A is prohibited from refinancing the January 2003 loan (or any other loan subject to §1026.32 to the same borrower) into a loan subject to §1026.32, until January 15, 2004. Creditor B is restricted until January 15, 2004, or such date prior to January 15, 2004 that Creditor B ceases to hold or service the loan. During the prohibition period, Creditors A and B may make a subordinate lien loan that does not refinance a loan subject to §1026.32. Assume that on April 1, 2003, Creditor A makes but does not assign a second-lien loan subject to §1026.32. In that case, Creditor A would be prohibited from refinancing either the first-lien or second-lien loans (or any other loans to that borrower subject to §1026.32) into another loan subject to §1026.32 until April 1, 2004.

ii. The loan made by Creditor A on January 15, 2003 (and assigned to Creditor B) may be refinanced by Creditor C at any time. If Creditor C refinances this loan on March 1, 2003 into a new loan subject to §1026.32, Creditor A is prohibited from refinancing the loan made by Creditor C (or any other loan subject to §1026.32 to the same borrower) into another loan subject to §1026.32 until January 15, 2004. Creditor C is similarly prohibited from refinancing any loan subject to §1026.32 to that borrower into another until March 1, 2004. (The limitations of §1026.34(a)(3) no longer apply to Creditor B after Creditor C refinanced the January 2003 loan and Creditor B ceased to hold or service the loan.)

Paragraph 34(a)(4) Repayment Ability for High-Cost Mortgages

1. *Application of repayment ability rule.* The §1026.34(a)(4) prohibition against making loans without regard to consumers' repayment ability applies to open-end, high-cost mortgages. The §1026.43 repayment ability provisions apply to closed-end, high-cost mortgages. Accordingly, in connection with a closed-end, high-cost mortgage, §1026.34(a)(4) requires a creditor to comply with the repayment ability requirements set forth in §1026.43.

2. *General prohibition.* Section 1026.34(a)(4) prohibits a creditor from extending credit under a high-cost, open-end credit plan based on the value of the consumer's collateral without regard to the consumer's repayment ability as of account opening, including the consumer's current and reasonably expected income, employment, assets other than the collateral, current obligations, and property tax and insurance obligations. A creditor may base its determination of repayment ability on current or reasonably expected income from employment or other sources, on assets other than the collateral, or both.

3. *Other dwelling-secured obligations.* For purposes of §1026.34(a)(4), current obligations include another credit obligation of which the creditor has knowledge undertaken prior to or at account opening and secured by the same dwelling that secures the high-cost mortgage transaction.

4. *Discounted introductory rates and non-amortizing payments.* A credit agreement may determine a consumer's initial payments using a temporarily discounted interest rate or permit the consumer to make initial payments that are non-amortizing. In such cases the creditor may determine repayment ability using the assumptions provided in §1026.34(a)(4)(iv).

5. *Repayment ability as of account opening.* Section 1026.34(a)(4) prohibits a creditor from disregarding repayment ability based on the facts and circumstances known to the creditor as of account opening. In general, a creditor does not violate this provision if a consumer defaults because of a significant reduction in income (for example, a job loss) or a significant obligation (for example, an obligation arising from a major medical expense) that occurs after account opening. However, if a creditor has knowledge as of account opening of reductions in income (for example, if a consumer's written application states that the consumer plans to retire within twelve months without obtaining new employment, or states that the consumer will transition from full-time to part-time employment), the creditor must consider that information.

6. *Income, assets, and employment.* Any current or reasonably expected assets or income may be considered by the creditor, except

the collateral itself. For example, a creditor may use information about current or expected salary, wages, bonus pay, tips, and commissions. Employment may be full-time, part-time, seasonal, irregular, military, or self-employment. Other sources of income could include interest or dividends; retirement benefits; public assistance; and alimony, child support, or separate maintenance payments. A creditor may also take into account assets such as savings accounts or investments that the consumer can or will be able to use.

7. *Interaction with Regulation B.* Section 1026.34(a)(4) does not require or permit the creditor to make inquiries or verifications that would be prohibited by Regulation B, 12 CFR part 1002.

34(a)(4)(i) Mortgage-Related Obligations

1. *Mortgage-related obligations.* A creditor must include in its repayment ability analysis the expected property taxes and premiums for mortgage-related insurance required by the creditor as set forth in §1026.35(b), as well as similar mortgage-related expenses. Similar mortgage-related expenses include homeowners' association dues and condominium or cooperative fees.

34(a)(4)(ii) Verification of Repayment Ability

1. *Income and assets relied on.* A creditor must verify the income and assets the creditor relies on to evaluate the consumer's repayment ability. For example, if a consumer earns a salary and also states that he or she is paid an annual bonus, but the creditor only relies on the applicant's salary to evaluate repayment ability, the creditor need only verify the salary.

2. *Income and assets—co-applicant.* If two persons jointly apply for credit and both list income or assets on the application, the creditor must verify repayment ability with respect to both applicants unless the creditor relies only on the income or assets of one of the applicants in determining repayment ability.

3. *Expected income.* If a creditor relies on expected income, the expectation must be reasonable and it must be verified with third-party documents that provide reasonably reliable evidence of the consumer's expected income. For example, if the creditor relies on an expectation that a consumer will receive an annual bonus, the creditor may verify the basis for that expectation with documents that show the consumer's past annual bonuses and the expected bonus must bear a reasonable relationship to past bonuses. Similarly, if the creditor relies on a consumer's expected salary following the consumer's receipt of an educational degree, the creditor may verify that expectation with a written statement from an employer indicating that the consumer will be employed upon graduation at a specified salary.

Paragraph 34(a)(4)(ii)(A)

1. *Internal Revenue Service (IRS) Form W–2.* A creditor may verify a consumer's income using a consumer's IRS Form W–2 (or any subsequent revisions or similar IRS Forms used for reporting wages and tax withholding). The creditor may also use an electronic retrieval service for obtaining the consumer's W–2 information.

2. *Tax returns.* A creditor may verify a consumer's income or assets using the consumer's tax return. A creditor may also use IRS Form 4506 ''Request for Copy of Tax Return,'' Form 4506–T ''Request for Transcript of Tax Return,'' or Form 8821 ''Tax Information Authorization'' (or any subsequent revisions or similar IRS Forms appropriate for obtaining tax return information directly from the IRS) to verify the consumer's income or assets. The creditor may also use an electronic retrieval service for obtaining tax return information.

3. *Other third-party documents that provide reasonably reliable evidence of consumer's income or assets.* Creditors may verify income and assets using documents produced by third parties. Creditors may not rely on information provided orally by third parties, but may rely on correspondence from the third party, such as by letter or email. The creditor may rely on any third-party document that provides reasonably reliable evidence of the consumer's income or assets. For example, creditors may verify the consumer's income using receipts from a check-cashing or remittance service, or by obtaining a written statement from the consumer's employer that states the consumer's income.

4. *Information specific to the consumer.* Creditors must verify a consumer's income or assets using information that is specific to the individual consumer. Creditors may use third-party databases that contain individual-specific data about a consumer's income or assets, such as a third-party database service used by the consumer's employer for the purpose of centralizing income verification requests, so long as the information is reasonably current and accurate. Information about average incomes for the consumer's occupation in the consumer's geographic location or information about average incomes paid by the consumer's employer, however, would not be specific to the individual consumer.

5. *Duplicative collection of documentation.* A creditor that has made a loan to a consumer and is refinancing or extending new credit to the same consumer need not collect from the consumer a document the creditor previously obtained if the creditor has no information that would reasonably lead the creditor to believe that document has changed since it was initially collected. For example,

if the creditor has obtained the consumer's 2006 tax return to make a home purchase loan in May 2007, the creditor may rely on the 2006 tax return if the creditor makes a home equity loan to the same consumer in August 2007. Similarly, if the creditor has obtained the consumer's bank statement for May 2007 in making the first loan, the creditor may rely on that bank statement for that month in making the subsequent loan in August 2007.

Paragraph 34(a)(4)(ii)(B)

1. *In general.* A credit report may be used to verify current obligations. A credit report, however, might not reflect an obligation that a consumer has listed on an application. The creditor is responsible for considering such an obligation, but the creditor is not required to independently verify the obligation. Similarly, a creditor is responsible for considering certain obligations undertaken just before or at account opening and secured by the same dwelling that secures the transaction (for example, a ''piggy back'' loan), of which the creditor knows, even if not reflected on a credit report. *See* comment 34(a)(4)–3.

34(a)(4)(iii) Presumption of Compliance

1. *In general.* A creditor is presumed to have complied with §1026.34(a)(4) if the creditor follows the three underwriting procedures specified in paragraph 34(a)(4)(iii) for verifying repayment ability, determining the payment obligation, and measuring the relationship of obligations to income. The procedures for verifying repayment ability are required under §1026.34(a)(4)(ii); the other procedures are not required but, if followed along with the required procedures, create a presumption that the creditor has complied with §1026.34(a)(4). The consumer may rebut the presumption with evidence that the creditor nonetheless disregarded repayment ability despite following these procedures. For example, evidence of a very high debt-to-income ratio and a very limited residual income could be sufficient to rebut the presumption, depending on all of the facts and circumstances. If a creditor fails to follow one of the non-required procedures set forth in §1026.34(a)(4)(iii), then the creditor's compliance is determined based on all of the facts and circumstances without there being a presumption of either compliance or violation.

Paragraph 34(a)(4)(iii)(B)

1. *Determination of payment schedule.* To retain a presumption of compliance under §1026.34(a)(4)(iii), a creditor must determine the consumer's ability to pay the principal and interest obligation based on the maximum scheduled payment. In general, a creditor should determine a payment schedule for purposes of §1026.34(a)(4)(iii)(B) based on the guidance in the commentary to §1026.32(c)(3).

Paragraph 34(a)(4)(iii)(C)

1. *''Income'' and ''debt''.* To determine whether to classify particular inflows or obligations as ''income'' or ''debt,'' creditors may look to widely accepted governmental and non-governmental underwriting standards, including, for example, those set forth in the Federal Housing Administration's handbook on Mortgage Credit Analysis for Mortgage Insurance.

34(a)(4)(iv) Exclusions From Presumption of Compliance

1. *In general.* The exclusions from the presumption of compliance should be interpreted consistent with comments 32(d)(1)(i)–1 and 32(d)(2)–1.

2. *Renewable balloon loan.* If a creditor is unconditionally obligated to renew a balloon-payment loan at the consumer's option (or is obligated to renew subject to conditions within the consumer's control), the full term resulting from such renewal is the relevant term for purposes of the exclusion of certain balloon-payment loans. See comment 17(c)(1)–11 for a discussion of conditions within a consumer's control in connection with renewable balloon-payment loans.

34(a)(5) Pre-loan counseling.

34(a)(5)(i) Certification of counseling required.

1. *HUD-approved counselor.* For purposes of §1026.34(a)(5), counselors approved by the Secretary of the U.S. Department of Housing and Urban Development are homeownership counselors certified pursuant to section 106(e) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(e)), or as otherwise determined by the Secretary.

2. *State housing finance authority.* For purposes of §1026.34(a)(5), a ''State housing finance authority'' has the same meaning as ''State housing finance agency'' provided in 24 CFR 214.3.

3. *Processing applications.* Prior to receiving certification of counseling, a creditor may not extend a high-cost mortgage, but may engage in other activities, such as processing an application that will result in the extension of a high-cost mortgage (by, for example, ordering an appraisal or title search).

4. *Form of certification.* The written certification of counseling required by §1026.34(a)(5)(i) may be received by mail, email, facsimile, or any other method, so long as the certification is in a retainable form.

5. *Purpose of certification.* Certification of counseling indicates that a consumer has received counseling as required by §1026.34(a)(5), but it does not indicate that a

counselor has made a judgment or determination as to the appropriateness of the transaction for the consumer.

34(a)(5)(ii) Timing of counseling.

1. *Disclosures for open-end credit plans.* Section 1026.34(a)(5)(ii) permits receipt of either the disclosure required by section 5(c) of RESPA or the disclosures required under §1026.40 to allow counseling to occur. Pursuant to 12 CFR 1024.7(h), the disclosures required by §1026.40 can be provided for open-end plans in lieu of the usual disclosure required by section 5(c) of RESPA.

2. *Transactions not subject to RESPA or §1026.40.* For closed-end mortgage transactions that are not subject to RESPA, the counseling certification must include a statement that the consumer(s) received counseling on the advisability of the high-cost mortgage based on the terms provided in the disclosures required by §1026.32(c). (Reference to counseling on advisability using the disclosures required by §1026.32(c) is not required for transactions subject to RESPA or §1026.40.) The disclosures required by §1026.32(c) must be furnished to the consumer at least three business days prior to consummation of the mortgage. The creditor may wish to furnish the disclosures sooner, to provide sufficient time for counseling and certification.

3. *Initial disclosure.* Counseling may occur after receipt of either an initial disclosure required by section 5(c) of RESPA, the disclosures required by §1026.40, or the disclosures required by §1026.32(c), regardless of whether revised versions of such disclosures are subsequently provided to the consumer.

34(a)(5)(iv) Content of certification.

1. *Statement of counseling on advisability.* A statement that a consumer has received counseling on the advisability of the high-cost mortgage means that the consumer has received counseling about key terms of the mortgage transaction, as set out in either the disclosure required by section 5(c) of RESPA or the disclosures provided to the consumer pursuant to §1026.40, or, for closed-end transactions not subject to RESPA, the disclosures required by §1026.32(c); the consumer's budget, including the consumer's income, assets, financial obligations, and expenses; and the affordability of the mortgage transaction for the consumer. Examples of such terms of the mortgage transaction include the initial interest rate, the initial monthly payment, whether the payment may increase, how the minimum periodic payment will be determined, and fees imposed by the creditor, as may be reflected in the applicable disclosure. A statement that a consumer has received counseling on the advisability of the high-cost mortgage does not require the counselor to have made a judgment or determination as to the appropriateness of the mortgage transaction for the consumer.

2. *Statement of verification.* A statement that a counselor has verified that the consumer has received the disclosures required by either §1026.32(c) or by RESPA for the high-cost mortgage means that a counselor has confirmed, orally, in writing, or by some other means, receipt of such disclosures with the consumer.

34(a)(5)(v) Counseling fees.

1. *Financing.* Section 1026.34(a)(5)(v) does not prohibit a creditor from financing the counseling fee as part of the transaction for a high-cost mortgage, if the fee is a bona fide third-party charge as provided by §1026.32(b)(5)(i).

34(a)(5)(vi) Steering prohibited.

1. An example of an action that constitutes steering would be when a creditor repeatedly highlights or otherwise distinguishes the same counselor in the notices the creditor provides to consumers pursuant to §1026.34(a)(5)(vii).

2. Section 1026.34(a)(5)(vi) does not prohibit a creditor from providing a consumer with objective information related to counselors or counseling organizations in response to a consumer's inquiry. An example of an action that would not constitute steering would be when a consumer asks the creditor for information about the fees charged by a counselor, and the creditor responds by providing the consumer information about fees charged by the counselor to other consumers that previously obtained counseling pursuant to §1026.34(a)(5).

34(a)(6) Recommended default.

1. *Facts and circumstances.* Whether a creditor or mortgage broker ''recommends or encourages'' default for purposes of §1026.34(a)(6) depends on all of the relevant facts and circumstances.

2. *Examples.* i. A creditor or mortgage broker ''recommends or encourages'' default when the creditor or mortgage broker advises the consumer to stop making payments on an existing loan in a manner that is likely to cause the consumer to default on the existing loan.

ii. When delay of consummation of a high-cost mortgage occurs for reasons outside the control of a creditor or mortgage broker, that creditor or mortgage broker does not ''recommend or encourage'' default because the creditor or mortgage broker informed a consumer that:

A. The consumer's high-cost mortgage is scheduled to be consummated prior to the due date for the next payment due on the consumer's existing loan, which is intended to be paid by the proceeds of the new high-cost mortgage; and

B. Any delay of consummation of the new high-cost mortgage beyond the payment due date of the existing loan will not relieve the consumer of the obligation to make timely payment on that loan.

34(a)(8) Late fees.

34(a)(8)(i) General.

1. For purposes of §1026.34(a)(8), in connection with an open-end credit plan, the amount of the payment past due is the required minimum periodic payment as provided under the terms of the open-end credit agreement.

34(a)(8)(iii) Multiple late charges assessed on payment subsequently paid.

1. Section 1026.34(a)(8)(iii) prohibits the pyramiding of late fees or charges in connection with a high-cost mortgage payment. For example, assume that a consumer's regular periodic payment of $500 is due on the 1st of each month. On August 25, the consumer makes a $500 payment which was due on August 1, and as a result, a $10 late charge is assessed. On September 1, the consumer makes another $500 payment for the regular periodic payment due on September 1, but does not pay the $10 late charge assessed on the August payment. Under §1026.34(h)(2), it is impermissible to allocate $10 of the consumer's September 1 payment to cover the late charge, such that the September payment becomes delinquent. In short, because the $500 payment made on September 1 is a full payment for the applicable period and is paid by its due date or within any applicable grace period, no late charge may be imposed on the account in connection with the September payment.

34(a)(8)(iv) Failure to make required payment.

1. Under §1026.34(a)(8)(iv), if a consumer fails to make one or more required payments and then resumes making payments but fails to bring the account current, it is permissible, if permitted by the terms of the loan contract or open-end credit agreement, to apply the consumer's payments first to the past due payment(s) and to impose a late charge on each subsequent required payment until the account is brought current. To illustrate: Assume that a consumer's regular periodic payment of $500 is due on the 1st of each month, or before the expiration of a 15-day grace period. Also assume that the consumer fails to make a timely installment payment by August 1 (or within the applicable grace period), and a $10 late charge therefore is imposed. The consumer resumes making monthly payments on September 1. Under §1026.34(a)(8)(iv), if permitted by the terms of the loan contract, the creditor may apply the $500 payment made on September 1 to satisfy the missed $500 payment that was due on August 1. If the consumer makes no other payment prior to the end of the grace period for the payment that was due on September 1, the creditor may also impose a $10 late fee for the payment that was due on September 1.

34(a)(10) Financing of points and fees.

1. *Points and fees.* For purposes of §1026.34(a)(10), ''points and fees'' means those items that are required to be included in the calculation of points and fees under §1026.32(b)(1) and (2). Thus, for example, in connection with the extension of credit under a high-cost mortgage, a creditor may finance a fee charged by a third-party counselor in connection with the consumer's receipt of pre-loan counseling under §1026.34(a)(5), because, pursuant to §1026.32(b)(1)(i)(D) and (b)(2)(i)(D), such a fee is excluded from the calculation of points and fees as a bona fide third-party charge.

2. *Examples of financing points and fees.* For purposes of §1026.34(a)(10), points and fees are financed if, for example, they are added to the loan balance or financed through a separate note, if the note is payable to the creditor or to an affiliate of the creditor. In the case of an open-end credit plan, a creditor also finances points and fees if the creditor advances funds from the credit line to cover the fees.

34(b) Prohibited acts or practices for dwelling-secured loans; structuring loans to evade high-cost mortgage requirements.

1. *Examples.* i. A creditor structures a transaction in violation of §1026.34(b) if, for example, the creditor structures a loan that would otherwise be a high-cost mortgage as two or more loans, whether made consecutively or at the same time, for example, to divide the loan fees to avoid the points and fees threshold for high-cost mortgages in §1026.32(a)(1)(ii).

ii. A creditor does not structure a transaction in violation of §1026.34(b) when a loan to finance the initial construction of a dwelling may be permanently financed by the same creditor, such as a ''construction-to-permanent'' loan, and the construction phase and the permanent phase are treated as separate transactions. Section 1026.17(c)(6)(ii) permits the creditor to give either one combined disclosure for both the construction financing and the permanent financing, or a separate set of disclosures for each of the two phases as though they were two separate transactions. *See also* comment 17(c)(6)–2.

2. *Amount of credit extended.* Where a loan is documented as open-end credit but the features and terms or other circumstances demonstrate that it does not meet the definition of open-end credit, the loan is subject to the rules for closed-end credit. Thus, in determining the ''total loan amount'' for purposes of applying the triggers under §1026.32, the amount of credit that would have been extended if the loan had been documented as a closed-end loan is a factual determination to be made in each case. Factors to be considered include the amount of money the consumer originally requested, the amount of the first advance or the highest outstanding balance, or the amount of the credit line. The full amount of the credit line is considered only to the extent that it is reasonable to expect that the consumer might use the full amount of credit.

34(b) Prohibited Acts or Practices for Dwelling-Secured Loans; Open-End Credit

1. *Amount of credit extended.* Where a loan is documented as open-end credit but the features and terms or other circumstances demonstrate that it does not meet the definition of open-end credit, the loan is subject to the rules for closed-end credit, including § 1026.32 if the rate or fee trigger is met. In applying the triggers under § 1026.32, the "amount financed," including the "principal loan amount" must be determined. In making the determination, the amount of credit that would have been extended if the loan had been documented as a closed-end loan is a factual determination to be made in each case. Factors to be considered include the amount of money the consumer originally requested, the amount of the first advance or the highest outstanding balance, or the amount of the credit line. The full amount of the credit line is considered only to the extent that it is reasonable to expect that the consumer might use the full amount of credit.

Section 1026.35—Requirements for Higher-Priced Mortgage Loans

35(a) Definitions

Paragraph 35(a)(1)

1. *Comparable transaction.* A higher-priced mortgage loan is a consumer credit transaction secured by the consumer's principal dwelling with an annual percentage rate that exceeds the average prime offer rate for a comparable transaction as of the date the interest rate is set by the specified margin. The table of average prime offer rates published by the Bureau indicates how to identify the comparable transaction.

2. *Rate set.* A transaction's annual percentage rate is compared to the average prime offer rate as of the date the transaction's interest rate is set (or "locked") before consummation. Sometimes a creditor sets the interest rate initially and then re-sets it at a different level before consummation. The creditor should use the last date the interest rate is set before consummation.

3. *Threshold for "jumbo" loans.* Section 1026.35(a)(1)(ii) provides a separate threshold for determining whether a transaction is a higher-priced mortgage loan subject to § 1026.35 when the principal balance exceeds the limit in effect as of the date the transaction's rate is set for the maximum principal obligation eligible for purchase by Freddie Mac (a "jumbo" loan). The Federal Housing Finance Agency (FHFA) establishes and adjusts the maximum principal obligation pursuant to rules under 12 U.S.C. 1454(a)(2) and other provisions of federal law. Adjustments to the maximum principal obligation made by FHFA apply in determining whether a mortgage loan is a "jumbo" loan to which the separate coverage threshold in § 1026.35(a)(1)(ii) applies.

Paragraph 35(a)(2)

1. *Average prime offer rate.* Average prime offer rates are annual percentage rates derived from average interest rates, points, and other loan pricing terms currently offered to consumers by a representative sample of creditors for mortgage transactions that have low-risk pricing characteristics. Other pricing terms include commonly used indices, margins, and initial fixed-rate periods for variable-rate transactions. Relevant pricing characteristics include a consumer's credit history and transaction characteristics such as the loan-to-value ratio, owner-occupant status, and purpose of the transaction. To obtain average prime offer rates, the Bureau uses a survey of creditors that both meets the criteria of § 1026.35(a)(2) and provides pricing terms for at least two types of variable-rate transactions and at least two types of non-variable-rate transactions. An example of such a survey is the Freddie Mac Primary Mortgage Market Survey®.

2. *Bureau table.* The Bureau publishes on the Internet, in table form, average prime offer rates for a wide variety of transaction types. The Bureau calculates an annual percentage rate, consistent with Regulation Z (*see* § 1026.22 and appendix J), for each transaction type for which pricing terms are available from a survey. The Bureau estimates annual percentage rates for other types of transactions for which direct survey data are not available based on the loan pricing terms available in the survey and other information. The Bureau publishes on the Internet the methodology it uses to arrive at these estimates.

3. *Additional guidance on determination of average prime offer rates.* The average prime offer rate has the same meaning in § 1026.35 as in Regulation C, 12 CFR part 1003. See 12 CFR 1003.4(a)(12)(ii). Guidance on the average prime offer rate under § 1026.35(a)(2), such as when a transaction's rate is set and determination of the comparable transaction, is provided in the official commentary under Regulation C, the publication entitled "A Guide to HMDA Reporting: Getting it Right!", and the relevant "Frequently Asked Questions" on Home Mortgage Disclosure Act (HMDA) compliance posted on the FFIEC's Web site at *http://www.ffiec.gov/hmda*.

35(b) Escrow Accounts

1. *Principal dwelling.* Section 1026.35(b)(1) applies to principal dwellings, including structures that are classified as personal property under State law. For example, an escrow account must be established on a higher-priced mortgage loan secured by a first lien on a manufactured home, boat, or

trailer used as the consumer's principal dwelling. *See* the commentary under §§1026.2(a)(19) and(24), 1026.15, and 1026.23. Section 1026.35(b)(1) also applies to a higher-priced mortgage loan secured by a first lien on a condominium if it is in fact used as the consumer's principal dwelling. But see §1026.35(b)(2) for exemptions from the escrow requirement that may apply to such transactions.

35(b)(1) Requirement to escrow for property taxes and insurance

1. *Administration of escrow accounts.* Section 1026.35(b)(1) requires creditors to establish an escrow account for payment of property taxes and premiums for mortgage-related insurance required by the creditor before the consummation of a higher-priced mortgage loan secured by a first lien on a principal dwelling. Section 6 of RESPA, 12 U.S.C. 2605, and Regulation X, 12 CFR 1024.17, address how escrow accounts must be administered.

2. *Optional insurance items.* Section 1026.35(b)(1) does not require that an escrow account be established for premiums for mortgage-related insurance that the creditor does not require in connection with the credit transaction, such as earthquake insurance or credit life insurance, even if the consumer voluntarily obtains such insurance.

3. *Transactions not subject to §1026.35(b)(1).* Section 1026.35(b)(1) requires a creditor to establish an escrow account before consummation of a first-lien higher-priced mortgage loan. This requirement does not affect a creditor's ability, right, or obligation, pursuant to the terms of the legal obligation or applicable law, to offer or require an escrow account for a transaction that is not subject to §1026.35(b)(1).

35(b)(2) Exemptions

Paragraph 35(b)(2)(i).

1. *Construction-permanent loans.* Under §1026.35(b)(2)(ii)(B), §1026.35 does not apply to a transaction to finance the initial construction of a dwelling. Section 1026.35 may apply, however, to permanent financing that replaces a construction loan, whether the permanent financing is extended by the same or a different creditor. When a construction loan may be permanently financed by the same creditor, §1026.17(c)(6)(ii) permits the creditor to give either one combined disclosure for both the construction financing and the permanent financing, or a separate set of disclosures for each of the two phases as though they were two separate transactions. *See also* comment 17(c)(6)–2. Section 1026.17(c)(6)(ii) addresses only how a creditor may elect to disclose a construction-permanent transaction. Which disclosure option a creditor elects under §1026.17(c)(6)(ii) does not affect the determination of whether the permanent phase of the transaction is subject to §1026.35. When the creditor discloses the two phases as separate transactions, the annual percentage rate for the permanent phase must be compared to the average prime offer rate for a transaction that is comparable to the permanent financing to determine whether the transaction is a higher-priced mortgage loan under §1026.35(a). When the creditor discloses the two phases as a single transaction, a single annual percentage rate, reflecting the appropriate charges from both phases, must be calculated for the transaction in accordance with §1026.22(a)(1) and appendix D to part 1026. This annual percentage rate must be compared to the average prime offer rate for a transaction that is comparable to the permanent financing to determine the transaction is a higher-priced mortgage loan under §1026.35(a). If the transaction is determined to be a higher-priced mortgage loan, only the permanent phase is subject to the requirement of §1026.35(b)(1) to establish and maintain an escrow account, and the period for which the escrow account must remain in place under §1026.35(b)(3) is measured from the time the conversion to the permanent phase financing occurs.

Paragraph 35(b)(2)(ii).

1. *Limited exemption.* A creditor is required to escrow for payment of property taxes for all first-lien higher-priced mortgage loans secured by condominium, planned unit development, or similar dwellings or units regardless of whether the creditor escrows for insurance premiums for such dwellings or units.

2. *Planned unit developments.* Planned unit developments (PUDs) are a form of property ownership often used in retirement communities, golf communities, and similar communities made up of homes located within a defined geographical area. PUDs usually have a homeowners' association or some other governing association, analogous to a condominium association and with similar authority and obligations. Thus, as with condominiums, PUDs often have master insurance policies that cover all units in the PUD. Under §1026.35(b)(2)(ii), if a PUD's governing association is obligated to maintain such a master insurance policy, an escrow account required by §1026.35(b)(1) for a transaction secured by a unit in the PUD need not include escrows for insurance. This exemption applies not only to condominiums and PUDs but also to any other type of property ownership arrangement that has a governing association with an obligation to maintain a master insurance policy.

3. *More than one governing association associated with a dwelling.* The limited exemption provided pursuant to §1026.35(b)(2)(ii) applies to each master insurance policy for properties with multiple governing associations, to the extent each governing association has

an obligation to maintain a master insurance policy.

Paragraph 35(b)(2)(iii).

1. *Requirements for exemption.* Under §1026.35(b)(2)(iii), except as provided in §1026.35(b)(2)(v), a creditor need not establish an escrow account for taxes and insurance for a higher-priced mortgage loan, provided the following four conditions are satisfied when the higher-priced mortgage loan is consummated:

i. During the preceding calendar year, or during either of the two preceding calendar years if the application for the loan was received before April 1 of the current calendar year, a creditor extended a first-lien covered transaction, as defined in §1026.43(b)(1), secured by a property located in an area that is either ''rural'' or ''underserved,'' as set forth in §1026.35(b)(2)(iv).

A. In general, whether the rural-or-underserved test is satisfied depends on the creditor's activity during the preceding calendar year. However, if the application for the loan in question was received before April 1 of the current calendar year, the creditor may instead meet the rural-or-underserved test based on its activity during the next-to-last calendar year. This provides creditors with a grace period if their activity meets the rural-or-underserved test (in §1026.35(b)(2)(iii)(A)) in one calendar year but fails to meet it in the next calendar year.

B. A creditor meets the rural-or-underserved test for any higher-priced mortgage loan consummated during a calendar year if it extended a first-lien covered transaction in the preceding calendar year secured by a property located in a rural-or-underserved area. If the creditor does not meet the rural-or-underserved test in the preceding calendar year, the creditor meets this condition for a higher-priced mortgage loan consummated during the current calendar year only if the application for the loan was received before April 1 of the current calendar year and the creditor extended a first-lien covered transaction during the next-to-last calendar year that is secured by a property located in a rural or underserved area. The following examples are illustrative:

1. Assume that a creditor extended during 2016 a first-lien covered transaction that is secured by a property located in a rural or underserved area. Because the creditor extended a first-lien covered transaction during 2016 that is secured by a property located in a rural or underserved area, the creditor can meet this condition for exemption for any higher-priced mortgage loan consummated during 2017.

2. Assume that a creditor did not extend during 2016 a first-lien covered transaction secured by a property that is located in a rural or underserved area. Assume further that the same creditor extended during 2015 a first-lien covered transaction that is located in a rural or underserved area. Assume further that the creditor consummates a higher-priced mortgage loan in 2017 for which the application was received in November 2017. Because the creditor did not extend during 2016 a first-lien covered transaction secured by a property that is located in a rural or underserved area, and the application was received on or after April 1, 2017, the creditor does not meet this condition for exemption. However, assume instead that the creditor consummates a higher-priced mortgage loan in 2017 based on an application received in February 2017. The creditor meets this condition for exemption for this loan because the application was received before April 1, 2017, and the creditor extended during 2015 a first-lien covered transaction that is located in a rural or underserved area.

ii. The creditor and its affiliates together extended no more than 2,000 covered transactions, as defined in §1026.43(b)(1), secured by first liens, that were sold, assigned, or otherwise transferred by the creditor or its affiliates to another person, or that were subject at the time of consummation to a commitment to be acquired by another person, during the preceding calendar year or during either of the two preceding calendar years if the application for the loan was received before April 1 of the current calendar year. For purposes of §1026.35(b)(2)(iii)(B), a transfer of a first-lien covered transaction to ''another person'' includes a transfer by a creditor to its affiliate.

A. In general, whether this condition is satisfied depends on the creditor's activity during the preceding calendar year. However, if the application for the loan in question is received before April 1 of the current calendar year, the creditor may instead meet this condition based on activity during the next-to-last calendar year. This provides creditors with a grace period if their activity falls at or below the threshold in one calendar year but exceeds it in the next calendar year.

B. For example, assume that in 2015 a creditor and its affiliates together extended 1,500 loans that were sold, assigned, or otherwise transferred by the creditor or its affiliates to another person, or that were subject at the time of consummation to a commitment to be acquired by another person, and 2,500 such loans in 2016. Because the 2016 transaction activity exceeds the threshold but the 2015 transaction activity does not, the creditor satisfies this condition for exemption for a higher-priced mortgage loan consummated during 2017 if the creditor received the application for the loan before April 1, 2017, but does not satisfy this condition for a higher-priced mortgage loan consummated during 2017 if the application for the loan was received on or after April 1, 2017.

C. For purposes of §1026.35(b)(2)(iii)(B), extensions of first-lien covered transactions, during the applicable time period, by all of a creditor's affiliates, as ''affiliate'' is defined in §1026.32(b)(5), are counted toward the threshold in this section. ''Affiliate'' is defined in §1026.32(b)(5) as ''any company that controls, is controlled by, or is under common control with another company, as set forth in the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*).'' Under the Bank Holding Company Act, a company has control over a bank or another company if it directly or indirectly or acting through one or more persons owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank or company; it controls in any manner the election of a majority of the directors or trustees of the bank or company; or the Federal Reserve Board determines, after notice and opportunity for hearing, that the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company. 12 U.S.C. 1841(a)(2).

iii. As of the end of the preceding calendar year, or as of the end of either of the two preceding calendar years if the application for the loan was received before April 1 of the current calendar year, the creditor and its affiliates that regularly extended covered transactions secured by first liens, together, had total assets that are less than the applicable annual asset threshold.

A. For purposes of §1026.35(b)(2)(iii)(C), in addition to the creditor's assets, only the assets of a creditor's ''affiliate'' (as defined by §1026.32(b)(5)) that regularly extended covered transactions (as defined by §1026.43(b)(1)) secured by first liens, are counted toward the applicable annual asset threshold. *See* comment 35(b)(2)(iii)–1.ii.C for discussion of definition of ''affiliate.''

B. Only the assets of a creditor's affiliate that regularly extended first-lien covered transactions during the applicable period are included in calculating the creditor's assets. The meaning of ''regularly extended'' is based on the number of times a person extends consumer credit for purposes of the definition of ''creditor'' in §1026.2(a)(17). Because covered transactions are ''transactions secured by a dwelling,'' consistent with §1026.2(a)(17)(v), an affiliate regularly extended covered transactions if it extended more than five covered transactions in a calendar year. Also consistent with §1026.2(a)(17)(v), because a covered transaction may be a high-cost mortgage subject to §1026.32, an affiliate regularly extends covered transactions if, in any 12-month period, it extends more than one covered transaction that is subject to the requirements of §1026.32 or one or more such transactions through a mortgage broker. Thus, if a creditor's affiliate regularly extended first-lien covered transactions during the preceding calendar year, the creditor's assets as of the end of the preceding calendar year, for purposes of the asset limit, take into account the assets of that affiliate. If the creditor, together with its affiliates that regularly extended first-lien covered transactions, exceeded the asset limit in the preceding calendar year—to be eligible to operate as a small creditor for transactions with applications received before April 1 of the current calendar year—the assets of the creditor's affiliates that regularly extended covered transactions in the year before the preceding calendar year are included in calculating the creditor's assets.

C. If multiple creditors share ownership of a company that regularly extended first-lien covered transactions, the assets of the company count toward the asset limit for a co-owner creditor if the company is an ''affiliate,'' as defined in §1026.32(b)(5), of the co-owner creditor. Assuming the company is not an affiliate of the co-owner creditor by virtue of any other aspect of the definition (such as by the company and co-owner creditor being under common control), the company's assets are included toward the asset limit of the co-owner creditor only if the company is controlled by the co-owner creditor, ''as set forth in the Bank Holding Company Act.'' If the co-owner creditor and the company are affiliates (by virtue of any aspect of the definition), the co-owner creditor counts all of the company's assets toward the asset limit, regardless of the co-owner creditor's ownership share. Further, because the co-owner and the company are mutual affiliates the company also would count all of the co-owner's assets towards its own asset limit. *See* comment 35(b)(2)(iii)–1.ii.C for discussion of the definition of ''affiliate.''

D. A creditor satisfies the criterion in §1026.35(b)(2)(iii)(C) for purposes of any higher-priced mortgage loan consummated during 2016, for example, if the creditor (together with its affiliates that regularly extended first-lien covered transactions) had total assets of less than the applicable asset threshold on December 31, 2015. A creditor that (together with its affiliates that regularly extended first-lien covered transactions) did not meet the applicable asset threshold on December 31, 2015, satisfies this criterion for a higher-priced mortgage loan consummated during 2016 if the application for the loan was received before April 1, 2016, and the creditor (together with its affiliates that regularly extended first-lien covered transactions) had total assets of less than the applicable asset threshold on December 31, 2014.

E. Under §1026.35(b)(2)(iii)(C), the $2,000,000,000 asset threshold adjusts automatically each year based on the year-to-year change in the average of the Consumer Price Index for Urban Wage Earners and Clerical Workers, not seasonally adjusted, for each 12-month period ending in November, with rounding to the nearest million dollars. The Bureau will publish notice of the asset threshold each year by amending this comment. For calendar year 2024, the asset threshold is $2,640,000,000. A creditor that together with the assets of its affiliates that regularly extended first-lien covered transactions during calendar year 2023 has total assets of less than $2,640,000,000 on December 31, 2023, satisfies this criterion for purposes of any loan consummated in 2024 and for purposes of any loan consummated in 2025 for which the application was received before April 1, 2025. For historical purposes:

1. For calendar year 2013, the asset threshold was $2,000,000,000. Creditors that had total assets of less than $2,000,000,000 on December 31, 2012, satisfied this criterion for purposes of the exemption during 2013.

2. For calendar year 2014, the asset threshold was $2,028,000,000. Creditors that had total assets of less than $2,028,000,000 on December 31, 2013, satisfied this criterion for purposes of the exemption during 2014.

3. For calendar year 2015, the asset threshold was $2,060,000,000. Creditors that had total assets of less than $2,060,000,000 on December 31, 2014, satisfied this criterion for purposes of any loan consummated in 2015 and, if the creditor's assets together with the assets of its affiliates that regularly extended first-lien covered transactions during calendar year 2014 were less than that amount, for purposes of any loan consummated in 2016 for which the application was received before April 1, 2016.

4. For calendar year 2016, the asset threshold was $2,052,000,000. A creditor that together with the assets of its affiliates that regularly extended first-lien covered transactions during calendar year 2015 had total assets of less than $2,052,000,000 on December 31, 2015, satisfied this criterion for purposes of any loan consummated in 2016 and for purposes of any loan consummated in 2017 for which the application was received before April 1, 2017.

5. For calendar year 2017, the asset threshold was $2,069,000,000. A creditor that together with the assets of its affiliates that regularly extended first-lien covered transactions during calendar year 2016 had total assets of less than $2,069,000,000 on December 31, 2016, satisfied this criterion for purposes of any loan consummated in 2017 and for purposes of any loan consummated in 2018 for which the application was received before April 1, 2018.

6. For calendar year 2018, the asset threshold was $2,112,000,000. A creditor that together with the assets of its affiliates that regularly extended first-lien covered transactions during calendar year 2017 had total assets of less than $2,112,000,000 on December 31, 2017, satisfied this criterion for purposes of any loan consummated in 2018 and for purposes of any loan consummated in 2019 for which the application was received before April 1, 2019.

7. For calendar year 2019, the asset threshold was $2,167,000,000. A creditor that together with the assets of its affiliates that regularly extended first-lien covered transactions during calendar year 2018 had total assets of less than $2,167,000,000 on December 31, 2018, satisfied this criterion for purposes of any loan consummated in 2019 and for purposes of any loan consummated in 2020 for which the application was received before April 1, 2020.

8. For calendar year 2020, the asset threshold was $2,202,000,000. A creditor that together with the assets of its affiliates that regularly extended first-lien covered transactions during calendar year 2019 had total assets of less than $2,202,000,000 on December 31, 2019, satisfied this criterion for purposes of any loan consummated in 2020 and for purposes of any loan consummated in 2021 for which the application was received before April 1, 2021.

9. For calendar year 2021, the asset threshold was $2,230,000,000. A creditor that together with the assets of its affiliates that regularly extended first-lien covered transactions during calendar year 2020 had total assets of less than $2,230,000,000 on December 31, 2020, satisfied this criterion for purposes of any loan consummated in 2021 and for purposes of any loan consummated in 2022 for which the application was received before April 1, 2022.

10. For calendar year 2022, the asset threshold was $2,336,000,000. A creditor that together with the assets of its affiliates that regularly extended first-lien covered transactions during calendar year 2021 had total assets of less than $2,336,000,000 on December 31, 2021, satisfied this criterion for purposes of any loan consummated in 2022 and for purposes of any loan consummated in 2023 for which the application was received before April 1, 2023.

11. For calendar year 2023, the asset threshold was $2,537,000,000. A creditor that together with the assets of its affiliates that regularly extended first-lien covered transactions during calendar year 2022 had total assets of less than $2,537,000,000 on December 31, 2022, satisfied this criterion for purposes of any loan consummated in 2023 and for purposes of any loan consummated in 2024 for which the application was received before April 1, 2024.

iv. The creditor and its affiliates do not maintain an escrow account for any mortgage transaction being serviced by the creditor or its affiliate at the time the transaction is consummated, except as provided in §1026.35(b)(2)(iii)(D)(*1*) and (*2*). Thus, the exemption applies, provided the other conditions of §1026.35(b)(2)(iii) (or, if applicable, the conditions for the exemption in

§ 1026.35(b)(2)(vi)) are satisfied, even if the creditor previously maintained escrow accounts for mortgage loans, provided it no longer maintains any such accounts except as provided in § 1026.35(b)(2)(iii)(D)(*1*) and (*2*). Once a creditor or its affiliate begins escrowing for loans currently serviced other than those addressed in § 1026.35(b)(2)(iii)(D)(*1*) and (*2*), however, the creditor and its affiliate become ineligible for the exemption in § 1026.35(b)(2)(iii) and (vi) on higher-priced mortgage loans they make while such escrowing continues. Thus, as long as a creditor (or its affiliate) services and maintains escrow accounts for any mortgage loans, other than as provided in § 1026.35(b)(2)(iii)(D)(*1*) and (*2*), the creditor will not be eligible for the exemption for any higher-priced mortgage loan it may make. For purposes of § 1026.35(b)(2)(iii) and (vi), a creditor or its affiliate ''maintains'' an escrow account only if it services a mortgage loan for which an escrow account has been established at least through the due date of the second periodic payment under the terms of the legal obligation.

Paragraph 35(b)(2)(iii)(D)(1).

1. *Exception for certain accounts.* Escrow accounts established for first-lien higher-priced mortgage loans for which applications were received on or after April 1, 2010, and before June 17, 2021, are not counted for purposes of § 1026.35(b)(2)(iii)(D). For applications received on and after June 17, 2021, creditors, together with their affiliates, that establish new escrow accounts, other than those described in § 1026.35(b)(2)(iii)(D)(*2*), do not qualify for the exemptions provided under § 1026.35(b)(2)(iii) and (vi). Creditors, together with their affiliates, that continue to maintain escrow accounts established for first-lien higher-priced mortgage loans for which applications were received on or after April 1, 2010, and before June 17, 2021, still qualify for the exemptions provided under § 1026.35(b)(2)(iii) and (vi) so long as they do not establish new escrow accounts for transactions for which they received applications on or after June 17, 2021, other than those described in § 1026.35(b)(2)(iii)(D)(*2*), and they otherwise qualify under § 1026.35(b)(2)(iii) or (vi).

Paragraph 35(b)(2)(iii)(D)(2).

1. *Exception for post-consummation escrow accounts for distressed consumers.* An escrow account established after consummation for a distressed consumer does not count for purposes of § 1026.35(b)(2)(iii)(D). Distressed consumers are consumers who are working with the creditor or servicer to attempt to bring the loan into a current status through a modification, deferral, or other accommodation to the consumer. A creditor, together with its affiliates, that establishes escrow accounts after consummation as a regular business practice, regardless of whether consumers are in distress, does not qualify for the exception described in § 1026.35(b)(2)(iii)(D)(*2*).

Paragraph 35(b)(2)(iv).

1. *Requirements for ''rural'' or ''underserved'' status.* An area is considered to be ''rural'' or ''underserved'' during a calendar year for purposes of § 1026.35(b)(2)(iii)(A) if it satisfies either the definition for ''rural'' or the definition for ''underserved'' in § 1026.35(b)(2)(iv). A creditor's extensions of covered transactions, as defined by § 1026.43(b)(1), secured by first liens on properties located in such areas are considered in determining whether the creditor satisfies the condition in § 1026.35(b)(2)(iii)(A). *See* comment 35(b)(2)(iii)–1.

i. Under § 1026.35(b)(2)(iv)(A), an area is rural during a calendar year if it is: A county that is neither in a metropolitan statistical area nor in a micropolitan statistical area that is adjacent to a metropolitan statistical area; or a census block that is not in an urban area, as defined by the U.S. Census Bureau using the latest decennial census of the United States. Metropolitan statistical areas and micropolitan statistical areas are defined by the Office of Management and Budget and applied under currently applicable Urban Influence Codes (UICs), established by the United States Department of Agriculture's Economic Research Service (USDA–ERS). For purposes of § 1026.35(b)(2)(iv)(A)(*1*), ''adjacent'' has the meaning applied by the USDA–ERS in determining a county's UIC; as so applied, ''adjacent'' entails a county not only being physically contiguous with a metropolitan statistical area but also meeting certain minimum population commuting patterns. A county is a ''rural'' area under § 1026.35(b)(2)(iv)(A)(*1*) if the USDA–ERS categorizes the county under UIC 4, 6, 7, 8, 9, 10, 11, or 12. Descriptions of UICs are available on the USDA–ERS website at *http://www.ers.usda.gov/data-products/urban-influence-codes/documentation.aspx.* A county for which there is no currently applicable UIC (because the county has been created since the USDA–ERS last categorized counties) is a rural area only if all counties from which the new county's land was taken are themselves rural under currently applicable UICs.

ii. Under § 1026.35(b)(2)(iv)(B), an area is underserved during a calendar year if, according to Home Mortgage Disclosure Act (HMDA) data for the preceding calendar year, it is a county in which no more than two creditors extended covered transactions, as defined in § 1026.43(b)(1), secured by first liens, five or more times on properties in the county. Specifically, a county is an ''underserved'' area if, in the applicable calendar year's public HMDA aggregate dataset, no more than two creditors have reported five or more first-lien covered transactions, with HMDA geocoding that places the properties in that county.

iii. A. Each calendar year, the Bureau applies the ''underserved'' area test and the ''rural'' area test to each county in the United States. If a county satisfies either test, the Bureau will include the county on a list of counties that are rural or underserved as defined by §1026.35(b)(2)(iv)(A)(*1*) or §1026.35(b)(2)(iv)(B) for a particular calendar year, even if the county contains census blocks that are designated by the Census Bureau as urban. To facilitate compliance with appraisal requirements in §1026.35(c), the Bureau also creates a list of those counties that are rural under the Bureau's definition without regard to whether the counties are underserved. To the extent that U.S. territories are treated by the Census Bureau as counties and are neither metropolitan statistical areas nor micropolitan statistical areas adjacent to metropolitan statistical areas, such territories will be included on these lists as rural areas in their entireties. The Bureau will post on its public website the applicable lists for each calendar year by the end of that year to assist creditors in ascertaining the availability to them of the exemption during the following year. Any county that the Bureau includes on these lists of counties that are rural or underserved under the Bureau's definitions for a particular year is deemed to qualify as a rural or underserved area for that calendar year for purposes of §1026.35(b)(2)(iv), even if the county contains census blocks that are designated by the Census Bureau as urban. A property located in such a listed county is deemed to be located in a rural or underserved area, even if the census block in which the property is located is designated as urban.

B. A property is deemed to be in a rural or underserved area according to the definitions in §1026.35(b)(2)(iv) during a particular calendar year if it is identified as such by an automated tool provided on the Bureau's public website. A printout or electronic copy from the automated tool provided on the Bureau's public website designating a particular property as being in a rural or underserved area may be used as ''evidence of compliance'' that a property is in a rural or underserved area, as defined in §1026.35(b)(2)(iv)(A) and (B), for purposes of the record retention requirements in §1026.25.

C. The U.S. Census Bureau may provide on its public website an automated address search tool that specifically indicates if a property is located in an urban area for purposes of the Census Bureau's most recent delineation of urban areas. For any calendar year that began after the date on which the Census Bureau announced its most recent delineation of urban areas, a property is deemed to be in a rural area if the search results provided for the property by any such automated address search tool available on the Census Bureau's public website do not designate the property as being in an urban area. A printout or electronic copy from such an automated address search tool available on the Census Bureau's public website designating a particular property as not being in an urban area may be used as ''evidence of compliance'' that the property is in a rural area, as defined in §1026.35(b)(2)(iv)(A), for purposes of the record retention requirements in §1026.25.

D. For a given calendar year, a property qualifies for a safe harbor if any of the enumerated safe harbors affirms that the property is in a rural or underserved area or not in an urban area. For example, the Census Bureau's automated address search tool may indicate a property is in an urban area, but the Bureau's rural or underserved counties list indicates the property is in a rural or underserved county. The property in this example is in a rural or underserved area because it qualifies under the safe harbor for the rural or underserved counties list. The lists of counties posted on the Bureau's public website, the automated tool on its public website, and the automated address search tool available on the Census Bureau's public website, are not the exclusive means by which a creditor can demonstrate that a property is in a rural or underserved area as defined in §1026.35(b)(2)(iv)(A) and (B). However, creditors are required to retain ''evidence of compliance'' in accordance with §1026.25, including determinations of whether a property is in a rural or underserved area as defined in §1026.35(b)(2)(iv)(A) and (B).

2. *Examples*. i. An area is considered ''rural'' for a given calendar year based on the most recent available UIC designations by the USDA–ERS and the most recent available delineations of urban areas by the U.S. Census Bureau that are available at the beginning of the calendar year. These designations and delineations are updated by the USDA–ERS and the U.S. Census Bureau respectively once every ten years. As an example, assume a creditor makes first-lien covered transactions in Census Block X that is located in County Y during calendar year 2017. As of January 1, 2017, the most recent UIC designations were published in the second quarter of 2013, and the most recent delineation of urban areas was announced in the FEDERAL REGISTER in 2012, *see* U.S. Census Bureau, *Qualifying Urban Areas for the 2010 Census*, 77 FR 18652 (Mar. 27, 2012). To determine whether County Y is rural under the Bureau's definition during calendar year 2017, the creditor can use USDA–ERS's 2013 UIC designations. If County Y is not rural, the creditor can use the U.S. Census Bureau's 2012 delineation of urban areas to determine whether Census Block X is rural and is therefore a ''rural'' area for purposes of §1026.35(b)(2)(iv)(A).

ii. A county is considered an "underserved" area for a given calendar year based on the most recent available HMDA data. For example, assume a creditor makes first-lien covered transactions in County Y during calendar year 2016, and the most recent HMDA data are for calendar year 2015, published in the third quarter of 2016. The creditor will use the 2015 HMDA data to determine "underserved" area status for County Y in calendar year 2016 for the purposes of qualifying for the "rural or underserved" exemption for any higher-priced mortgage loans consummated in calendar year 2017 or for any higher-priced mortgage loan consummated during 2018 for which the application was received before April 1, 2018.

Paragraph 35(b)(2)(v).

1. *Forward commitments.* A creditor may make a mortgage loan that will be transferred or sold to a purchaser pursuant to an agreement that has been entered into at or before the time the loan is consummated. Such an agreement is sometimes known as a "forward commitment." Even if a creditor is otherwise eligible for an exemption in §1026.35(b)(2)(iii) or §1026.35(b)(2)(vi), a first-lien higher-priced mortgage loan that will be acquired by a purchaser pursuant to a forward commitment is subject to the requirement to establish an escrow account under §1026.35(b)(1) unless the purchaser is also eligible for an exemption in §1026.35(b)(2)(iii) or §1026.35(b)(2)(vi), or the transaction is otherwise exempt under §1026.35(b)(2). The escrow requirement applies to any such transaction, whether the forward commitment provides for the purchase and sale of the specific transaction or for the purchase and sale of mortgage obligations with certain prescribed criteria that the transaction meets. For example, assume a creditor that qualifies for an exemption in §1026.35(b)(2)(iii) or §1026.35(b)(2)(vi) makes a higher-priced mortgage loan that meets the purchase criteria of an investor with which the creditor has an agreement to sell such mortgage obligations after consummation. If the investor is ineligible for an exemption in §1026.35(b)(2)(iii) or §1026.35(b)(2)(vi), an escrow account must be established for the transaction before consummation in accordance with §1026.35(b)(1) unless the transaction is otherwise exempt (such as a reverse mortgage or home equity line of credit).

Paragraph 35(b)(2)(vi).

1. For guidance on applying the grace periods for determining asset size or transaction thresholds under §1026.35(b)(2)(vi)(A), (B) and (C), the rural or underserved requirement, or other aspects of the exemption in §1026.35(b)(2)(vi) not specifically discussed in the commentary to §1026.35(b)(2)(vi), an insured depository institution or insured credit union may refer to the commentary to §1026.35(b)(2)(iii), while allowing for differences between the features of the two exemptions.

Paragraph 35(b)(2)(vi)(A).

1. The asset threshold in §1026.35(b)(2)(vi)(A) will adjust automatically each year, based on the year-to-year change in the average of the Consumer Price Index for Urban Wage Earners and Clerical Workers, not seasonally adjusted, for each 12-month period ending in November, with rounding to the nearest million dollars. Unlike the asset threshold in §1026.35(b)(2)(iii) and the other thresholds in §1026.35(b)(2)(vi), affiliates are not considered in calculating compliance with this threshold. The Bureau will publish notice of the asset threshold each year by amending this comment. For calendar year 2024, the asset threshold is $11,835,000,000. A creditor that is an insured depository institution or insured credit union that during calendar year 2023 had assets of $11,835,000,000 or less on December 31, 2023, satisfies this criterion for purposes of any loan consummated in 2024 and for purposes of any loan secured by a first lien on a principal dwelling of a consumer consummated in 2025 for which the application was received before April 1, 2025. For historical purposes:

1. For calendar year 2021, the asset threshold was $10,000,000,000. Creditors that had total assets of 10,000,000,000 or less on December 31, 2020, satisfied this criterion for purposes of any loan consummated in 2021 and for purposes of any loan secured by a first lien on a principal dwelling of a consumer consummated in 2022 for which the application was received before April 1, 2022.

2. For calendar year 2022, the asset threshold was $10,473,000,000. Creditors that had total assets of $10,473,000,000 or less on December 31, 2021, satisfied this criterion for purposes of any loan consummated in 2022 and for purposes of any loan secured by a first lien on a principal dwelling of a consumer consummated in 2023 for which the application was received before April 1, 2023.

3. For calendar year 2023, the asset threshold is $11,374,000,000. A creditor that is an insured depository institution or insured credit union that during calendar year 2022 had assets of $11,374,000,000 or less on December 31, 2022, satisfied this criterion for purposes of any loan consummated in 2023 and for purposes of any loan secured by a first lien on a principal dwelling of a consumer consummated in 2024 for which the application was received before April 1, 2024.

Paragraph 35(b)(2)(vi)(B).

1. The transaction threshold in §1026.35(b)(2)(vi)(B) differs from the transaction threshold in §1026.35(b)(2)(iii)(B) in two ways. First, the threshold in §1026.35(b)(2)(vi)(B) is 1,000 loans secured by first liens on a principal dwelling, while the threshold in §1026.35(b)(2)(iii)(B) is 2,000 loans secured by first liens on a dwelling. Second,

all loans made by the creditor and its affiliates secured by a first lien on a principal dwelling count toward the 1,000-loan threshold in §1026.35(b)(2)(vi)(B), whether or not such loans are held in portfolio. By contrast, under §1026.35(b)(2)(iii)(B), only loans secured by first liens on a dwelling that were sold, assigned, or otherwise transferred to another person, or that were subject at the time of consummation to a commitment to be acquired by another person, are counted toward the 2,000-loan threshold.

35(b)(3) Cancellation.

1. *Termination of underlying debt obligation.* Section 1026.35(b)(3)(i) provides that, in general, an escrow account required by §1026.35(b)(1) may not be cancelled until the underlying debt obligation is terminated or the consumer requests cancellation at least five years after consummation. Methods by which an underlying debt obligation may be terminated include, among other things, repayment, refinancing, rescission, and foreclosure.

2. *Minimum durations.* Section 1026.35(b)(3) establishes minimum durations for which escrow accounts established pursuant to §1026.35(b)(1) must be maintained. This requirement does not affect a creditor's right or obligation, pursuant to the terms of the legal obligation or applicable law, to offer or require an escrow account thereafter.

3. *Less than eighty percent unpaid principal balance.* The term ''original value'' in §1026.35(b)(3)(ii)(A) means the lesser of the sales price reflected in the sales contract for the property, if any, or the appraised value of the property at the time the transaction was consummated. In determining whether the unpaid principal balance has reached less than 80 percent of the original value of the property securing the underlying debt, the creditor or servicer shall count any subordinate lien of which it has reason to know. If the consumer certifies in writing that the equity in the property securing the underlying debt obligation is unencumbered by a subordinate lien, the creditor or servicer may rely upon the certification in making its determination unless it has actual knowledge to the contrary.

35(c)—Appraisals

35(c)(1) Definitions

35(c)(1)(i) Certified or Licensed Appraiser

1. *USPAP.* The Uniform Standards of Professional Appraisal Practice (USPAP) are established by the Appraisal Standards Board of the Appraisal Foundation (as defined in 12 U.S.C. 3350(9)). Under §1026.35(c)(1)(i), the relevant USPAP standards are those found in the edition of USPAP and that are in effect at the time the appraiser signs the appraiser's certification.

2. *Appraiser's certification.* The appraiser's certification refers to the certification that must be signed by the appraiser for each appraisal assignment. This requirement is specified in USPAP Standards Rule 2–3.

3. *FIRREA title XI and implementing regulations.* The relevant regulations are those prescribed under section 1110 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), as amended (12 U.S.C. 3339), that relate to an appraiser's development and reporting of the appraisal in effect at the time the appraiser signs the appraiser's certification. Paragraph (3) of FIRREA section 1110 (12 U.S.C. 3339(3)), which relates to the review of appraisals, is not relevant for determining whether an appraiser is a certified or licensed appraiser under §1026.35(c)(1)(i).

35(c)(2) Exemptions

1. *Compliance with title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).* Section 1026.35(c)(2) provides exemptions solely from the requirements of section 1026.35(c)(3) through (6). Institutions subject to the requirements of FIRREA and its implementing regulations that make a loan qualifying for an exemption under section 1026.35(c)(2) must still comply with appraisal and evaluation requirements under FIRREA and its implementing regulations.

Paragraph 35(c)(2)(i)

1. *Qualified mortgage criteria.* Under §1026.35(c)(2)(i), a loan is exempt from the appraisal requirements of §1026.35(c) if either:

i. The loan is—(1) subject to the Bureau's ability-to-repay requirements in §1026.43 as a ''covered transaction'' (defined in §1026.43(b)(1)) and (2) a qualified mortgage pursuant to the Bureau's rules or, for loans insured, guaranteed, or administered by the U.S. Department of Housing and Urban Development (HUD), U.S. Department of Veterans Affairs (VA), U.S. Department of Agriculture (USDA), or Rural Housing Service (RHS), a qualified mortgage pursuant to applicable rules prescribed by those agencies (but only once such rules are in effect; otherwise, the Bureau's definition of a qualified mortgage applies to those loans); or

ii. The loan is—(1) not subject to the Bureau's ability-to-repay requirements in §1026.43 as a ''covered transaction'' (defined in §1026.43(b)(1)), but (2) meets the criteria for a qualified mortgage in the Bureau's rules or, for loans insured, guaranteed, or administered by HUD, VA, USDA, or RHS, meets the criteria for a qualified mortgage in the applicable rules prescribed by those agencies (but only once such rules are in effect; otherwise, the Bureau's criteria for a qualified mortgage applies to those loans). To explain further, loans enumerated in

§ 1026.43(a) are not ''covered transactions'' under the Bureau's ability-to-repay requirements in § 1026.43, and thus cannot be qualified mortgages (entitled to a rebuttable presumption or safe harbor of compliance with the ability-to-repay requirements of § 1026.43, *see, e.g.,* § 1026.43(e)(1)). These include an extension of credit made pursuant to a program administered by a Housing Finance Agency, as defined under 24 CFR 266.5, or pursuant to a program authorized by sections 101 and 109 of the Emergency Economic Stabilization Act of 2008. *See* § 1026.43(a)(3)(iv) and (vi). They also include extensions of credit made by a creditor identified in § 1026.43(a)(3)(v). However, these loans are eligible for the exemption in § 1026.35(c)(2)(i) if they meet the Bureau's qualified mortgage criteria in § 1026.43(e)(2), (4), (5), or (6) or § 1026.43(f) (including limits on when loans must be consummated) or, for loans that are insured, guaranteed, or administered by HUD, VA, USDA, or RHS, in applicable rules prescribed by those agencies (but only once such rules are in effect; otherwise, the Bureau's criteria for a qualified mortgage applies to those loans). For example, assume that HUD has prescribed rules to define loans insured under its programs that are qualified mortgages and those rules are in effect. Assume further that a creditor designated as a Community Development Financial Institution, as defined under 12 CFR 1805.104(h), originates a loan insured by the Federal Housing Administration, which is a part of HUD. The loan is not a ''covered transaction'' and thus is not a qualified mortgage. *See* § 1026.43(a)(3)(v)(A) and (b)(1). Nonetheless, the transaction is eligible for an exemption from the appraisal requirements of § 1026.35(c) if it meets the qualified mortgage criteria in HUD's rules. Nothing in § 1026.35(c)(2)(i) alters the definition of a qualified mortgage under regulations of the Bureau, HUD, VA, USDA, or RHS.

Paragraph 35(c)(2)(ii)

1. *Threshold amount.* For purposes of § 1026.35(c)(2)(ii), the threshold amount in effect during a particular period is the amount stated in comment 35(c)(2)(ii)–3 for that period. The threshold amount is adjusted effective January 1 of each year by any annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W) that was in effect on the preceding June 1. Comment 35(c)(2)(ii)–3 will be amended to provide the threshold amount for the upcoming year after the annual percentage change in the CPI–W that was in effect on June 1 becomes available. Any increase in the threshold amount will be rounded to the nearest $100 increment. For example, if the annual percentage increase in the CPI–W would result in a $950 increase in the threshold amount, the threshold amount will be increased by $1,000. However, if the annual percentage increase in the CPI–W would result in a $949 increase in the threshold amount, the threshold amount will be increased by $900.

2. *No increase in the CPI–W.* If the CPI–W in effect on June 1 does not increase from the CPI–W in effect on June 1 of the previous year, the threshold amount effective the following January 1 through December 31 will not change from the previous year. When this occurs, for the years that follow, the threshold is calculated based on the annual percentage change in the CPI–W applied to the dollar amount that would have resulted, after rounding, if decreases and any subsequent increases in the CPI–W had been taken into account.

i. *Net increases.* If the resulting amount calculated, after rounding, is greater than the current threshold, then the threshold effective January 1 the following year will increase accordingly.

ii. *Net decreases.* If the resulting amount calculated, after rounding, is equal to or less than the current threshold, then the threshold effective January 1 the following year will not change, but future increases will be calculated based on the amount that would have resulted.

3. *Threshold.* For purposes of § 1026.35(c)(2)(ii), the threshold amount in effect during a particular period is the amount stated below for that period.

i. From January 18, 2014, through December 31, 2014, the threshold amount is $25,000.

ii. From January 1, 2015, through December 31, 2015, the threshold amount is $25,500.

iii. From January 1, 2016, through December 31, 2016, the threshold amount is $25,500.

iv. From January 1, 2017, through December 31, 2017, the threshold amount is $25,500.

v. From January 1, 2018, through December 31, 2018, the threshold amount is $26,000.

vi. From January 1, 2019, through December 31, 2019, the threshold amount is $26,700.

vii. From January 1, 2020, through December 31, 2020, the threshold amount is $27,200.

viii. From January 1, 2021, through December 31, 2021, the threshold amount is $27,200.

ix. From January 1, 2022, through December 31, 2022, the threshold amount is $28,500.

x. From January 1, 2023, through December 31, 2023, the threshold amount is $31,000.

xi. From January 1, 2024, through December 31, 2024, the threshold amount is $32,400.

4. *Qualifying for exemption—in general.* A transaction is exempt under § 1026.35(c)(2)(ii) if the creditor makes an extension of credit at consummation that is equal to or below the threshold amount in effect at the time of consummation.

5. *Qualifying for exemption—subsequent changes.* A transaction does not meet the condition for an exemption under § 1026.35(c)(2)(ii) merely because it is used to satisfy and replace an existing exempt loan

unless the amount of the new extension of credit is equal to or less than the applicable threshold amount. For example, assume a closed-end loan that qualified for a §1026.35(c)(2)(ii) exemption at consummation in year one is refinanced in year ten and that the new loan amount is greater than the threshold amount in effect in year ten. In these circumstances, the creditor must comply with all of the applicable requirements of §1026.35(c) with respect to the year ten transaction if the original loan is satisfied and replaced by the new loan unless another exemption from the requirements of §1026.35(c) applies. *See* §1026.35(c)(2) and (c)(4)(vii).

Paragraph 35(c)(2)(iii)

1. *Secured by a mobile home.* For purposes of the exemption in §1026.35(c)(2)(iii), a mobile home does not include a manufactured home, as defined in §1026.35(c)(1)(ii).

Paragraph 35(c)(2)(iv)

1. *Construction-to-permanent loans.* Section 1026.35(c) does not apply to a transaction to finance the initial construction of a dwelling. This exclusion applies to a construction-only loan as well as to the construction phase of a construction-to-permanent loan. Section 1026.35(c) does apply, however, to permanent financing that replaces a construction loan, whether the permanent financing is extended by the same or a different creditor, unless the permanent financing is otherwise exempt from the requirements of §1026.35(c). *See* §1026.35(c)(2). When a construction loan may be permanently financed by the same creditor, the general disclosure requirements for closed-end credit (§1026.17) provide that the creditor may give either one combined disclosure for both the construction financing and the permanent financing, or a separate set of disclosures for each of the two phases as though they were two separate transactions. *See* §1026.17(c)(6)(ii) and comment 17(c)(6)–2. Section 1026.17(c)(6)(ii) addresses only how a creditor may elect to disclose a construction-to-permanent transaction. Which disclosure option a creditor elects under §1026.17(c)(6)(ii) does not affect the determination of whether the permanent phase of the transaction is subject to §1026.35(c). When the creditor discloses the two phases as separate transactions, the annual percentage rate for the permanent phase must be compared to the average prime offer rate for a transaction that is comparable to the permanent financing to determine coverage under §1026.35(c). When the creditor discloses the two phases as a single transaction, a single annual percentage rate, reflecting the appropriate charges from both phases, must be calculated for the transaction in accordance with §1026.35 and appendix D to part 1026. The annual percentage rate must be compared to the average prime offer rate for a transaction that is comparable to the permanent financing to determine coverage under §1026.35(c). If the transaction is determined to be a higher-priced mortgage loan not otherwise exempt under §1026.35(c)(2), only the permanent phase is subject to the requirements of §1026.35(c).

2. *Financing initial construction.* The exemption for construction loans in §1026.35(c)(2)(iv) applies to temporary financing of the construction of a dwelling that will be replaced by permanent financing once construction is complete. The exemption does not apply, for example, to loans to finance the purchase of manufactured homes that have not been or are in the process of being built when the financing obtained by the consumer at that time is permanent. *See* §1026.35(c)(2)(viii).

Paragraph 35(c)(2)(vii)(A)(*1*)

1. *Same credit risk holder.* The requirement that the holder of the credit risk on the existing obligation and the refinancing be the same applies to situations in which an entity bears the financial responsibility for the default of a loan by either holding the loan in its portfolio or guaranteeing payments of principal and any interest to investors in a mortgage-backed security in which the loan is pooled. *See* §1026.35(c)(1)(ii) (defining "credit risk"). For example, a credit risk holder could be a bank that bears the credit risk on the existing obligation by holding the loan in the bank's portfolio. Another example of a credit risk holder would be a government-sponsored enterprise that bears the risk of default on a loan by guaranteeing the payment of principal and any interest on a loan to investors in a mortgage-backed security. The holder of credit risk under §1026.35(c)(2)(vii)(A)(*1*) does not mean individual investors in a mortgage-backed security or providers of private mortgage insurance.

2. *Same credit risk holder—illustrations.*

Illustrations of the credit risk holder of the existing obligation continuing to be the credit risk holder of the refinancing include, but are not limited to, the following:

i. The existing obligation is held in the portfolio of a bank, thus the bank holds the credit risk. The bank arranges to refinance the loan and also will hold the refinancing in its portfolio. If the refinancing otherwise meets the requirements for an exemption under §1026.35(c)(2)(vii), the transaction will qualify for the exemption because the credit risk holder is the same for the existing obligation and the refinance transaction. In this case, the exemption would apply regardless of whether the bank arranged to refinance the loan directly or indirectly, such as through the servicer or subservicer on the existing obligation.

ii. The existing obligation is held in the portfolio of a government-sponsored enterprise (GSE), thus the GSE holds the credit risk. The existing obligation is then refinanced by the servicer of the loan and immediately transferred to the GSE. The GSE pools the refinancing in a mortgage-backed security guaranteed by the GSE, thus the GSE holds the credit risk on the refinance loan. If the refinance transaction otherwise meets the requirements for an exemption under §1026.35(c)(2)(vii), the transaction will qualify for the exemption because the credit risk holder is the same for the existing obligation and the refinance transaction. In this case, the exemption would apply regardless of whether the existing obligation was refinanced by the servicer or subservicer on the existing obligation (acting as a ‘‘creditor’’ under §1026.2(a)(17)) or by a different creditor.

3. *Forward commitments.* A creditor may make a mortgage loan that will be sold or otherwise transferred pursuant to an agreement that has been entered into at or before the time the transaction is consummated. Such an agreement is sometimes known as a ‘‘forward commitment.’’ A refinance loan does not satisfy the requirement of §1026.35(c)(2)(vii)(A)(*1*) if the loan will be acquired pursuant to a forward commitment, such that the credit risk on the refinance loan will transfer to a person who did not hold the credit risk on the existing obligation.

Paragraph 35(c)(2)(vii)(B)

1. *Regular periodic payments.* Under §1026.35(c)(2)(vii)(B), the regular periodic payments on the refinance loan must not: result in an increase of the principal balance (negative amortization); allow the consumer to defer repayment of principal (*see* comment 43(e)(2)(i)–2); or result in a balloon payment. Thus, the terms of the legal obligation must require the consumer to make payments of principal and interest on a monthly or other periodic basis that will repay the loan amount over the loan term. Except for payments resulting from any interest rate changes after consummation in an adjustable-rate or step-rate mortgage, the periodic payments must be substantially equal. For an explanation of the term ‘‘substantially equal,’’ see comment 43(c)(5)(i)–4. In addition, a single-payment transaction is not a refinancing meeting the requirements of §1026.35(c)(2)(vii) because it does not require ‘‘regular periodic payments.’’

Paragraph 35(c)(2)(vii)(C)

1. *Permissible use of proceeds.* The exemption for a refinancing under §1026.35(c)(2)(vii) is available only if the proceeds from the refinancing are used exclusively for the existing obligation and amounts attributed solely to the costs of the refinancing. The existing obligation includes the unpaid principal balance of the existing first lien loan, any earned unpaid finance charges, and any other lawful charges related to the existing loan. For guidance on the meaning of refinancing costs, see comment 23(f)–4. If the proceeds of a refinancing are used for other purposes, such as to pay off other liens or to provide additional cash to the consumer for discretionary spending, the transaction does not qualify for the exemption for a refinancing under §1026.35(c)(2)(vii) from the appraisal requirements in §1026.35(c).

For applications received on or after July 18, 2015

Paragraph 35(c)(2)(viii)(A)

1. *Secured by new manufactured home and land—physical visit of the interior.* A transaction secured by a new manufactured home and land is subject to the requirements of §1026.35(c)(3) through (6) except for the requirement in §1026.35(c)(3)(i) that the appraiser conduct a physical inspection of the interior of the property. Thus, for example, a creditor of a loan secured by a new manufactured home and land could comply with §1026.35(c)(3)(i) by obtaining an appraisal conducted by a state-certified or -licensed appraiser based on plans and specifications for the new manufactured home and an inspection of the land on which the property will be sited, as well as any other information necessary for the appraiser to complete the appraisal assignment in conformity with the Uniform Standards of Professional Appraisal Practice and the requirements of FIRREA and any implementing regulations.

Paragraph 35(c)(2)(viii)(B)

1. *Secured by a manufactured home and not land.* Section 1026.35(c)(2)(viii)(B) applies to a higher-priced mortgage loan secured by a manufactured home and not land, regardless of whether the home is titled as realty by operation of state law.

Paragraph 35(c)(2)(viii)(B)(*2*)

1. *Independent.* A cost service provider from which the creditor obtains a manufactured home unit cost estimate under §1026.35(c)(2)(viii)(B)(*2*) is ‘‘independent’’ if that person is not affiliated with the creditor in the transaction, such as by common corporate ownership, and receives no direct or indirect financial benefits based on whether the transaction is consummated.

2. *Adjustments.* The requirement that the cost estimate be from an independent cost service provider does not prohibit a creditor from providing a cost estimate that reflects adjustments to account for factors such as special features, condition or location. However, the requirement that the estimate be

obtained from an independent cost service provider means that any adjustments to the estimate must be based on adjustment factors available as part of the independent cost service used, with associated values that are determined by the independent cost service.

Paragraph 35(c)(2)(viii)(C)(*3*)

1. *Interest in the property.* A person has a direct or indirect in the property if, for example, the person has any ownership or reasonably foreseeable ownership interest in the manufactured home. To illustrate, a person who seeks a loan to purchase the manufactured home to be valued has a reasonably foreseeable ownership interest in the property.

2. *Interest in the transaction.* A person has a direct or indirect interest in the transaction if, for example, the person or an affiliate of that person also serves as a loan officer of the creditor or otherwise arranges the credit transaction, or is the retail dealer of the manufactured home. A person also has a prohibited interest in the transaction if the person is compensated or otherwise receives financial or other benefits based on whether the transaction is consummated.

3. *Training in valuing manufactured homes.* Training in valuing manufactured homes includes, for example, successfully completing a course in valuing manufactured homes offered by a state or national appraiser association or receiving job training from an employer in the business of valuing manufactured homes.

4. *Manufactured home valuation—example.* A valuation in compliance with §1026.35(c)(2)(viii)(B)(*3*) would include, for example, an appraisal of the manufactured home in accordance with the appraisal requirements for a manufactured home classified as personal property under the Title I Manufactured Home Loan Insurance Program of the U.S. Department of Housing and Urban Development, pursuant to section 2(b)(10) of the National Housing Act, 12 U.S.C. 1703(b)(10).

35(c)(3) Appraisals Required

35(c)(3)(i) In General

1. *Written appraisal—electronic transmission.* To satisfy the requirement that the appraisal be ''written,'' a creditor may obtain the appraisal in paper form or via electronic transmission.

35(c)(3)(ii) Safe Harbor.

1. *Safe harbor.* A creditor that satisfies the safe harbor conditions in §1026.35(c)(3)(ii)(A) through (D) complies with the appraisal requirements of §1026.35(c)(3)(i). A creditor that does not satisfy the safe harbor conditions in §1026.35(c)(3)(ii)(A) through (D) does not necessarily violate the appraisal requirements of §1026.35(c)(3)(i).

2. *Appraiser's certification.* For purposes of §1026.35(c)(3)(ii), the appraiser's certification refers to the certification specified in item 9 of appendix N. *See also* comment 35(c)(1)(i)–2.

Paragraph 35(c)(3)(ii)(C)

1. *Confirming elements in the appraisal.* To confirm that the elements in appendix N to this part are included in the written appraisal, a creditor need not look beyond the face of the written appraisal and the appraiser's certification.

35(c)(4) Additional Appraisal for Certain Higher-Priced Mortgage Loans

1. *Acquisition.* For purposes of §1026.35(c)(4), the terms ''acquisition'' and ''acquire'' refer to the acquisition of legal title to the property pursuant to applicable State law, including by purchase.

35(c)(4)(i) In General

1. *Appraisal from a previous transaction.* An appraisal that was previously obtained in connection with the seller's acquisition or the financing of the seller's acquisition of the property does not satisfy the requirements to obtain two written appraisals under §1026.35(c)(4)(i).

2. *90-day, 180-day calculation.* The time periods described in §1026.35(c)(4)(i)(A) and (B) are calculated by counting the day after the date on which the seller acquired the property, up to and including the date of the consumer's agreement to acquire the property that secures the transaction. For example, assume that the creditor determines that date of the consumer's acquisition agreement is October 15, 2012, and that the seller acquired the property on April 17, 2012. The first day to be counted in the 180-day calculation would be April 18, 2012, and the last day would be October 15, 2012. In this case, the number of days from April 17 would be 181, so an additional appraisal is not required.

3. *Date seller acquired the property.* For purposes of §1026.35(c)(4)(i)(A) and (B), the date on which the seller acquired the property is the date on which the seller became the legal owner of the property pursuant to applicable State law.

4. *Date of the consumer's agreement to acquire the property.* For the date of the consumer's agreement to acquire the property under §1026.35(c)(4)(i)(A) and (B), the creditor should use the date on which the consumer and the seller signed the agreement provided to the creditor by the consumer. The date on which the consumer and the seller signed the agreement might not be the date on which the consumer became contractually obligated under State law to acquire the property. For purposes of §1026.35(c)(4)(i)(A) and (B), a creditor is not obligated to determine whether and to what extent the agreement is

legally binding on both parties. If the dates on which the consumer and the seller signed the agreement differ, the creditor should use the later of the two dates.

5. *Price at which the seller acquired the property*. The price at which the seller acquired the property refers to the amount paid by the seller to acquire the property. The price at which the seller acquired the property does not include the cost of financing the property.

6. *Price the consumer is obligated to pay to acquire the property*. The price the consumer is obligated to pay to acquire the property is the price indicated on the consumer's agreement with the seller to acquire the property. The price the consumer is obligated to pay to acquire the property from the seller does not include the cost of financing the property. For purposes of §1026.35(c)(4)(i)(A) and (B), a creditor is not obligated to determine whether and to what extent the agreement is legally binding on both parties. *See also* comment 35(c)(4)(i)–4.

35(c)(4)(ii) Different Certified or Licensed Appraisers

1. *Independent appraisers*. The requirements that a creditor obtain two separate appraisals under §1026.35(c)(4)(i), and that each appraisal be conducted by a different licensed or certified appraiser under §1026.35(c)(4)(ii), indicate that the two appraisals must be conducted independently of each other. If the two certified or licensed appraisers are affiliated, such as by being employed by the same appraisal firm, then whether they have conducted the appraisal independently of each other must be determined based on the facts and circumstances of the particular case known to the creditor.

35(c)(4)(iii) Relationship to General Appraisal Requirements

1. *Safe harbor*. When a creditor is required to obtain an additional appraisal under §1026(c)(4)(i), the creditor must comply with the requirements of both §1026.35(c)(3)(i) and §1026.35(c)(4)(ii) through (v) for that appraisal. The creditor complies with the requirements of §1026.35(c)(3)(i) for the additional appraisal if the creditor meets the safe harbor conditions in §1026.35(c)(3)(ii) for that appraisal.

35(c)(4)(iv) Required Analysis in the Additional Appraisal

1. *Determining acquisition dates and prices used in the analysis of the additional appraisal*. For guidance on identifying the date on which the seller acquired the property, see comment 35(c)(4)(i)–3. For guidance on identifying the date of the consumer's agreement to acquire the property, see comment 35(c)(4)(i)–4. For guidance on identifying the price at which the seller acquired the property, see comment 35(c)(4)(i)–5. For guidance on identifying the price the consumer is obligated to pay to acquire the property, see comment 35(c)(4)(i)–6.

35(c)(4)(v) No Charge for Additional Appraisal

1. *Fees and mark-ups*. The creditor is prohibited from charging the consumer for the performance of one of the two appraisals required under §1026.35(c)(4)(i), including by imposing a fee specifically for that appraisal or by marking up the interest rate or any other fees payable by the consumer in connection with the higher-priced mortgage loan.

35(c)(4)(vi) Creditor's Determination of Prior Sale Date and Price

35(c)(4)(vi)(A) In General

1. *Estimated sales price*. If a written source document describes the seller's acquisition price in a manner that indicates that the price described is an estimated or assumed amount and not the actual price, the creditor should look at an alternative document to satisfy the reasonable diligence standard in determining the price at which the seller acquired the property.

2. *Reasonable diligence—oral statements insufficient*. Reliance on oral statements of interested parties, such as the consumer, seller, or mortgage broker, does not constitute reasonable diligence under §1026.35(c)(4)(vi)(A).

3. *Lack of information and conflicting information—two appraisals required*. If a creditor is unable to demonstrate that the requirement to obtain two appraisals under §1026.35(c)(4)(i) does not apply, the creditor must obtain two written appraisals before extending a higher-priced mortgage loan subject to the requirements of §1026.35(c). *See also* comment 35(c)(4)(vi)(B)–1. For example:

i. Assume a creditor orders and reviews the results of a title search, which shows that a prior sale occurred between 91 and 180 days ago, but not the price paid in that sale. Thus, based on the title search, the creditor would not be able to determine whether the price the consumer is obligated to pay under the consumer's acquisition agreement is more than 20 percent higher than the seller's acquisition price, pursuant to §1026.35(c)(4)(i)(B). Before extending a higher-priced mortgage loan subject to the appraisal requirements of §1026.35(c), the creditor must either: (1) Perform additional diligence to ascertain the seller's acquisition price and, based on this information, determine whether two written appraisals are required; or (2) obtain two written appraisals in compliance with §1026.35(c)(4). *See also* comment 35(c)(4)(vi)(B)–1.

ii. Assume a creditor reviews the results of a title search indicating that the last recorded purchase was more than 180 days before the consumer's agreement to acquire the property. Assume also that the creditor subsequently receives a written appraisal indicating that the seller acquired the property between 91 and 180 days before the consumer's agreement to acquire the property. In this case, unless one of these sources is clearly wrong on its face, the creditor would not be able to determine whether the seller acquired the property within 180 days of the date of the consumer's agreement to acquire the property from the seller, pursuant to §1026.35(c)(4)(i)(B). Before extending a higher-priced mortgage loan subject to the appraisal requirements of §1026.35(c), the creditor must either: perform additional diligence to ascertain the seller's acquisition date and, based on this information, determine whether two written appraisals are required; or obtain two written appraisals in compliance with §1026.35(c)(4). *See also* comment 35(c)(4)(vi)(B)–1.

35(c)(4)(vi)(B) Inability To Determine Prior Sales Date or Price—Modified Requirements for Additional Appraisal

1. *Required analysis*. In general, the additional appraisal required under §1026.35(c)(4)(i) should include an analysis of the factors listed in §1026.35(c)(4)(iv)(A) through (C). However, if, following reasonable diligence, a creditor cannot determine whether the conditions in §1026.35(c)(4)(i)(A) or (B) are present due to a lack of information or conflicting information, the required additional appraisal must include the analyses required under §1026.35(c)(4)(iv)(A) through (C) only to the extent that the information necessary to perform the analyses is known. For example, assume that a creditor is able, following reasonable diligence, to determine that the date on which the seller acquired the property occurred between 91 and 180 days prior to the date of the consumer's agreement to acquire the property. However, the creditor is unable, following reasonable diligence, to determine the price at which the seller acquired the property. In this case, the creditor is required to obtain an additional written appraisal that includes an analysis under §1026.35(c)(4)(iv)(B) and (c)(4)(iv)(C) of the changes in market conditions and any improvements made to the property between the date the seller acquired the property and the date of the consumer's agreement to acquire the property. However, the creditor is not required to obtain an additional written appraisal that includes analysis under §1026.35(c)(4)(iv)(A) of the difference between the price at which the seller acquired the property and the price that the consumer is obligated to pay to acquire the property.

35(c)(4)(vii) Exemptions From the Additional Appraisal Requirement

Paragraph 35(c)(4)(vii)(C)

1. *Non-profit entity*. For purposes of §1026.35(c)(4)(vii)(C), a ''non-profit entity'' is a person with a tax exemption ruling or determination letter from the Internal Revenue Service under section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)).

Paragraph 35(c)(4)(vii)(H)

1. *Bureau table of rural counties*. The Bureau publishes on its Web site a table of rural counties under §1026.35(c)(4)(vii)(H) for each calendar year by the end of that calendar year. *See* comment 35(b)(2)(iv)–1. A property securing an HPML subject to §1026.35(c) is in a rural county under §1026.35(c)(4)(vii)(H) if the county in which the property is located is on the table of rural counties most recently published by the Bureau. For example, for a transaction occurring in 2015, assume that the Bureau most recently published a table of rural counties at the end of 2014. The property securing the transaction would be located in a rural county for purposes of §1026.35(c)(4)(vii)(H) if the county is on the table of rural counties published by the Bureau at the end of 2014.

35(c)(5) Required Disclosure

35(c)(5)(i) In General

1. *Multiple applicants*. When two or more consumers apply for a loan subject to this section, the creditor is required to give the disclosure to only one of the consumers.

2. *Appraisal independence requirements not affected*. Nothing in the text of the consumer notice required by §1026.35(c)(5)(i) should be construed to affect, modify, limit, or supersede the operation of any legal, regulatory, or other requirements or standards relating to independence in the conduct of appraisers or restrictions on the use of borrower-ordered appraisals by creditors.

35(c)(6) Copy of Appraisals

35(c)(6)(i) In General

1. *Multiple applicants*. When two or more consumers apply for a loan subject to this section, the creditor is required to give the copy of each required appraisal to only one of the consumers.

35(c)(6)(ii) Timing

1. ''*Provide*.'' For purposes of the requirement to provide a copy of the appraisal within a specified time under §1026.35(c)(6)(ii), ''provide'' means ''deliver.'' Delivery occurs three business days after mailing or delivering the copies to the last-known address of

the applicant, or when evidence indicates actual receipt by the applicant (which, in the case of electronic receipt, must be based upon consent that complies with the E-Sign Act), whichever is earlier.

2. *No waiver.* Regulation B, 12 CFR 1002.14(a)(1), allowing the consumer to waive the requirement that the appraisal copy be provided three business days before consummation, does not apply to higher-priced mortgage loans subject to §1026.35(c). A consumer of a higher-priced mortgage loan subject to §1026.35(c) may not waive the timing requirement to receive a copy of the appraisal under §1026.35(c)(6)(i).

35(c)(6)(iv) No Charge for Copy Of Appraisal

1. *Fees and mark-ups.* The creditor is prohibited from charging the consumer for any copy of an appraisal required to be provided under §1026.35(c)(6)(i), including by imposing a fee specifically for a required copy of an appraisal or by marking up the interest rate or any other fees payable by the consumer in connection with the higher-priced mortgage loan.

35(e) Rules for Higher-Priced Mortgage Loans

Paragraph 35(e)(2)(ii)(C)

1. *Payment change.* Section 1026.35(e)(2) provides that a loan subject to this section may not have a penalty described by §1026.32(d)(6) unless certain conditions are met. Section 1026.35(e)(2)(ii)(C) lists as a condition that the amount of the periodic payment of principal or interest or both may not change during the four-year period following consummation. For examples showing whether a prepayment penalty is permitted or prohibited in connection with particular payment changes, see comment 32(d)(7)(iv)–1. Those examples, however, include a condition that §1026.35(e)(2) does not include: The condition that, at consummation, the consumer's total monthly debt payments may not exceed 50 percent of the consumer's monthly gross income. For guidance about circumstances in which payment changes are not considered payment changes for purposes of this section, see comment 32(d)(7)(iv)–2.

2. *Negative amortization.* Section 1026.32(d)(2) provides that a loan described in §1026.32(a) may not have a payment schedule with regular periodic payments that cause the principal balance to increase. Therefore, the commentary to §1026.32(d)(7)(iv) does not include examples of payment changes in connection with negative amortization. The following examples show whether, under §1026.35(e)(2), prepayment penalties are permitted or prohibited in connection with particular payment changes, when a loan agreement permits negative amortization:

i. Initial payments for a variable-rate transaction consummated on January 1, 2010, are $1,000 per month and the loan agreement permits negative amortization to occur. Under the loan agreement, the first date that a scheduled payment in a different amount may be due is January 1, 2014, and the creditor does not have the right to change scheduled payments prior to that date even if negative amortization occurs. A prepayment penalty is permitted with this mortgage transaction provided that the other §1026.35(e)(2) conditions are met, that is: Provided that the prepayment penalty is permitted by other applicable law, the penalty expires on or before December 31, 2011, and the penalty will not apply if the source of the prepayment funds is a refinancing by the creditor or its affiliate.

ii. Initial payments for a variable-rate transaction consummated on January 1, 2010 are $1,000 per month and the loan agreement permits negative amortization to occur. Under the loan agreement, the first date that a scheduled payment in a different amount may be due is January 1, 2014, but the creditor has the right to change scheduled payments prior to that date if negative amortization occurs. A prepayment penalty is prohibited with this mortgage transaction because the payment may change within the four-year period following consummation.

Section 1026.36—Prohibited Acts or Practices and Certain Requirements for Credit Secured by a Dwelling

36(a) Definitions

1. *Meaning of loan originator.* i. *General.* A. Section 1026.36(a) defines the set of activities or services any one of which, if done for or in the expectation of compensation or gain, makes the person doing such activities or performing such services a loan originator, unless otherwise excluded. The scope of activities covered by the term loan originator includes:

1. Referring a consumer to any person who participates in the origination process as a loan originator. Referring is an activity included under each of the activities of offering, arranging, or assisting a consumer in obtaining or applying to obtain an extension of credit. Referring includes any oral or written action directed to a consumer that can affirmatively influence the consumer to select a particular loan originator or creditor to obtain an extension of credit when the consumer will pay for such credit. See comment 36(a)–4 with respect to certain activities that do not constitute referring.

2. Arranging a credit transaction, including initially contacting and orienting the consumer to a particular loan originator's or creditor's origination process or particular credit terms that are or may be available to that consumer selected based on the consumer's financial characteristics, assisting the consumer to apply for credit, taking an application, offering particular credit terms to the consumer selected based on the consumer's financial characteristics, negotiating credit terms, or otherwise obtaining or making an extension of credit.

3. Assisting a consumer in obtaining or applying for consumer credit by advising on particular credit terms that are or may be available to that consumer based on the consumer's financial characteristics, filling out an application form, preparing application packages (such as a credit application or pre-approval application or supporting documentation), or collecting application and supporting information on behalf of the consumer to submit to a loan originator or creditor. A person who, acting on behalf of a loan originator or creditor, collects information or verifies information provided by the consumer, such as by asking the consumer for documentation to support the information the consumer provided or for the consumer's authorization to obtain supporting documents from third parties, is not collecting information on behalf of the consumer. See also comment 36(a)–4.i through .iv with respect to application-related administrative and clerical tasks and comment 36(a)–1.v with respect to third-party advisors.

4. Presenting particular credit terms for the consumer's consideration that are selected based on the consumer's financial characteristics, or communicating with a consumer for the purpose of reaching a mutual understanding about prospective credit terms.

5. Advertising or communicating to the public that one can or will perform any loan origination services. Advertising the services of a third party that engages or intends to engage in loan origination activities does not make the advertiser a loan originator.

B. The term ''loan originator'' includes employees, agents, and contractors of a creditor as well as employees, agents, and contractors of a mortgage broker that satisfy this definition.

C. The term ''loan originator'' includes any creditor that satisfies the definition of loan originator but makes use of ''table funding'' by a third party. See comment 36(a)–1.ii discussing table funding. Solely for purposes of §1026.36(f) and (g) concerning loan originator qualifications, the term loan originator includes any creditor that satisfies the definition of loan originator, even if the creditor does not make use of table funding. Such a person is a creditor, not a loan originator, for general purposes of this part, including the provisions of §1026.36 other than §1026.36(f) and (g).

D. A ''loan originator organization'' is a loan originator other than a natural person. The term includes any legal person or organization such as a sole proprietorship, trust, partnership, limited liability partnership, limited partnership, limited liability company, corporation, bank, thrift, finance company, or credit union. An ''individual loan originator'' is limited to a natural person. (Under §1026.2(a)(22), the term ''person'' means a natural person or an organization.)

E. The term ''loan originator'' does not include consumers who obtain extensions of consumer credit on their own behalf.

ii. *Table funding.* Table funding occurs when the creditor does not provide the funds for the transaction at consummation out of the creditor's own resources, including, for example, by drawing on a *bona fide* warehouse line of credit or out of deposits held by the creditor. Accordingly, a table-funded transaction is consummated with the debt obligation initially payable by its terms to one person, but another person provides the funds for the transaction at consummation and receives an immediate assignment of the note, loan contract, or other evidence of the debt obligation. Although §1026.2(a)(17)(i)(B) provides that a person to whom a debt obligation is initially payable on its face generally is a creditor, §1026.36(a)(1) provides that, solely for the purposes of §1026.36, such a person is also considered a loan originator. For example, if a person closes a transaction in its own name but does not fund the transaction from its own resources and assigns the transaction after consummation to the person providing the funds, it is considered a creditor for purposes of Regulation Z and also a loan originator for purposes of §1026.36. However, if a person closes in its own name and finances a consumer credit transaction from the person's own resources, including drawing on a *bona fide* warehouse line of credit or out of deposits held by the person, and does not assign the loan at closing, the person is a creditor not making use of table funding but is included in the definition of loan originator for the purposes of §1026.36(f) and (g) concerning loan originator qualifications.

iii. *Servicing.* A loan servicer or a loan servicer's employees, agents, or contractors that otherwise meet the definition of ''loan originator'' are excluded from the definition when modifying or offering to modify an existing loan on behalf of the current owner or holder of the loan (including an assignee or the servicer, if applicable). Other than §1026.36(c), §1026.36 applies to extensions of consumer credit. Thus, other than §1026.36(c), §1026.36 does not apply if a person renegotiates, modifies, replaces, or subordinates an existing obligation or its terms, unless the transaction constitutes a refinancing under §1026.20(a) or obligates a different consumer on the existing debt.

iv. *Real estate brokerage.* The definition of ''loan originator'' does not include a person that performs only real estate brokerage activities (*e.g.*, does not perform mortgage broker or consumer credit referral activities or extend consumer credit) if the person is licensed or registered under applicable State law governing real estate brokerage, unless such person is paid by a loan originator or a creditor for a particular consumer credit transaction subject to §1026.36. Such a person is not paid by a loan originator or a creditor if the person is paid by a loan originator or creditor on behalf of a buyer or seller solely for performing real estate brokerage activities. Such a person is not paid for a particular consumer credit transaction subject to §1026.36 if the person is paid compensation by a loan originator or creditor, or affiliate of the loan originator or creditor, solely for performing real estate brokerage activities in connection with a property owned by that loan originator or creditor.

v. *Third-party advisors*. The definition of ''loan originator'' does not include bona fide third-party advisors such as accountants, attorneys, registered financial advisors, housing counselors, or others who do not receive compensation for engaging in loan origination activities. Advisory activity not constituting loan originator activity would include, for example, licensed accountants advising clients on tax implications of credit terms, registered financial advisors advising clients on potential effects of credit terms on client finances, HUD-approved housing counselors assisting consumers with understanding the credit origination process and various credit terms or collecting and organizing documents to support a credit application, or a licensed attorney assisting clients with consummating a real property transaction or with divorce, trust, or estate planning matters. Such a person, however, who advises a consumer on credit terms offered by either the person or the person's employer, or who receives compensation or other monetary gain, directly or indirectly, from the loan originator or creditor on whose credit offer the person advises a consumer, generally would be a loan originator. A referral by such a person does not make the person a loan originator, however, where the person neither receives nor expects any compensation from a loan originator or creditor for referring the consumer. HUD-approved housing counselors who simply assist a consumer in obtaining or applying to obtain consumer credit from a loan originator or creditor are not loan originators if the compensation is not contingent on referrals or on engaging in additional loan origination activities and either of two alternative conditions is satisfied: The first alternative condition is that the compensation is expressly permitted by applicable local, State, or Federal law that requires counseling and the counseling performed complies with such law (for example, §1026.34(a)(5) and §1026.36(k)). The second alternative condition is that the compensation is a fixed sum received from a creditor, loan originator, or the affiliate of a loan originator or a creditor as a result of agreements between creditors or loan originators and local, State, or Federal agencies. However, HUD-approved housing counselors are loan originators if, for example, they receive compensation that is contingent on referrals or on engaging in loan originator activity other than assisting a consumer in obtaining or applying to obtain consumer credit from a loan originator or creditor.

2. *Meaning of mortgage broker*. For purposes of §1026.36, with respect to a particular transaction, the term ''mortgage broker'' refers to a loan originator who is not an employee of the creditor. Accordingly, the term ''mortgage broker'' includes companies that engage in the activities described in §1026.36(a) and also includes employees of such companies that engage in these activities. Section 1026.36(d) prohibits certain payments to a loan originator. These prohibitions apply to payments made to all loan originators, including payments made to mortgage brokers, and payments made by a company acting as a mortgage broker to its employees who are loan originators.

3. *Meaning of creditor*. For purposes of §1026.36(d) and (e), a creditor means a creditor that is not deemed to be a loan originator on the transaction under this section. Thus, a person that closes a loan in its own name (but another person provides the funds for the transaction at consummation and receives an immediate assignment of the note, loan contract, or other evidence of the debt obligation) is deemed a loan originator, not a creditor, for purposes of §1026.36. However, that person is still a creditor for all other purposes of Regulation Z.

4. *Managers, administrative and clerical staff*. For purposes of §1026.36, managers, administrative and clerical staff, and similar individuals who are employed by (or contractor or agent of) a creditor or loan originator organization and take an application, offer, arrange, assist a consumer in obtaining or applying to obtain, negotiate, or otherwise obtain or make a particular extension of credit for another person are loan originators. The following examples describe activities that, in the absence of any other activities, do not render a manager, administrative or clerical staff member, or similar employee a loan originator:

i. *Application-related administrative and clerical tasks*. The definition of loan originator does not include a loan originator's or creditor's employee who provides a credit application form from the entity for which the person works to the consumer for the consumer to complete or, without assisting the consumer in completing the credit application, processing or analyzing the information, or discussing particular credit terms that are or may be available from a creditor or loan originator to that consumer selected based on the consumer's financial characteristics, delivers the credit application from a consumer to a loan originator or creditor. A person does not assist the consumer in completing the application if the person explains to the consumer filling out the application the contents of the application or where particular consumer information is to be provided, or generally describes the credit application process to a consumer without discussing particular credit terms that are or may be available from a creditor or loan originator to that consumer selected based on the consumer's financial characteristics.

ii. *Responding to consumer inquiries and providing general information.* The definition of loan originator does not include persons who:

A. Provide general explanations, information, or descriptions in response to consumer queries, such as explaining credit terminology or lending policies or who confirm written offer terms already transmitted to the consumer;

B. As employees of a creditor or loan originator, provide loan originator or creditor contact information of the loan originator or creditor entity for which he or she works, or of a person who works for that the same entity to a consumer, provided that the person does not discuss particular credit terms that are or may be available from a creditor or loan originator to that consumer selected based on the consumer's financial characteristics and does not direct the consumer, based on his or her assessment of the consumer's financial characteristics, to a particular loan originator or particular creditor seeking to originate credit transactions to consumers with those financial characteristics;

C. Describe other product-related services (for example, persons who describe optional monthly payment methods via telephone or via automatic account withdrawals, the availability and features of online account access, the availability of 24-hour customer support, or free mobile applications to access account information); or

D. Explain or describe the steps that a consumer would need to take to obtain an offer of credit, including providing general guidance on qualifications or criteria that would need to be met that is not specific to that consumer's circumstances.

iii. *Loan processing.* The definition of loan originator does not include persons who, acting on behalf of a loan originator or a creditor:

A. Compile and assemble credit application packages and supporting documentation;

B. Verify information provided by the consumer in a credit application such as by asking the consumer for supporting documentation or the consumer's authorization for the person to obtain supporting documentation from other persons;

C. Coordinate consummation of the credit transaction or other aspects of the credit transaction process, including by communicating with a consumer about process deadlines and documents needed at consummation, provided that any communication that includes a discussion about credit terms available from a creditor to that consumer selected based on the consumer's financial characteristics only confirms credit terms already agreed to by the consumer;

D. Provide a consumer with information unrelated to credit terms, such as the best days of the month for scheduling consummation; or

E. Communicate on behalf of a loan originator that a written credit offer has been sent to a consumer without providing any details of that offer.

iv. *Underwriting, credit approval, and credit pricing.* The definition of loan originator does not include persons who:

A. Receive and evaluate a consumer's information to make underwriting decisions on whether a consumer qualifies for an extension of credit and communicate decisions to a loan originator or creditor, provided that only a loan originator communicates such underwriting decisions to the consumer;

B. Approve particular credit terms or set particular credit terms available from a creditor to that consumer selected based on the consumer's financial characteristics in offer or counter-offer situations, provided that only a loan originator communicates to or with the consumer regarding these credit terms, an offer, or provides or engages in negotiation, a counter-offer, or approval conditions; or

C. Establish credit pricing that the creditor offers generally to the public, via advertisements or other marketing or via other persons that are loan originators.

v. *Producing managers.* Managers that work for creditors or loan originator organizations sometimes engage themselves in loan origination activities, as set forth in the definition of loan originator in §1026.36(a)(1)(i) (such managers are sometimes referred to as ''producing managers''). The definition of loan originator includes persons, including managers, who are employed by a creditor or loan originator organization and take an application, offer, arrange, assist a consumer with obtaining or applying to obtain, negotiate, or otherwise obtain or make a particular extension of credit for another person, even if such persons are also employed by the creditor or loan originator organization to perform duties that are not loan origination activities. Thus, such producing managers are loan originators.

5. *Compensation.* i. *General.* For purposes of §1026.36, compensation is defined in §1026.36(a)(3) as salaries, commissions, and any financial or similar incentive. For example, the term ''compensation'' includes:

A. An annual or other periodic bonus; or

B. Awards of merchandise, services, trips, or similar prizes.

ii. *Name of fee.* Compensation includes amounts the loan originator retains and is not dependent on the label or name of any fee imposed in connection with the transaction. For example, if a loan originator imposes a ''processing fee'' in connection with the transaction and retains such fee, it is compensation for purposes of § 1026.36, including § 1026.36(d) and (e), whether the originator expends the time to process the consumer's application or uses the fee for other expenses, such as overhead.

iii. *Amounts for third-party charges.* Compensation does not include amounts the loan originator receives as payment for bona fide and reasonable charges, such as credit reports, where those amounts are passed on to a third party that is not the creditor, its affiliate, or the affiliate of the loan originator. *See* comment 36(a)–5.v.

iv. *Amounts for charges for services that are not loan origination activities.*

1. A payment received by a loan originator organization for bona fide and reasonable charges for services it performs that are not loan origination activities;

2. A payment received by an affiliate of a loan originator organization for bona fide and reasonable charges for services it performs that are not loan origination activities; or

3. A payment received by a loan originator organization for bona fide and reasonable charges for services that are not loan origination activities where those amounts are not retained by the loan originator but are paid to the creditor, its affiliate, or the affiliate of the loan originator organization. *See* comment 36(a)–5.v.

B. Compensation includes any salaries, commissions, and any financial or similar incentive to an individual loan originator, regardless of whether it is labeled as payment for services that are not loan origination activities.

C. Loan origination activities for purposes of this comment means activities described in § 1026.36(a)(1)(i) (*e.g.,* taking an application, offering, arranging, negotiating, or otherwise obtaining an extension of consumer credit for another person) that would make a person performing those activities for compensation a loan originator as defined in § 1026.36(a)(1)(i).

v. *Amounts that exceed the actual charge for a service.* In some cases, amounts received by the loan originator organization for payment for third-party charges described in comment 36(a)–5.iii or payment for services to the creditor, its affiliates, or the affiliates of the loan originator organization described in comment 36(a)–5.iv.A.*3* may exceed the actual charge because, for example, the loan originator organization cannot determine with accuracy what the actual charge will be when it is imposed and instead uses average charge pricing (in accordance with the Real Estate Settlement Procedures Act). In such a case, the difference retained by the loan originator organization is not compensation if the charge imposed on the consumer or collected from a person other than the consumer was bona fide and reasonable and also complies with State and other applicable law. On the other hand, if the loan originator organization marks up the charge (a practice known as ''upcharging''), and the originator retains the difference between the actual charge and the marked-up charge, the amount retained is compensation for purposes of § 1026.36, including § 1026.36(d) and (e). For example:

A. Assume a loan originator organization receives compensation directly from either a consumer or a creditor. Further assume the loan originator organization uses average charge pricing in accordance with the Real Estate Settlement Procedures Act and, based on its past average cost for credit reports, charges the consumer $25 for a credit report provided by a third party. Under the loan originator organization's agreement with the consumer reporting agency, the cost of the credit report is to be paid in a month-end bill and will vary between $15 and $35 depending on how many credit reports the originator obtains that month. Assume the $25 for the credit report is paid by the consumer or is paid by the creditor with proceeds from a rebate. At the end of the month, the cost for the credit report is determined to be $15 for this consumer's transaction, based on the loan originator organization's credit report volume that month. In this case, the $10 difference between the $25 credit report fee imposed on the consumer and the actual $15 cost for the credit report is not compensation for purposes of § 1026.36, even though the $10 is retained by the loan originator organization.

B. Using the same example as in comment 36(a)–5.v.A, the $10 difference would be compensation for purposes of § 1026.36 if the price for a credit report varies between $10 and $15.

vi. *Returns on equity interests and dividends on equity holdings.* The term ''compensation'' for purposes of § 1026.36(d) and (e) also includes, for example, awards of stock, stock options and equity interests. Thus, the awarding of stock, stock options, or equity interests to loan originators is subject to the restrictions in § 1026.36(d) and (e). For example, a person may not award additional stock or a preferable type of equity interest to a loan originator based on the terms of a consumer credit transaction subject to § 1026.36 originated by that loan originator. However, bona fide returns or dividends paid on stock or other equity holdings, including those paid to owners or shareholders of a loan originator organization who own such stock or equity interests, are not compensation for purposes of §1026.36(d) and (e). Bona fide returns or dividends are those returns and dividends that are paid pursuant to documented ownership or equity interests and that are not functionally equivalent to compensation. Ownership and equity interests must be bona fide. Bona fide ownership and equity interests are allocated according to a loan originator's respective capital contribution where the allocation is not a mere subterfuge for the payment of compensation based on terms of a transaction. Ownership and equity interests also are not bona fide if the formation or maintenance of the business from which returns or dividends are paid is a mere subterfuge for the payment of compensation based on the terms of a transaction. For example, assume that three individual loan originators form a loan originator organization that is a limited liability company (LLC). The three individual loan originators are members of the LLC, and the LLC agreement governing the loan originator organization's structure calls for regular distributions based on the members' respective equity interests. If the members' respective equity interests are allocated based on the members' terms of transactions, rather than according to their respective capital contributions, then distributions based on such equity interests are not bona fide and, thus, are compensation for purposes of §1026.36(d) and (e).

36(a)(1)(i)(B) Employee of a retailer of manufactured homes.

1. The definition of loan originator does not include an employee of a manufactured home retailer that ''assists'' a consumer in obtaining or applying for consumer credit as defined in comment 36(a)–1.i.A.*3,* provided the employee does not advise the consumer on specific credit terms, or otherwise engage in loan originator activity as defined in §1026.36(a)(1). The following examples describe activities that, in the absence of other activities, do not define a manufactured home retailer employee as a loan originator:

i. Generally describing the credit application process to a consumer without advising on credit terms available from a creditor.

ii. Preparing residential mortgage loan packages, which means compiling and processing loan application materials and supporting documentation, and providing general application instructions to consumers so consumers can complete an application, without interacting or communicating with the consumer regarding transaction terms, but not filling out a consumer's application, inputting the information into an online application or other automated system, or taking information from the consumer over the phone to complete the application.

iii. Collecting information on behalf of the consumer with regard to a residential mortgage loan. Collecting information ''on behalf of the consumer'' would include gathering information or supporting documentation from third parties on behalf of the consumer to provide to the consumer, for the consumer then to provide in the application or for the consumer to submit to the loan originator or creditor.

iv. Providing or making available general information about creditors or loan originators that may offer financing for manufactured homes in the consumer's general area, when doing so does not otherwise amount to ''referring'' as defined in comment 36(a)–1.i.A.*1.* This includes making available, in a neutral manner, general brochures or information about the different creditors or loan originators that may offer financing to a consumer, but does not include recommending a particular creditor or loan originator or otherwise influencing the consumer's decision.

36(a)(4) Seller Financers; Three Properties

1. *Reasonable ability to repay safe harbors.* A person in good faith determines that the consumer to whom the person extends seller financing has a reasonable ability to repay the obligation if the person complies with §1026.43(c) of this part or complies with the alternative criteria discussed in this comment. If the consumer intends to make payments from income, the person considers evidence of the consumer's current or reasonably expected income. If the consumer intends to make payments with income from employment, the person considers the consumer's earnings, which may be reflected in payroll statements or earnings statements, IRS Form W–2s or similar IRS forms used for reporting wages or tax withholding, or military Leave and Earnings Statements. If the consumer intends to make payments from other income, the person considers the consumer's income from sources such as a Federal, State, or local government agency providing benefits and entitlements. If the consumer intends to make payments from income earned from assets, the person considers the relevant assets, such as funds held in accounts with financial institutions, equity ownership interests, or rental property. However, the value of the dwelling that secures the financing does not constitute evidence of the consumer's ability to repay. In considering these and other potential sources of income to determine in good faith that the consumer has a reasonable ability to repay the obligation, the person making that determination may rely on copies of tax returns the consumer filed with the Internal Revenue Service or a State taxing authority.

2. *Adjustable rate safe harbors.* i. *Annual rate increase.* An annual rate increase of two percentage points or less is reasonable.

ii. *Lifetime increase.* A lifetime limitation of an increase of six percentage points or less, subject to a minimum floor of the person's choosing and maximum ceiling that does not exceed the usury limit applicable to the transaction, is reasonable.

36(a)(5) Seller Financers; One Property

1. *Adjustable rate safe harbors*. For a discussion of reasonable annual and lifetime interest rate increases, see comment 36(a)(4)–2.

36(b) Scope.

1. *Scope of coverage*. Section 1026.36(c)(1) and (c)(2) applies to closed-end consumer credit transactions secured by a consumer's principal dwelling. Section 1026.36(c)(3) applies to a consumer credit transaction, including home equity lines of credit under §1026.40, secured by a consumer's dwelling. Paragraphs (h) and (i) of §1026.36 apply to home equity lines of credit under §1026.40 secured by a consumer's principal dwelling. Paragraphs (d), (e), (f), (g), (h), and (i) of §1026.36 apply to closed-end consumer credit transactions secured by a dwelling. Closed-end consumer credit transactions include transactions secured by first or subordinate liens, and reverse mortgages that are not home equity lines of credit under §1026.40. See §1026.36(b) for additional restrictions on the scope of §1026.36, and §§1026.1(c) and 1026.3(a) and corresponding commentary for further discussion of extensions of credit subject to Regulation Z.

36(c) Servicing Practices

Paragraph 36(c)(1)(i)

1. *Crediting of payments*. Under §1026.36(c)(1)(i), a mortgage servicer must credit a payment to a consumer's loan account as of the date of receipt. This does not require that a mortgage servicer post the payment to the consumer's loan account on a particular date; the servicer is only required to credit the payment *as of* the date of receipt. Accordingly, a servicer that receives a payment on or before its due date (or within any grace period), and does not enter the payment on its books or in its system until after the payment's due date (or expiration of any grace period), does not violate this rule as long as the entry does not result in the imposition of a late charge, additional interest, or similar penalty to the consumer, or in the reporting of negative information to a consumer reporting agency.

2. *Method of crediting periodic payments*. The method by which periodic payments shall be credited is based on the legal obligation between the creditor and consumer, subject to applicable law.

3. *Date of receipt*. The ''date of receipt'' is the date that the payment instrument or other means of payment reaches the mortgage servicer. For example, payment by check is received when the mortgage servicer receives it, not when the funds are collected. If the consumer elects to have payment made by a third-party payor such as a financial institution, through a preauthorized payment or telephone bill-payment arrangement, payment is received when the mortgage servicer receives the third-party payor's check or other transfer medium, such as an electronic fund transfer.

4. *Temporary loss mitigation programs*. If a loan contract has not been permanently modified but the consumer has agreed to a temporary loss mitigation program, a periodic payment under §1026.36(c)(1)(i) is the amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle under the loan contract, regardless of the payment due under the temporary loss mitigation program.

5. *Permanent loan modifications*. If a loan contract has been permanently modified, a periodic payment under §1026.36(c)(1)(i) is an amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle under the modified loan contract.

Paragraph 36(c)(1)(ii).

1. *Handling of partial payments*. If a servicer receives a partial payment from a consumer, to the extent not prohibited by applicable law or the legal obligation between the parties, the servicer may take any of the following actions:

i. Credit the partial payment upon receipt.

ii. Return the partial payment to the consumer.

iii. Hold the payment in a suspense or unapplied funds account. If the payment is held in a suspense or unapplied funds account, this fact must be reflected on future periodic statements, in accordance with §1026.41(d)(3). When sufficient funds accumulate to cover a periodic payment, as defined in §1026.36(c)(1)(i), they must be treated as a periodic payment received in accordance with §1026.36(c)(1)(i).

Paragraph 36(c)(1)(iii).

1. *Payment requirements*. The servicer may specify reasonable requirements for making payments in writing, such as requiring that payments be accompanied by the account number or payment coupon; setting a cut-off hour for payment to be received, or setting different hours for payment by mail and payments made in person; specifying that only checks or money orders should be sent by mail; specifying that payment is to be made in U.S. dollars; or specifying one particular address for receiving payments, such as a post office box. The servicer may be prohibited, however, from requiring payment solely by preauthorized electronic fund transfer. *See* section 913 of the Electronic Fund Transfer Act, 15 U.S.C. 1693k.

2. *Payment requirements—Limitations*. Requirements for making payments must be reasonable; it should not be difficult for most consumers and potential successors in interest to make conforming payments. For

example, it would be reasonable to require a cut-off time of 5 p.m. for receipt of a mailed check at the location specified by the servicer for receipt of such check.

3. *Implied guidelines for payments.* In the absence of specified requirements for making payments, payments may be made at any location where the servicer conducts business; any time during the servicer's normal business hours; and by cash, money order, draft, or other similar instrument in properly negotiable form, or by electronic fund transfer if the servicer and consumer have so agreed.

Paragraph 36(c)(2).

1. *Pyramiding of late fees.* The prohibition on pyramiding of late fees in §1026.36(c)(2) should be construed consistently with the ''credit practices rule'' of the Federal Trade Commission, 16 CFR 444.4.

Paragraph 36(c)(3).

1. *Person acting on behalf of the consumer.* For purposes of §1026.36(c)(3), a person acting on behalf of the consumer may include the consumer's representative, such as an attorney representing the individual, a non-profit consumer counseling or similar organization, or a creditor with which the consumer is refinancing and which requires the payoff statement to complete the refinancing. A creditor, assignee or servicer may take reasonable measures to verify the identity of any person acting on behalf of the consumer and to obtain the consumer's authorization to release information to any such person before the ''reasonable time'' period begins to run.

2. *Payment requirements.* The creditor, assignee or servicer may specify reasonable requirements for making payoff requests, such as requiring requests to be directed to a mailing address, email address, or fax number specified by the creditor, assignee or servicer or any other reasonable requirement or method. If the consumer does not follow these requirements, a longer timeframe for responding to the request would be reasonable.

3. *Accuracy of payoff statements.* Payoff statements must be accurate when issued.

36(d) Prohibited Payments to Loan Originators

1. *Persons covered.* Section 1026.36(d) prohibits any person (including a creditor) from paying compensation to a loan originator in connection with a covered credit transaction, if the amount of the payment is based on a term of a transaction. For example, a person that purchases an extension of credit from the creditor after consummation may not compensate the loan originator in a manner that violates §1026.36(d).

2. *Mortgage brokers.* The payments made by a company acting as a mortgage broker to its employees who are loan originators are subject to the section's prohibitions. For example, a mortgage broker may not pay its employee more for a transaction with a 7 percent interest rate than for a transaction with a 6 percent interest rate.

36(d)(1) Payments Based on a Term of a Transaction

1. *Compensation that is ''based on'' a term of a transaction.* i. *Objective facts and circumstances.* Whether compensation is ''based on'' a term of a transaction does not require a comparison of multiple transactions or proof that any person subjectively intended that there be a relationship between the amount of the compensation paid and a transaction term. Instead, the determination is based on the objective facts and circumstances indicating that compensation would have been different if a transaction term had been different. Generally, when there is a compensation policy in place and the objective facts and circumstances indicate the policy was followed, the determination of whether compensation would have been different if a transaction term had been different is made by analysis of the policy. In the absence of a compensation policy, or when a compensation policy is not followed, the determination may be made based on a comparison of transactions originated and the amounts of compensation paid.

ii. *Single or multiple transactions.* The prohibition on payment and receipt of compensation under §1026.36(d)(1)(i) encompasses compensation that directly or indirectly is based on the terms of a single transaction of a single individual loan originator, the terms of multiple transactions by that single individual loan originator, or the terms of multiple transactions by multiple individual loan originators. Compensation to an individual loan originator that is based upon profits determined with reference to a mortgage-related business is considered compensation that is based on the terms of multiple transactions by multiple individual loan originators. For clarification about the exceptions permitting compensation based upon profits determined with reference to mortgage-related business pursuant to either a designated tax-advantaged plan or a non-deferred profits-based compensation plan, see comment 36(d)(1)–3. For clarification about ''mortgage-related business,'' see comments 36(d)(1)–3.v.B and –3.v.E.

A. Assume that a creditor pays a bonus to an individual loan originator out of a bonus pool established with reference to the creditor's profits and the profits are determined with reference to the creditor's revenue from origination of closed-end consumer credit transactions secured by a dwelling. In such instance, the bonus is considered compensation that is based on the terms of multiple transactions by multiple individual loan originators. Therefore, the bonus is prohibited under §1026.36(d)(1)(i), unless it is otherwise permitted under §1026.36(d)(1)(iv).

B. Assume that an individual loan originator's employment contract with a creditor guarantees a quarterly bonus in a specified amount conditioned upon the individual loan originator meeting certain performance benchmarks (e.g., volume of originations monthly). A bonus paid following the satisfaction of those contractual conditions is not directly or indirectly based on the terms of a transaction by an individual loan originator, the terms of multiple transactions by that individual loan originator, or the terms of multiple transactions by multiple individual loan originators under §1026.36(d)(1)(i) as clarified by this comment 36(d)(1)–1.ii, because the creditor is obligated to pay the bonus, in the specified amount, regardless of the terms of transactions of the individual loan originator or multiple individual loan originators and the effect of those terms of multiple transactions on the creditor's profits. Because this type of bonus is not directly or indirectly based on the terms of multiple transactions by multiple individual loan originators, as described in §1026.36(d)(1)(i) (as clarified by this comment 36(d)(1)–1.ii), it is not subject to the 10-percent total compensation limit described in §1026.36(d)(1)(iv)(B)(*1*).

iii. *Transaction term defined.* A ''term of a transaction'' under §1026.36(d)(1)(ii) is any right or obligation of any of the parties to a credit transaction. A ''credit transaction'' is the operative acts (*e.g.*, the consumer's purchase of certain goods or services essential to the transaction) and written and oral agreements that, together, create the consumer's right to defer payment of debt or to incur debt and defer its payment. For the purposes of §1026.36(d)(1)(ii), this definition includes:

A. The rights and obligations, or part of any rights or obligations, memorialized in a promissory note or other credit contract, as well as the security interest created by a mortgage, deed of trust, or other security instrument, and in any document incorporated by reference in the note, contract, or security instrument;

B. The payment of any loan originator or creditor fees or charges for the credit, or for a product or service provided by the loan originator or creditor related to the extension of that credit, imposed on the consumer, including any fees or charges financed through the interest rate; and

C. The payment of any fees or charges imposed on the consumer, including any fees or charges financed through the interest rate, for any product or service required to be obtained or performed as a condition of the extension of credit.

D. The fees and charges described above in paragraphs B and C can only be a term of a transaction if the fees or charges are required to be disclosed in the Good Faith Estimate, the HUD–1, or the HUD–1A (and subsequently in any integrated disclosures promulgated by the Bureau under TILA section 105(b) (15 U.S.C. 1604(b)) and RESPA section 4 (12 U.S.C. 2603) as amended by sections 1098 and 1100A of the Dodd-Frank Act).

2. *Compensation that is or is not based on a term of a transaction or a proxy for a term of a transaction.* Section 1026.36(d)(1) does not prohibit compensating a loan originator differently on different transactions, provided the difference is not based on a term of a transaction or a proxy for a term of a transaction. The rule prohibits compensation to a loan originator for a transaction based on, among other things, that transaction's interest rate, annual percentage rate, collateral type (*e.g.*, condominium, cooperative, detached home, or manufactured housing), or the existence of a prepayment penalty. The rule also prohibits compensation to a loan originator that is based on any factor that is a proxy for a term of a transaction. Compensation paid to a loan originator organization directly by a consumer in a transaction is not prohibited by §1026.36(d)(1) simply because that compensation itself is a term of the transaction. Nonetheless, that compensation may not be based on any other term of the transaction or a proxy for any other term of the transaction. In addition, in a transaction where a loan originator organization is paid compensation directly by a consumer, compensation paid by the loan originator organization to individual loan originators is not prohibited by §1026.36(d)(1) simply because it is based on the amount of compensation paid directly by the consumer to the loan originator organization but the compensation to the individual loan originator may not be based on any other term of the transaction or proxy for any other term of the transaction.

i. *Permissible methods of compensation.* Compensation based on the following factors is not compensation based on a term of a transaction or a proxy for a term of a transaction:

A. The loan originator's overall dollar volume (*i.e.*, total dollar amount of credit extended or total number of transactions originated), delivered to the creditor. See comment 36(d)(1)–9 discussing variations of compensation based on the amount of credit extended.

B. The long-term performance of the originator's loans.

C. An hourly rate of pay to compensate the originator for the actual number of hours worked.

D. Whether the consumer is an existing customer of the creditor or a new customer.

E. A payment that is fixed in advance for every loan the originator arranges for the creditor (*e.g.*, $600 for every credit transaction arranged for the creditor, or $1,000 for the first 1,000 credit transactions arranged and $500 for each additional credit transaction arranged).

F. The percentage of applications submitted by the loan originator to the creditor that results in consummated transactions.

G. The quality of the loan originator's loan files (*e.g.*, accuracy and completeness of the loan documentation) submitted to the creditor.

ii. *Proxies for terms of a transaction.* If the loan originator's compensation is based in whole or in part on a factor that is a proxy for a term of a transaction, then the loan originator's compensation is based on a term of a transaction. A factor (that is not itself a term of a transaction) is a proxy for a term of a transaction if the factor consistently varies with a term or terms of the transaction over a significant number of transactions, and the loan originator has the ability, directly or indirectly, to add, drop, or change the factor when originating the transaction. For example:

A. Assume a creditor pays a loan originator a higher commission for transactions to be held by the creditor in portfolio than for transactions sold by the creditor into the secondary market. The creditor holds in portfolio only extensions of credit that have a fixed interest rate and a five-year term with a final balloon payment. The creditor sells into the secondary market all other extensions of credit, which typically have a higher fixed interest rate and a 30-year term. Thus, whether an extension of credit is held in portfolio or sold into the secondary market for this creditor consistently varies with the interest rate and whether the credit has a five-year term or a 30-year term (which are terms of the transaction) over a significant number of transactions. Also, the loan originator has the ability to change the factor by, for example, advising the consumer to choose an extension of credit a five-year term. Therefore, under these circumstances, whether or not an extension of credit will be held in portfolio is a proxy for a term of a transaction.

B. Assume a loan originator organization pays loan originators higher commissions for transactions secured by property in State A than in State B. For this loan originator organization, over a significant number of transactions, transactions in State B have substantially lower interest rates than transactions in State A. The loan originator, however, does not have any ability to influence whether the transaction is secured by property located in State A or State B. Under these circumstances, the factor that affects compensation (the location of the property) is not a proxy for a term of a transaction.

iii. *Pooled compensation.* Section 1026.36(d)(1) prohibits the sharing of pooled compensation among loan originators who originate transactions with different terms and are compensated differently. For example, assume that Loan Originator A receives a higher commission than Loan Originator B and that loans originated by Loan Originator A generally have higher interest rates than loans originated by Loan Originator B. Under these circumstances, the two loan originators may not share pooled compensation because each receives compensation based on the terms of the transactions they collectively make.

3. *Interpretation of §1026.36(d)(1)(iii) and (iv).* Subject to certain restrictions, §1026.36(d)(1)(iii) and §1026.36(d)(1)(iv) permit contributions to or benefits under designated tax-advantaged plans and compensation under a non-deferred profits-based compensation plan even if the contributions, benefits, or compensation, respectively, are based on the terms of multiple transactions by multiple individual loan originators.

i. *Designated tax-advantaged plans.* Section 1026.36(d)(1)(iii) permits an individual loan originator to receive, and a person to pay, compensation in the form of contributions to a defined contribution plan or benefits under a defined benefit plan provided the plan is a designated tax-advantaged plan (as defined in §1026.36(d)(1)(iii)), even if contributions to or benefits under such plans are directly or indirectly based on the terms of multiple transactions by multiple individual loan originators. In the case of a designated tax-advantaged plan that is a defined contribution plan, §1026.36(d)(1)(iii) does not permit the contribution to be directly or indirectly based on the terms of that individual loan originator's transactions. A defined contribution plan has the meaning set forth in Internal Revenue Code section 414(i), 26 U.S.C. 414(i). A defined benefit plan has the meaning set forth in Internal Revenue Code section 414(j), 26 U.S.C. 414(j).

ii. *Non-deferred profits-based compensation plans.* As used in §1026.36(d)(1)(iv), a "non-deferred profits-based compensation plan" is any compensation arrangement where an individual loan originator may be paid variable, additional compensation based in whole or in part on the mortgage-related business profits of the person paying the compensation, any affiliate, or a business unit within the organizational structure of the person or the affiliate, as applicable (*i.e.*, depending on the level within the person's or affiliate's organization at which the non-deferred profits-based compensation plan is established). A non-deferred profits-based compensation plan does not include a designated tax-advantaged plan or other forms of deferred compensation that are not designated tax-advantaged plans, such as those created pursuant to Internal Revenue Code section 409A, 26 U.S.C. 409A. Thus, if contributions to or benefits under a designated tax-advantaged plan or compensation under another form of deferred compensation plan are determined with reference to the mortgage-related business profits of the person making the contribution, then the contribution, benefits, or other compensation, as applicable, are not permitted by §1026.36(d)(1)(iv) (although, in the case of contributions to or benefits under a designated tax-advantaged plan, the benefits or contributions may be permitted by §1026.36(d)(1)(iii)). Under a non-deferred profits-based compensation plan, the individual loan originator may, for example, be paid directly in cash, stock, or other non-deferred compensation, and the compensation under the non-deferred profits-based compensation plan may be determined by a fixed formula or may be at the discretion of the person (e.g., the person may elect not to pay compensation under a non-deferred profits-based compensation plan in a given year), provided the compensation is not directly or indirectly based on the terms of the individual loan originator's transactions. As used in §1026.36(d)(1)(iv) and this commentary, non-deferred profits-based compensation plans include, without limitation, bonus pools, profits pools, bonus plans, and profit-sharing plans. Compensation under a non-deferred profits-based compensation plan could include, without limitation, annual or periodic bonuses, or awards of merchandise, services, trips, or similar prizes or incentives where the bonuses, contributions, or awards are determined with reference to the profits of the person, business unit, or affiliate, as applicable. As used in §1026.36(d)(1)(iv) and this commentary, a business unit is a division, department, or segment within the overall organizational structure of the person or the person's affiliate that performs discrete business functions and that the person or the affiliate treats separately for accounting or other organizational purposes. For example, a creditor that pays its individual loan originators bonuses at the end of a calendar year based on the creditor's average net return on assets for the calendar year is operating a non-deferred profits-based compensation plan under §1026.36(d)(1)(iv). A bonus that is paid to an individual loan originator from a source other than a non-deferred profits-based compensation plan (or a deferred compensation plan where the bonus is determined with reference to mortgage-related business profits), such as a retention bonus budgeted for in advance or a performance bonus paid out of a bonus pool set aside at the beginning of the company's annual accounting period as part of the company's operating budget, does not violate the prohibition on payment of compensation based on the terms of multiple transactions by multiple individual loan originators under §1026.36(d)(1)(i), as clarified by comment 36(d)(1)–1.ii; therefore, §1026.36(d)(1)(iv) does not apply to such bonuses.

iii. *Compensation that is not directly or indirectly based on the terms of multiple transactions by multiple individual loan originators.* The compensation arrangements addressed in §1026.36(d)(1)(iii) and (iv) are permitted even if they are directly or indirectly based on the terms of multiple transactions by multiple individual loan originators. See comment 36(d)(1)–1 for additional interpretation. If a loan originator organization's revenues are exclusively derived from transactions subject to §1026.36(d) (whether paid by creditors, consumers, or both) and that loan originator organization pays its individual loan originators a bonus under a non-deferred profits-based compensation plan, the bonus is not directly or indirectly based on the terms of multiple transactions by multiple individual loan originators if §1026.36(d)(1)(i) is otherwise complied with.

iv. *Compensation based on terms of an individual loan originator's transactions.* Under both §1026.36(d)(1)(iii), with regard to contributions made to a defined contribution plan that is a designated tax-advantaged plan, and §1026.36(d)(1)(iv)(A), with regard to compensation under a non-deferred profits-based compensation plan, the payment of compensation to an individual loan originator may not be directly or indirectly based on the terms of that individual loan originator's transaction or transactions. Consequently, for example, where an individual loan originator makes loans that vary in their interest rate spread, the compensation payment may not take into account the average interest rate spread on the individual loan originator's transactions during the relevant calendar year.

v. *Compensation under non-deferred profits-based compensation plans.* Assuming that the conditions in §1026.36(d)(1)(iv)(A) are met, §1026.36(d)(1)(iv)(B)(*1*) permits certain compensation to an individual loan originator under a non-deferred profits-based compensation plan. Specifically, if the compensation is determined with reference to the profits of the person from mortgage-related business, compensation under a non-deferred profits-based compensation plan is permitted provided the compensation does not, in the aggregate, exceed 10 percent of the individual loan originator's total compensation corresponding to the time period for which compensation under the non-deferred profits-based compensation plan is paid. The compensation restrictions under §1026.36(d)(1)(iv)(B)(*1*) are sometimes referred to in this commentary as the ''10-percent total compensation limit'' or the ''10-percent limit.''

A. *Total compensation.* For purposes of §1026.36(d)(1)(iv)(B)(*1*), the individual loan originator's total compensation consists of the sum total of: (1) All wages and tips reportable for Medicare tax purposes in box 5 on IRS form W–2 (or, if the individual loan originator is an independent contractor, reportable compensation on IRS form 1099–MISC) that are actually paid during the relevant time period (regardless of when the wages and tips are earned), except for any compensation under a non-deferred profits-based compensation plan that is earned during a different time period (see comment 36(d)(1)–3.v.C); (2) at the election of the person paying the compensation, all contributions that are actually made during the relevant time period by the creditor or loan originator organization to the individual loan originator's accounts in designated tax-advantaged plans that are defined contribution plans (regardless of when the contributions are earned); and (3) at the election of the person paying the compensation, all compensation under a non-deferred profits-based compensation plan that is earned during the relevant time period, regardless of whether the compensation is actually paid during that time period (see comment 36(d)(1)–3.v.C). If an individual loan originator has some compensation that is reportable on the W–2 and some that is reportable on the 1099–MISC, the total compensation is the sum total of what is reportable on each of the two forms.

B. *Profits of the Person.* Under §1026.36(d)(1)(iv), a plan is a non-deferred profits-based compensation plan if compensation is paid, based in whole or in part, on the profits of the person paying the compensation. As used in §1026.36(d)(1)(iv), ''profits of the person'' include, as applicable depending on where the non-deferred profits-based compensation plan is set, the profits of the person, the business unit to which the individual loan originators are assigned for accounting or other organizational purposes, or any affiliate of the person. Profits from mortgage-related business are profits determined with reference to revenue generated from transactions subject to §1026.36(d). Pursuant to §1026.36(b) and comment 36(b)–1, §1026.36(d) applies to closed-end consumer credit transactions secured by dwellings. This revenue includes, without limitation, and as applicable based on the particular sources of revenue of the person, business unit, or affiliate, origination fees and interest associated with dwelling-secured transactions for which individual loan originators working for the person were loan originators, income from servicing of such transactions, and proceeds of secondary market sales of such transactions. If the amount of the individual loan originator's compensation under non-deferred profits-based compensation plans paid for a time period does not, in the aggregate, exceed 10 percent of the individual loan originator's total compensation corresponding to the same time period, compensation under non-deferred profits-based compensation plans may be paid under §1026.36(d)(1)(iv)(B)(*1*) regardless of whether or not it was determined with reference to the profits of the person from mortgage-related business.

C. *Time period for which the compensation under the non-deferred profits-based compensation plan is paid and to which the total compensation corresponds.* Under §1026.36(d)(1)(iv)(B)(*1*), determination of whether payment of compensation under a non-deferred profits-based compensation plan complies with the 10-percent limit requires a calculation of the ratio of the compensation under the non-deferred profits-based compensation plan (*i.e.*, the compensation subject to the 10-percent limit) and the total compensation corresponding to the relevant time period. For compensation subject to the 10-percent limit, the relevant time period is the time period for which a person makes reference to profits in determining the compensation (*i.e.*, when the compensation was earned). It does not matter whether the compensation is actually paid during that particular time period. For total compensation, the relevant time period is the same time period, but only certain types of compensation may be included in the total compensation amount for that time period (see comment 36(d)(1)–3.v.A). For example, assume that during calendar year 2014 a creditor pays an individual loan originator compensation in the following amounts: $80,000 in commissions based on the individual loan originator's performance and volume of loans generated during the calendar year; and $10,000 in an employer contribution to a designated tax-advantaged defined contribution plan on behalf of the individual loan originator. The creditor desires to pay the individual loan originator a year-end bonus of $10,000 under a non-deferred profits-based compensation plan. The commissions are paid and employer contributions to the designated tax-advantaged defined contribution plan are made during calendar year 2014, but the year-end bonus will be paid in January 2015. For purposes of the 10-percent limit, the year-end bonus is counted toward the 10-percent limit for calendar year 2014, even though it is not actually paid until 2015. Therefore, for calendar year 2014 the individual loan originator's compensation that is subject to the 10-percent limit would be $10,000 (*i.e.*, the year-end bonus) and the total compensation would be $100,000 (*i.e.*, the sum of the commissions, the designated tax-advantaged plan contribution (assuming the creditor elects to include it in total compensation for calendar year 2014), and the bonus (assuming the creditor elects to include it in total compensation for calendar year 2014)); the bonus would be permissible under §1026.36(d)(1)(iv) because it does not exceed 10 percent of total compensation. The determination of total compensation corresponding to 2014 also would not take into account any compensation subject to the 10-percent limit that is actually paid in 2014 but is earned during a different calendar year (e.g., an annual bonus determined with reference to mortgage-related business profits for calendar year 2013 that is paid in January 2014). If the employer contribution to the designated tax-advantaged plan is earned in 2014 but actually made in 2015, however, it may not be included in total compensation for 2014. A company, business unit, or affiliate, as applicable, may pay compensation subject to the 10-percent limit during different time periods falling within its annual accounting period for keeping records and reporting income and expenses, which may be a calendar year or a fiscal year depending on the annual accounting period. In such instances, however, the 10-percent limit applies both as to each time period and cumulatively as to the annual accounting period. For example, assume that a creditor uses a calendar-year accounting period. If the creditor pays an individual loan originator a bonus at the end of each quarter under a non-deferred profits-based compensation plan, the payment of each quarterly bonus is subject to the 10-percent limit measured with respect to each quarter. The creditor can also pay an annual bonus under the non-deferred profits-based compensation plan that does not exceed the difference of 10 percent of the individual loan originator's total compensation corresponding to the calendar year and the aggregate amount of the quarterly bonuses.

D. *Awards of merchandise, services, trips, or similar prizes or incentives.* If any compensation paid to an individual loan originator under §1026.36(d)(1)(iv) consists of an award of merchandise, services, trips, or similar prize or incentive, the cash value of the award is factored into the calculation of the 10-percent total compensation limit. For example, during a given calendar year, individual loan originator A and individual loan originator B are each employed by a creditor and paid $40,000 in salary, and $45,000 in commissions. The creditor also contributes $5,000 to a designated tax-advantaged defined contribution plan for each individual loan originator during that calendar year, which the creditor elects to include in the total compensation amount. Neither individual loan originator is paid any other form of compensation by the creditor. In December of the calendar year, the creditor rewards both individual loan originators for their performance during the calendar year out of a bonus pool established with reference to the profits of the mortgage origination business unit. Individual loan originator A is paid a $10,000 cash bonus, meaning that individual loan originator A's total compensation is $100,000 (assuming the creditor elects to include the bonus in the total compensation amount). Individual loan originator B is paid a $7,500 cash bonus and awarded a vacation package with a cash value of $3,000, meaning that individual loan originator B's total compensation is $100,500 (assuming the creditor elects to include the reward in the total compensation amount). Under §1026.36(d)(1)(iv)(B)(*1*), individual loan originator A's $10,000 bonus is permissible because the bonus would not constitute more than 10 percent of individual loan originator A's total compensation for the calendar year. The creditor may not pay individual loan originator B the $7,500 bonus and award the vacation package, however, because the total value of the bonus and the vacation package would be $10,500, which is greater than 10 percent (10.45 percent) of individual loan originator B's total compensation for the calendar year. One way to comply with §1026.36(d)(1)(iv)(B)(*1*) would be if the amount of the bonus were reduced to $7,000 or less or the vacation package were structured such that its cash value would be $2,500 or less.

E. *Compensation determined only with reference to non-mortgage-related business profits.* Compensation under a non-deferred profits-based compensation plan is not subject to the 10-percent total compensation limit under §1026.36(d)(1)(iv)(B)(*1*) if the non-deferred profits-based compensation plan is determined with reference only to profits from business other than mortgage-related business, as determined in accordance with reasonable accounting principles. Reasonable accounting principles reflect an accurate allocation of revenues, expenses, profits, and losses among the person, any affiliate of the person, and any business units within the person or affiliates, and are consistent with the accounting principles applied by the person, the affiliate, or the business unit with respect to, as applicable, its internal budgeting and auditing functions and external reporting requirements. Examples of external reporting and filing requirements that may be applicable to creditors and loan originator organizations are Federal income tax filings, Federal securities law filings, or quarterly reporting of income, expenses, loan origination activity, and other information required by government-sponsored enterprises. As used in §1026.36(d)(1)(iv)(B)(*1*), profits means positive profits or losses avoided or mitigated.

F. *Additional examples. 1.* Assume that, during a given calendar year, a loan originator organization pays an individual loan originator employee $40,000 in salary and $125,000 in commissions, and makes a contribution of $15,000 to the individual loan originator's 401(k) plan. At the end of the year, the loan originator organization wishes to pay the individual loan originator a bonus based on a formula involving a number of performance metrics, to be paid out of a profit pool established at the level of the company but that is determined in part with reference to the profits of the company's mortgage origination unit. Assume that the loan originator organization derives revenues from sources other than transactions covered by §1026.36(d). In this example, the performance bonus would be directly or indirectly based on the terms of multiple individual loan originators' transactions as described in §1026.36(d)(1)(i), because it is being determined with reference to profits from mortgage-related business. Assume, furthermore, that the loan originator organization elects to include the bonus in the total compensation amount for the calendar year. Thus, the bonus is permissible under §1026.36(d)(1)(iv)(B)(*1*) if it does not exceed 10 percent of the loan originator's total compensation, which in this example consists of the individual loan originator's salary and commissions, the contribution to the 401(k) plan (if the loan originator organization elects to include the contribution in the total compensation amount), and the performance bonus. Therefore, if the loan originator organization elects to include the 401(k) contribution in total compensation for these purposes, the loan originator organization may pay the individual loan originator a performance bonus of up to $20,000 (*i.e.*, 10 percent of $200,000 in total compensation). If the loan originator organization does not include the 401(k) contribution in calculating total compensation, or the 401(k) contribution is actually made in January of the following calendar year (in which case it cannot be included in total compensation for the initial calendar year), the bonus may be up to $18,333.33. If the loan originator organization includes neither the 401(k) contribution nor the performance bonus in the total compensation amount, the bonus may not exceed $16,500.

2. Assume that the compensation during a given calendar year of an individual loan originator employed by a creditor consists of only salary and commissions, and the individual loan originator does not participate in a designated tax-advantaged defined contribution plan. Assume further that the creditor uses a calendar-year accounting period. At the end of the calendar year, the creditor pays the individual loan originator two bonuses: A ''performance'' bonus based on the individual loan originator's aggregate loan volume for a calendar year that is paid out of a bonus pool determined with reference to the profits of the mortgage origination business unit, and a year-end ''holiday'' bonus in the same amount to all company employees that is paid out of a company-wide bonus pool. Because the performance bonus is paid out of a bonus pool that is determined with reference to the profits of the mortgage origination business unit, it is compensation that is determined with reference to mortgage-related business profits, and the bonus is therefore subject to the 10-percent total compensation limit. If the company-wide bonus pool from which the ''holiday'' bonus is paid is derived in part from profits of the creditor's mortgage origination business unit, then the combination of the ''holiday'' bonus and the performance bonus is subject to the 10-percent total compensation limit. The ''holiday'' bonus is not subject to the 10-percent total compensation limit if the bonus pool is determined with reference only to the profits of business units other than the mortgage origination business unit, as determined in accordance with reasonable accounting principles. If the ''performance'' bonus and the ''holiday'' bonus in the aggregate do not exceed 10 percent of the individual loan originator's total compensation, the bonuses may be paid under §1026.36(d)(1)(iv)(B)(*1*) without the necessity of determining from which bonus pool they were paid or whether they were determined with reference to the profits of the creditor's mortgage origination business unit.

G. *Reasonable reliance by individual loan originator on accounting or statement by person paying compensation*. An individual loan originator is deemed to comply with its obligations regarding receipt of compensation under §1026.36(d)(1)(iv)(B)(*1*) if the individual loan originator relies in good faith on an accounting or a statement provided by the person who determined the individual loan originator's compensation under a non-deferred profits-based compensation plan pursuant to §1026.36(d)(1)(iv)(B)(*1*) and where the statement or accounting is provided within a reasonable time period following the person's determination.

vi. *Individual loan originators who originate ten or fewer transactions*. Assuming that the conditions in §1026.36(d)(1)(iv)(A) are met, §1026.36(d)(1)(iv)(B)(*2*) permits compensation to an individual loan originator under a non-deferred profits-based compensation plan even if the payment or contribution is directly or indirectly based on the terms of multiple individual loan originators' transactions if the individual is a loan originator (as defined in §1026.36(a)(1)(i)) for ten or fewer consummated transactions during the 12-month period preceding the compensation determination. For example, assume a loan originator organization employs two individual loan originators who originate transactions subject to §1026.36 during a given calendar year. Both employees are individual loan originators as defined in §1026.36(a)(1)(ii), but only one of them (individual loan originator B) acts as a loan originator in the normal course of business, while the other (individual loan originator A) is called upon to do so only occasionally and regularly performs other duties (such as serving as a manager). In January of the following calendar year, the loan originator organization formally determines the financial performance of its mortgage business for the prior calendar year. Based on that determination, the loan originator organization on February 1 decides to pay a bonus to the individual loan originators out of a company bonus pool. Assume that, between February 1 of the prior calendar year and January 31 of the current calendar year, individual loan originator A was the loan originator for eight consummated transactions, and individual loan originator B was the loan originator for 15 consummated transactions. The loan originator organization may award the bonus to individual loan originator A under §1026.36(d)(1)(iv)(B)(*2*). The loan originator organization may not award the bonus to individual loan originator B relying on the exception under §1026.36(d)(1)(iv)(B)(*2*) because it would not apply, although it could award a bonus pursuant to the 10-percent total compensation limit under §1026.36(d)(1)(iv)(B)(*1*) if the requirements of that provision are complied with.

4. *Creditor's flexibility in setting loan terms.* Section 1026.36(d) also does not limit a creditor from offering or providing different loan terms to the consumer based on the creditor's assessment of the credit and other transactional risks involved. If a creditor pays compensation to a loan originator in compliance with §1026.36(d), the creditor may recover the costs of the loan originator's compensation and other costs of the transaction by charging the consumer points or fees or a higher interest rate or a combination of these. Thus, in these transactions, a creditor may charge a higher interest rate to a consumer who will pay fewer of the costs of the transaction at or before closing or it may offer the consumer a lower rate if the consumer pays more of the transaction costs at or before closing. For example, if the consumer pays half of the transaction costs at or before closing, a creditor may charge an interest rate of 6.0 percent but, if the consumer pays none of the transaction costs at or before closing, the creditor may charge an interest rate of 6.5 percent. In these transactions, a creditor also may offer different consumers varying interest rates that include a consistent interest rate premium to recoup the loan originator's compensation through increased interest paid by the consumer (such as by consistently adding 0.25 percentage points to the interest rate on each transaction where the loan originator is compensated based on a percentage of the amount of the credit extended).

5. *Effect of modification of transaction terms.* Under §1026.36(d)(1), a loan originator's compensation may not be based on any of the terms of a credit transaction. Thus, a creditor and a loan originator may not agree to set the loan originator's compensation at a certain level and then subsequently lower it in selective cases (such as where the consumer is able to obtain a lower rate from another creditor). When the creditor offers to extend credit with specified terms and conditions (such as the rate and points), the amount of the originator's compensation for that transaction is not subject to change (increase or decrease) based on whether different credit terms are negotiated. For example, if the creditor agrees to lower the rate that was initially offered, the new offer may not be accompanied by a reduction in the loan originator's compensation. Thus, while the creditor may change credit terms or pricing to match a competitor, to avoid triggering high-cost mortgage provisions, or for other reasons, the loan originator's compensation on that transaction may not be changed for those reasons. A loan originator therefore may not agree to reduce its compensation or provide a credit to the consumer to pay a portion of the consumer's closing costs, for example, to avoid high-cost mortgage provisions. A loan originator organization may not reduce its own compensation in a transaction where the loan originator organization receives compensation directly from the consumer, with or without a corresponding reduction in compensation paid to an individual loan originator. See comment 36(d)(1)–7 for further interpretation.

6. *Periodic changes in loan originator compensation and terms of transactions.* Section 1026.36 does not limit a creditor or other person from periodically revising the compensation it agrees to pay a loan originator. However, the revised compensation arrangement must not result in payments to the loan originator that are based on the terms of a credit transaction. A creditor or other person might periodically review factors such as loan performance, transaction volume, as well as current market conditions for loan originator compensation, and prospectively revise the compensation it agrees to pay to a loan originator. For example, assume that during the first six months of the year, a creditor pays $3,000 to a particular loan originator for each loan delivered, regardless of the terms of the transaction. After considering the volume of business produced by that loan originator, the creditor could decide that as of July 1, it will pay $3,250 for each loan delivered by that particular loan originator, regardless of the terms of the transaction. No violation occurs even if the loans made by the creditor after July 1 generally carry a higher interest rate than loans made before that date, to reflect the higher compensation.

7. *Permitted decreases in loan originator compensation.* Notwithstanding comment 36(d)(1)–5, §1026.36(d)(1) does not prohibit a loan originator from decreasing its compensation to defray the cost, in whole or part, of an unforeseen increase in an actual

settlement cost over an estimated settlement cost disclosed to the consumer pursuant to section 5(c) of RESPA or an unforeseen actual settlement cost not disclosed to the consumer pursuant to section 5(c) of RESPA. For purposes of comment 36(d)(1)–7, an increase in an actual settlement cost over an estimated settlement cost or a cost not disclosed is unforeseen if the increase occurs even though the estimate provided to the consumer is consistent with the best information reasonably available to the disclosing person at the time of the estimate. For example:

i. Assume that a consumer agrees to lock an interest rate with a creditor in connection with the financing of a purchase-money transaction. A title issue with the property being purchased delays closing by one week, which in turn causes the rate lock to expire. The consumer desires to re-lock the interest rate. Provided that the title issue was unforeseen, the loan originator may decrease the loan originator's compensation to pay for all or part of the rate-lock extension fee.

ii. Assume that when applying the tolerance requirements under the regulations implementing RESPA sections 4 and 5(c), there is a tolerance violation of $70 that must be cured. Provided the violation was unforeseen, the rule is not violated if the individual loan originator's compensation decreases to pay for all or part of the amount required to cure the tolerance violation.

8. *Record retention. See* comment 25(c)(2)–1 and –2 for commentary on complying with the record retention requirements of §1026.25(c)(2) as they apply to §1026.36(d)(1).

9. *Amount of credit extended.* A loan originator's compensation may be based on the amount of credit extended, subject to certain conditions. Section 1026.36(d)(1) does not prohibit an arrangement under which a loan originator is paid compensation based on a percentage of the amount of credit extended, provided the percentage is fixed and does not vary with the amount of credit extended. However, compensation that is based on a fixed percentage of the amount of credit extended may be subject to a minimum and/or maximum dollar amount, as long as the minimum and maximum dollar amounts do not vary with each credit transaction. For example:

i. A creditor may offer a loan originator 1 percent of the amount of credit extended for all loans the originator arranges for the creditor, but not less than $1,000 or greater than $5,000 for each loan.

ii. A creditor may *not* offer a loan originator 1 percent of the amount of credit extended for loans of $300,000 or more, 2 percent of the amount of credit extended for loans between $200,000 and $300,000, and 3 percent of the amount of credit extended for loans of $200,000 or less.

10. *Amount of credit extended under a reverse mortgage.* For closed-end reverse mortgage loans, the ''amount of credit extended'' for purposes of §1026.36(d)(1) means either:

i. The maximum proceeds available to the consumer under the loan; or

ii. The maximum claim amount as defined in 24 CFR 206.3 if the mortgage is subject to 24 CFR part 206, or the appraised value of the property, as determined by the appraisal used in underwriting the loan, if the mortgage is not subject to 24 CFR part 206.

36(d)(2) Payments by Persons Other Than Consumer

36(d)(2)(i) Dual Compensation

1. *Compensation in connection with a particular transaction.* Under §1026.36(d)(2)(i)(A), if any loan originator receives compensation directly from a consumer in a transaction, no other person may provide any compensation to any loan originator, directly or indirectly, in connection with that particular credit transaction, whether before, at, or after consummation. See comment 36(d)(2)(i)–2 discussing compensation received directly from the consumer. The restrictions imposed under §1026.36(d)(2)(i) relate only to payments, such as commissions, that are specific to, and paid solely in connection with, the transaction in which the consumer has paid compensation directly to a loan originator. In a transaction where a loan originator receives compensation directly from a consumer, a creditor still may provide funds for the benefit of the consumer in that transaction, provided such funds are applied solely toward costs of the transaction other than loan originator compensation. Section 1026.36(d)(2)(i)(C) provides that, if a loan originator organization receives compensation directly from a consumer, the loan originator organization may provide compensation to individual loan originators, and the individual loan originator may receive compensation from the loan originator organization, subject to the restriction in §1026.36(d)(1). (See comment 36(a)(1)–1.i for an explanation of the use of the term ''loan originator organization'' and ''individual loan originator'' for purposes of §1026.36(d)(2)(i)(C).) For example, payments by a mortgage broker to an individual loan originator as compensation for originating a specific credit transaction do not violate §1026.36(d)(2)(i)(A) even if the consumer directly pays the mortgage broker a fee in connection with that transaction. However, neither the mortgage broker nor the individual loan originator can receive compensation from the creditor in connection with that particular credit transaction.

2. *Compensation received directly from a consumer.* i. Payments by a consumer to a loan originator from loan proceeds are considered compensation received directly from the

consumer, while payments derived from an increased interest rate are not considered compensation received directly from the consumer. However, payments by a consumer to the creditor are not considered payments to the loan originator that are received directly from the consumer whether they are paid directly by the consumer (for example, in cash or by check) or out of the loan proceeds. See the definition of ''compensation'' in §1026.36(a)(3) and related commentary.

ii. Funds from the creditor that will be applied to reduce the consumer's settlement charges, including origination fees paid by a creditor to the loan originator, that are characterized on the disclosures made pursuant to the Real Estate Settlement Procedures Act as a ''credit'' are nevertheless not considered to be received by the loan originator directly from the consumer for purposes of §1026.36(d)(2)(i).

iii. Section 1026.36(d)(2)(i)(B) provides that compensation received directly from a consumer includes payments to a loan originator made pursuant to an agreement between the consumer and a person other than the creditor or its affiliates, under which such other person agrees to provide funds toward the consumer's costs of the transaction (including loan originator compensation). Compensation to a loan originator is sometimes paid on the consumer's behalf by a person other than a creditor or its affiliates, such as a non-creditor seller, home builder, home improvement contractor or real estate broker or agent. Such payments to a loan originator are considered compensation received directly from the consumer for purposes of §1026.36(d)(2) if they are made pursuant to an agreement between the consumer and the person other than the creditor or its affiliates. State law determines whether there is an agreement between the parties. *See* §1026.2(b)(3). The parties do not have to agree specifically that the payments will be used to pay for the loan originator's compensation, but just that the person will make a payment to the loan originator toward the consumer's costs of the transaction, or ''closing costs'' and the loan originator retains such payment. For example, assume that a non-creditor seller (that is not the creditor's affiliate) has an agreement with the consumer to pay $1,000 of the consumer's closing costs on a transaction. Any of the $1,000 that is paid by the non-creditor seller to the loan originator and constitutes ''compensation'' as defined in §1026.36(a)(3) to the loan originator is compensation received directly from the consumer, even if the agreement does not specify that some or all of $1,000 must be used to compensate the loan originator. Nonetheless, payments by the consumer to the creditor are not payments to the loan originator that are received directly from the consumer. *See* comment 36(d)(2)(i)–2.i. Accordingly, payments in the transaction to the creditor on behalf of the consumer by a person other than the creditor or its affiliates are not payments to the loan originator that are received directly from the consumer.

36(d)(3) Affiliates

1. For purposes of §1026.36(d), affiliates are treated as a single ''person.'' The term ''affiliate'' is defined in §1026.32(b)(2). For example, assume a parent company has two mortgage lending subsidiaries. Under §1026.36(d)(1), subsidiary ''A'' could not pay a loan originator greater compensation for a loan with an interest rate of 8 percent than it would pay for a loan with an interest rate of 7 percent. If the loan originator may deliver loans to both subsidiaries, they must compensate the loan originator in the same manner. Accordingly, if the loan originator delivers the loan to subsidiary ''B'' and the interest rate is 8 percent, the originator must receive the same compensation that would have been paid by subsidiary A for a loan with a rate of either 7 or 8 percent.

36(e) Prohibition on Steering

1. *Compensation.* See comment 36(d)(1)–1 for guidance on compensation that is subject to §1026.36(e).

36(e)(1) General

1. *Steering.* For purposes of §1026.36(e), directing or ''steering'' a consumer to consummate a particular credit transaction means advising, counseling, or otherwise influencing a consumer to accept that transaction. For such actions to constitute steering, the consumer must actually consummate the transaction in question. Thus, §1026.36(e)(1) does not address the actions of a loan originator if the consumer does not actually obtain a loan through that loan originator.

2. *Prohibited conduct.* Under §1026.36(e)(1), a loan originator may not direct or steer a consumer to consummate a transaction based on the fact that the loan originator would increase the amount of compensation that the loan originator would receive for that transaction compared to other transactions, unless the consummated transaction is in the consumer's interest.

i. In determining whether a consummated transaction is in the consumer's interest, that transaction must be compared to other possible loan offers available through the originator, if any, and for which the consumer was likely to qualify, at the time that transaction was offered to the consumer. Possible loan offers are available through the loan originator if they could be obtained from a creditor with which the loan originator regularly does business. Section

1026.36(e)(1) does not require a loan originator to establish a business relationship with any creditor with which the loan originator does not already do business. To be considered a possible loan offer available through the loan originator, an offer need not be extended by the creditor; it need only be an offer that the creditor likely would extend upon receiving an application from the applicant, based on the creditor's current credit standards and its current rate sheets or other similar means of communicating its current credit terms to the loan originator. An originator need not inform the consumer about a potential transaction if the originator makes a good faith determination that the consumer is not likely to qualify for it.

ii. Section 1026.36(e)(1) does not require a loan originator to direct a consumer to the transaction that will result in a creditor paying the least amount of compensation to the originator. However, if the loan originator reviews possible loan offers available from a significant number of the creditors with which the originator regularly does business, and the originator directs the consumer to the transaction that will result in the least amount of creditor-paid compensation for the loan originator, the requirements of §1026.36(e)(1) are deemed to be satisfied. In the case where a loan originator directs the consumer to the transaction that will result in a greater amount of creditor-paid compensation for the loan originator, §1026.36(e)(1) is not violated if the terms and conditions on that transaction compared to the other possible loan offers available through the originator, and for which the consumer likely qualifies, are the same. A loan originator who is an employee of the creditor on a transaction may not obtain compensation that is based on the transaction's terms or conditions pursuant to §1026.36(d)(1), and compliance with that provision by such a loan originator also satisfies the requirements of §1026.36(e)(1) for that transaction with the creditor. However, if a creditor's employee acts as a broker by forwarding a consumer's application to a creditor *other than* the loan originator's employer, such as when the employer does not offer any loan products for which the consumer would qualify, the loan originator is not an employee of the creditor in that transaction and is subject to §1026.36(e)(1) if the originator is compensated for arranging the loan with the other creditor.

iii. See the commentary under §1026.36(e)(3) for additional guidance on what constitutes a "significant number of creditors with which a loan originator regularly does business" and guidance on the determination about transactions for which "the consumer likely qualifies."

3. *Examples.* Assume a loan originator determines that a consumer likely qualifies for a loan from Creditor A that has a fixed interest rate of 7 percent, but the loan originator directs the consumer to a loan from Creditor B having a rate of 7.5 percent. If the loan originator receives more in compensation from Creditor B than the amount that would have been paid by Creditor A, the prohibition in §1026.36(e) is violated unless the higher-rate loan is in the consumer's interest. For example, a higher-rate loan might be in the consumer's interest if the lower-rate loan has a prepayment penalty, or if the lower-rate loan requires the consumer to pay more in up-front charges that the consumer is unable or unwilling to pay or finance as part of the loan amount.

36(e)(2) Permissible Transactions

1. *Safe harbors.* A loan originator that satisfies §1026.36(e)(2) is deemed to comply with §1026.36(e)(1). A loan originator that does not satisfy §1026.36(e)(2) is not subject to any presumption regarding the originator's compliance or noncompliance with §1026.36(e)(1).

2. *Minimum number of loan options.* To obtain the safe harbor, §1026.36(e)(2) requires that the loan originator present loan options that meet the criteria in §1026.36(e)(3)(i) for each type of transaction in which the consumer expressed an interest. As required by §1026.36(e)(3)(ii), the loan originator must have a good faith belief that the options presented are loans for which the consumer likely qualifies. If the loan originator is not able to form such a good faith belief for loan options that meet the criteria in §1026.36(e)(3)(i) for a given type of transaction, the loan originator may satisfy §1026.36(e)(2) by presenting all loans for which the consumer likely qualifies and that meet the other requirements in §1026.36(e)(3) for that given type of transaction. A loan originator may present to the consumer any number of loan options, but presenting a consumer more than four loan options for each type of transaction in which the consumer expressed an interest and for which the consumer likely qualifies would not likely help the consumer make a meaningful choice.

36(e)(3) Loan Options Presented

1. *Significant number of creditors.* A significant number of the creditors with which a loan originator regularly does business is three or more of those creditors. If the loan originator regularly does business with fewer than three creditors, the originator is deemed to comply by obtaining loan options from all the creditors with which it regularly does business. Under §1026.36(e)(3)(i), the loan originator must obtain loan options from a significant number of creditors with which the loan originator regularly does business, but the loan originator need not present loan options from all such creditors to the consumer. For example, if three loans

available from one of the creditors with which the loan originator regularly does business satisfy the criteria in §1026.36(e)(3)(i), presenting those and no options from any other creditor satisfies that section.

2. *Creditors with which loan originator regularly does business.* To qualify for the safe harbor in §1026.36(e)(2), the loan originator must obtain and review loan options from a significant number of the creditors with which the loan originator regularly does business. For this purpose, a loan originator regularly does business with a creditor if:

i. There is a written agreement between the originator and the creditor governing the originator's submission of mortgage loan applications to the creditor;

ii. The creditor has extended credit secured by a dwelling to one or more consumers during the current or previous calendar month based on an application submitted by the loan originator; or

iii. The creditor has extended credit secured by a dwelling twenty-five or more times during the previous twelve calendar months based on applications submitted by the loan originator. For this purpose, the previous twelve calendar months begin with the calendar month that precedes the month in which the loan originator accepted the consumer's application.

3. *Lowest interest rate.* To qualify under the safe harbor in §1026.36(e)(2), for each type of transaction in which the consumer has expressed an interest, the loan originator must present the consumer with loan options that meet the criteria in §1026.36(e)(3)(i) for which the loan originator has a good faith belief that the consumer is likely to qualify. The criteria are: the loan with the lowest interest rate; the loan with the lowest total dollar amount of discount points, origination points or origination fees; and a loan with the lowest interest rate without negative amortization, a prepayment penalty, a balloon payment in the first seven years of the loan term, shared equity, or shared appreciation, or, in the case of a reverse mortgage, a loan without a prepayment penalty, shared equity, or shared appreciation. The loan with the lowest interest rate for which the consumer likely qualifies is the loan with the lowest rate the consumer can likely obtain, regardless of how many discount points, origination points or origination fees the consumer must pay to obtain it. To identify the loan with the lowest interest rate, for any loan that has an initial rate that is fixed for at least five years, the loan originator uses the initial rate that would be in effect at consummation. For a loan with an initial rate that is not fixed for at least five years:

i. If the interest rate varies based on changes to an index, the originator uses the fully-indexed rate that would be in effect at consummation without regard to any initial discount or premium.

ii. For a step-rate loan, the originator uses the highest rate that would apply during the first five years.

4. *Transactions for which the consumer likely qualifies.* To qualify under the safe harbor in §1026.36(e)(2), the loan originator must have a good faith belief that the loan options presented to the consumer pursuant to §1026.36(e)(3) are transactions for which the consumer likely qualifies. The loan originator's belief that the consumer likely qualifies should be based on information reasonably available to the loan originator at the time the loan options are presented. In making this determination, the loan originator may rely on information provided by the consumer, even if it subsequently is determined to be inaccurate. For purposes of §1026.36(e)(3), a loan originator is not expected to know all aspects of each creditor's underwriting criteria. But pricing or other information that is routinely communicated by creditors to loan originators is considered to be reasonably available to the loan originator, for example, rate sheets showing creditors' current pricing and the required minimum credit score or other eligibility criteria.

36(f) Loan Originator Qualification Requirements

1. *Scope.* Section 1026.36(f) sets forth qualification requirements that a loan originator must meet. As provided in §1026.36(a)(1) and accompanying commentary, the term "loan originator" includes natural persons and organizations and does not exclude creditors for purposes of the qualification requirements in §1026.36(f).

2. *Licensing and registration requirements.* Section 1026.36(f) requires loan originators to comply with applicable State and Federal licensing and registration requirements, including any such requirements imposed by the SAFE Act and its implementing regulations and State laws. SAFE Act licensing and registration requirements apply to individual loan originators, but many State licensing and registration requirements apply to loan originator organizations as well.

3. *No effect on licensing and registration requirements.* Section 1026.36(f) does not affect which loan originators must comply with State and Federal licensing and registration requirements. For example, the fact that the definition of loan originator in §1026.36(a)(1) differs somewhat from that in the SAFE Act does not affect who must comply with the SAFE Act. To illustrate, assume an individual is an employee of an organization that a State has determined to be a bona fide nonprofit organization and the State has not subjected the employee to that State's SAFE Act loan originator licensing. If that same

individual meets the definition of loan originator in §1026.36(a)(1), the individual is subject to the requirements of §1026.36, but the State may continue not to subject the employee to that State's SAFE Act licensing requirements. Similarly, the qualification requirements imposed under §1026.36(f) do not add to or affect the criteria that States must consider in determining whether a loan originator organization is a bona fide nonprofit organization under the SAFE Act.

Paragraph 36(f)(1)

1. *Legal existence and foreign qualification.* Section 1026.36(f)(1) requires a loan originator organization to comply with applicable State law requirements governing the legal existence and foreign qualification of the loan originator organization. Covered State law requirements include those that must be complied with to bring the loan originator organization into legal existence, to maintain its legal existence, to be permitted to transact business in another State, or to facilitate service of process. For example, covered State law requirements include those for incorporation or other type of legal formation and for designating and maintaining a registered agent for service of process. State law requirements to pay taxes and other requirements that do not relate to legal accountability of the loan originator organization to consumers are outside the scope of §1026.36(f)(1).

Paragraph 36(f)(2)

1. *License or registration.* Section 1026.36(f)(2) requires the loan originator organization to ensure that individual loan originators who work for it are licensed or registered in compliance with the SAFE Act and other applicable law. The individual loan originators who work for a loan originator organization include individual loan originators who are its employees or who operate under a brokerage agreement with the loan originator organization. Thus, for example, a brokerage is responsible for verifying that the loan originator individuals who work directly for it are licensed and registered in accordance with applicable law, whether the individual loan originators are its employees or independent contractors who operate pursuant to a brokerage agreement. A loan originator organization can meet this duty by confirming the registration or license status of an individual at *www.nmlsconsumeraccess.org*.

Paragraph 36(f)(3)

1. *Unlicensed individual loan originators.* Section 1026.36(f)(3) sets forth actions that a loan originator organization must take for any of its individual loan originator employees who are not required to be licensed and are not licensed as a loan originator pursuant to the SAFE Act. Individual loan originators who are not subject to SAFE Act licensing generally include employees of depository institutions and their Federally regulated subsidiaries and employees of bona fide nonprofit organizations that a State has exempted from licensing under the criteria in 12 CFR 1008.103(e)(7).

Paragraph 36(f)(3)(i)

1. *Criminal and credit histories.* Section 1026.36(f)(3)(i) requires the loan originator organization to obtain, for any of its individual loan originator employees who is not required to be licensed and is not licensed as a loan originator pursuant to the SAFE Act, a criminal background check, a credit report, and information related to any administrative, civil, or criminal determinations by any government jurisdiction. The requirement applies to individual loan originator employees who were hired on or after January 1, 2014 (or whom the loan originator organization hired before this date but for whom there were no applicable statutory or regulatory background standards in effect at the time of hire or before January 1, 2014, used to screen the individual). A credit report may be obtained directly from a consumer reporting agency or through a commercial service. A loan originator organization with access to the NMLSR can meet the requirement for the criminal background check by reviewing any criminal background check it receives upon compliance with the requirement in 12 CFR 1007.103(d)(1) and can meet the requirement to obtain information related to any administrative, civil, or criminal determinations by any government jurisdiction by obtaining the information through the NMLSR. Loan originator organizations that do not have access to these items through the NMLSR may obtain them by other means. For example, a criminal background check may be obtained from a law enforcement agency or commercial service. Information on any past administrative, civil, or criminal findings (such as from disciplinary or enforcement actions) may be obtained from the individual loan originator.

2. *Retroactive obtaining of information not required.* Section 1026.36(f)(3)(i) does not require the loan originator organization to obtain the covered information for an individual whom the loan originator organization hired as a loan originator before January 1, 2014, and screened under applicable statutory or regulatory background standards in effect at the time of hire. However, if the individual subsequently ceases to be employed as a loan originator by that loan originator organization, and later resumes employment as a loan originator by that loan originator organization (or any other loan originator organization), the loan originator organization is

subject to the requirements of §1026.36(f)(3)(i).

Paragraph 36(f)(3)(ii)

Paragraph 36(f)(3)(ii).

1. *Scope of review.* Section 1026.36(f)(3)(ii) requires the loan originator organization to review the information that it obtains under §1026.36(f)(3)(i) and other reasonably available information to determine whether the individual loan originator meets the standards in §1026.36(f)(3)(ii). Other reasonably available information includes any information the loan originator organization has obtained or would obtain as part of a reasonably prudent hiring process, including information obtained from application forms, candidate interviews, other reliable information and evidence provided by a candidate, and reference checks. The requirement applies to individual loan originator employees who were hired on or after January 1, 2014 (or whom the loan originator organization hired before this date but for whom there were no applicable statutory or regulatory background standards in effect at the time of hire or before January 1, 2014, used to screen the individual).

2. *Retroactive determinations not required.* Section 1026.36(f)(3)(ii) does not require the loan originator organization to review the covered information and make the required determinations for an individual whom the loan originator organization hired as a loan originator on or before January 1, 2014 and screened under applicable statutory or regulatory background standards in effect at the time of hire. However, if the individual subsequently ceases to be employed as a loan originator by that loan originator organization, and later resumes employment as a loan originator by that loan originator organization (or any other loan originator organization), the loan originator organization employing the individual is subject to the requirements of §1026.36(f)(3)(ii).

3. *Subsequent determinations.* The loan originator organization must make the required determinations for an individual before the individual acts as a loan originator. Subsequent reviews and assessments are required only if the loan originator organization knows of reliable information indicating that the individual loan originator likely no longer meets the required standards in §1026.36(f)(3). For example, if the loan originator organization has knowledge of criminal conduct of its individual loan originator through a newspaper article, a previously obtained criminal background report, or the NMLSR, the loan originator organization must determine whether any resulting conviction, or any other information, causes the individual to fail to meet the standards in §1026.36(f)(3)(ii), regardless of when the loan originator was hired or previously screened.

Paragraph 36(f)(3)(ii)(B)

1. *Financial responsibility, character, and general fitness.* The determination of financial responsibility, character, and general fitness required under §1026.36(f)(3)(ii)(B) requires an assessment of all information obtained pursuant to paragraph (f)(3)(i) and any other reasonably available information, including information that is known to the loan originator organization or would become known to the loan originator organization as part of a reasonably prudent hiring process. The absence of any significant adverse information is sufficient to support an affirmative determination that the individual meets the standards. A review and assessment of financial responsibility is sufficient if it considers, as relevant factors, the existence of current outstanding judgments, tax liens, other government liens, nonpayment of child support, or a pattern of bankruptcies, foreclosures, or delinquent accounts. A review and assessment of financial responsibility is not required to consider debts arising from medical expenses. A review and assessment of character and general fitness is sufficient if it considers, as relevant factors, acts of unfairness or dishonesty, including dishonesty by the individual in the course of seeking employment or in connection with determinations pursuant to the qualification requirements of §1026.36(f), and any disciplinary actions by regulatory or professional licensing agencies. No single factor necessarily requires a determination that the individual does not meet the standards for financial responsibility, character, or general fitness, provided that the loan originator organization considers all relevant factors and reasonably determines that, on balance, the individual meets the standards.

2. *Written procedures for making determinations.* A loan originator organization that establishes written procedures for determining whether individuals meet the financial responsibility, character, and general fitness standards under §1026.36(f)(3)(ii)(B) and comment 36(f)(3)(ii)(B)–1 and follows those written procedures for an individual and complies with the requirement for that individual. Such procedures may provide that bankruptcies and foreclosures are considered under the financial responsibility standard only if they occurred within a recent timeframe established in the procedures. Such procedures are not required to include review of a credit score.

Paragraph 36(f)(3)(iii)

1. *Training.* The periodic training required in §1026.36(f)(3)(iii) must be sufficient in frequency, timing, duration, and content to ensure that the individual loan originator has the knowledge of State and Federal legal requirements that apply to the individual loan

originator's loan origination activities. The training must take into consideration the particular responsibilities of the individual loan originator and the nature and complexity of the mortgage loans with which the individual loan originator works. An individual loan originator is not required to receive training on requirements and standards that apply to types of mortgage loans that the individual loan originator does not originate, or on subjects in which the individual loan originator already has the necessary knowledge and skill. Training may be delivered by the loan originator organization or any other person and may utilize workstation, internet, teleconferencing, or other interactive technologies and delivery methods. Training that a government agency or housing finance agency has established for an individual to originate mortgage loans under a program sponsored or regulated by a Federal, State, or other government agency or housing finance agency satisfies the requirement in §1026.36(f)(3)(iii), to the extent that the training covers the types of loans the individual loan originator originates and applicable Federal and State laws and regulations. Training that the NMLSR has approved to meet the licensed loan originator continuing education requirement at §1008.107(a)(2) of this chapter satisfies the requirement of §1026.36(f)(3)(iii), to the extent that the training covers the types of loans the individual loan originator originates and applicable Federal and State laws and regulations. The training requirements under §1026.36(f)(3)(iii) apply to individual loan originators regardless of when they were hired.

36(g) Name and NMLSR ID on Loan Documents

Paragraph 36(g)(1)

1. *NMLSR ID*. Section 1026.36(g) requires a loan originator organization to include its name and NMLSR ID and the name and NMLSR ID of the individual loan originator on certain loan documents. As provided in §1026.36(a)(1), the term "loan originator" includes creditors that engage in loan originator activities for purposes of this requirement. Thus, for example, if an individual loan originator employed by a bank originates a loan, the names and NMLSR IDs of the individual and the bank must be included on covered loan documents. The NMLSR ID is a number generally assigned by the NMLSR to individuals registered or licensed through NMLSR to provide loan origination services. For more information, see the SAFE Act sections 1503(3) and (12) and 1504 (12 U.S.C. 5102(3) and (12) and 5103), and its implementing regulations (12 CFR 1007.103(a) and 1008.103(a)(2)). A loan originator organization may also have an NMLSR unique identifier.

2. *Loan originators without NMLSR IDs*. An NMLSR ID is not required by §1026.36(g) to be included on loan documents if the loan originator is not required to obtain and has not been issued an NMLSR ID. For example, certain loan originator organizations and individual loan originators who are employees of bona fide nonprofit organizations may not be required to obtain a unique identifier under State law. However, some loan originators may have obtained NMLSR IDs, even if they are not required to have one for their current jobs. If a loan originator organization or an individual loan originator has been provided a unique identifier by the NMLSR, it must be included on the covered loan documents, regardless of whether the loan originator organization or individual loan originator is required to obtain an NMLSR unique identifier. In any event, the name of the loan originator is required by §1026.36(g) to be included on the covered loan documents.

3. *Inclusion of name and NMLSR ID*. Section 1026.36(g)(1) requires the inclusion of loan originator names and NMLSR IDs on each loan document. Those items need not be included more than once on each loan document on which loan originator names and NMLSR IDs are required, such as by including them on every page of a document.

Paragraph 36(g)(1)(ii)

1. *Multiple individual loan originators*. If more than one individual meets the definition of a loan originator for a transaction, the name and NMLSR ID of the individual loan originator with primary responsibility for the transaction at the time the loan document is issued must be included. A loan originator organization that establishes and follows a reasonable, written policy for determining which individual loan originator has primary responsibility for the transaction at the time the document is issued complies with the requirement. If the individual loan originator with primary responsibility for a transaction at the time a document is issued is not the same individual loan originator who had primary responsibility for the transaction at the time that a previously issued document was issued, the previously issued document is not required to be reissued merely to change a loan originator name and NMLSR ID.

36(i) Prohibition on financing credit insurance.

1. *Financing credit insurance premiums or fees*. In the case of single-premium credit insurance, a creditor violates §1026.36(i) by adding the credit insurance premium or fee to the amount owed by the consumer at closing. In the case of monthly-pay credit insurance, a creditor violates §1026.36(i) if, upon the close of the monthly period in which the premium or fee is due, the creditor includes

the premium or fee in the amount owed by the consumer.

36(k) Negative amortization counseling.

36(k)(1) Counseling required.

1. *HUD-certified or -approved counselor or counseling organization.* For purposes of §1026.36(k), organizations or counselors certified or approved by the U.S. Department of Housing and Urban Development (HUD) to provide the homeownership counseling required by §1026.36(k) include counselors and counseling organizations that are certified or approved pursuant to section 106(e) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(e)) or 24 CFR part 214, unless HUD determines otherwise.

2. *Homeownership counseling.* The counseling required under §1026.36(k) must include information regarding the risks and consequences of negative amortization.

3. *Documentation.* Examples of documentation that demonstrate a consumer has received the counseling required under §1026.36(k) include a certificate of counseling, letter, or email from a HUD-certified or -approved counselor or counseling organization indicating that the consumer has received homeownership counseling.

4. *Processing applications.* Prior to receiving documentation that a consumer has received the counseling required under §1026.36(k), a creditor may not extend credit to a first-time borrower in connection with a closed-end transaction secured by a dwelling that may result in negative amortization, but may engage in other activities, such as processing an application for such a transaction (by, for example, ordering an appraisal or title search).

36(k)(3) Steering prohibited.

1. See comments 34(a)(5)(vi)–1 and –2 for guidance concerning steering.

Section 1026.37—Content of Disclosures for Certain Mortgage Transactions (Loan Estimate)

1. *Disclosures not applicable.* The disclosures required by §1026.37 are required to reflect the terms of the legal obligation between the parties, and if any information necessary for an accurate disclosure is unknown to the creditor, the creditor shall make the disclosure in good faith, based on the best information reasonably available to the creditor pursuant to §§1026.17(c) and 1026.19(e). See comments 17(c)(1)–1, 17(c)(2)(i)–1 and –2, and 19(e)(1)(i)–1. Where a disclosure is not applicable to a particular transaction, unless otherwise provided by §1026.37, form H–24 of appendix H to this part may not be modified to delete the disclosure from form H–24, or to state ''not applicable'' or ''N/A'' in place of such disclosure. The portion of the form pertaining to the inapplicable disclosure may be left blank, unless otherwise provided by §1026.37. For example, in a transaction for which the consumer does not pay points to the creditor to reduce the interest rate, the amounts required to be disclosed by §1026.37(f)(1)(i) may be left blank on form H–24. As provided in §1026.37(i) and (j), however, the adjustable payment and adjustable interest rate tables required by those paragraphs may be included only if those disclosures are applicable to the transaction and otherwise must be excluded.

2. *Format.* See §1026.37(o) and its commentary for guidance on the proper format to be used in making the disclosures, as well as permissible modifications.

37(a) General information.

37(a)(3) Creditor.

1. *Multiple creditors.* For transactions with multiple creditors, see §1026.17(d) and comment 17(d)–1 for further guidance. The creditor making the disclosures, however, must be identified as the creditor for purposes of §1026.37(a)(3).

2. *Mortgage broker as loan originator.* In transactions involving a mortgage broker, the name and address of the creditor must be disclosed, if known, even if the mortgage broker provides the disclosures to the consumer under §1026.19(e)(1)(ii). As required by §1026.19(e)(1)(i), the mortgage broker must make a good faith effort to disclose the name and address of the creditor, but if the name of the creditor is not yet known, the disclosure required by §1026.37(a)(3) may be left blank. *See* comment 37–1.

37(a)(4) Date issued.

1. *Applicable date.* Section 1026.37(a)(4) requires disclosure of the date the creditor mails or delivers the Loan Estimate to the consumer. The creditor's method of delivery does not affect the date issued. For example, if the creditor hand delivers the Loan Estimate to the consumer on August 14, or if the creditor places the Loan Estimate in the mail on August 14, the date disclosed under §1026.37(a)(4) is August 14.

2. *Mortgage broker as loan originator.* In transactions involving a mortgage broker, the date disclosed is the date the mortgage broker mails or delivers the Loan Estimate to the consumer, because pursuant to §1026.19(e)(1)(ii), the mortgage broker is required to comply with all relevant requirements of §1026.19(e).

37(a)(5) Applicants.

1. *Multiple consumers.* If there is more than one consumer applying for the credit, §1026.37(a)(5) requires disclosure of the name and the mailing address of each consumer to whom the Loan Estimate will be delivered. If the names and mailing addresses of all consumers applying for the credit do not fit in the space allocated on the Loan Estimate, an additional page with that information may be appended to the end of the form. For additional information on permissible changes, see §1026.37(o)(5) and its commentary.

37(a)(6) Property.

1. *Alternate property address.* Section 1026.37(a)(6) requires disclosure of the address

including the zip code of the property that secures or will secure the transaction. A creditor complies with §1026.37(a)(6) by disclosing a complete address for purposes of the U.S. Postal Service. If the address is unavailable, a creditor complies with §1026.37(a)(6) by disclosing the location of such property including a zip code, which is required in all instances. Location of the property under §1026.37(a)(6) includes location information, such as a lot number. The disclosure of multiple zip codes is permitted if the consumer is investigating home purchase opportunities in multiple zip codes.

2. *Personal property*. Where personal property also secures the credit transaction, a description of that property may be disclosed, at the creditor's option pursuant to §1026.37(a)(6), if a description fits in the space provided on form H–24 for the disclosure required by §1026.37(a)(6). An additional page may not be appended to the form to disclose a description of personal property.

3. *Multiple properties*. Where more than one property secures the credit transaction, §1026.37(a)(6) requires disclosure of all properties. If the addresses of all properties securing the transaction do not fit in the space allocated on the Loan Estimate, an additional page with that information with respect to real properties may be appended to the end of the form.

37(a)(7) Sale price.

1. *Estimated property value*. In transactions where there is no seller, such as in a refinancing, §1026.37(a)(7)(ii) requires the creditor to disclose the estimated value of the property identified in §1026.37(a)(6) based on the best information reasonably available to the creditor at the time the disclosure is provided to the consumer, which may include, at the creditor's option, the estimated value of the improvements to be made on the property in transactions involving construction. The creditor may use the estimate provided by the consumer at application unless it has performed its own estimate of the property value by the time the disclosure is provided to the consumer, in which case the creditor must use its own estimate. If the creditor has obtained any appraisals or valuations of the property for the application at the time the disclosure is issued to the consumer, the value determined by the appraisal or valuation to be used during underwriting for the application is disclosed as the estimated property value. If the creditor has obtained multiple appraisals or valuations and has not yet determined which one will be used during underwriting, it may disclose the value from any appraisal or valuation it reasonably believes it may use in underwriting the transaction. In a transaction that involves a seller, if the sale price is not yet known, the creditor complies with §1026.37(a)(7) if it discloses the estimated value of the property that it used as the basis for the disclosures in the Loan Estimate.

2. *Personal property*. In transactions involving personal property that is separately valued from real property, only the value of the real property or cooperative unit is disclosed under §1026.37(a)(7). Where personal property is included in the sale price of the real property or cooperative unit (for example, if the consumer is purchasing the furniture inside the dwelling), however, §1026.37(a)(7) permits disclosure of the aggregate price without any reduction for the appraised or estimated value of the personal property.

37(a)(8) Loan term.

1. *Partial years*.

i. *Terms to maturity of 24 months or more*. Section 1026.37(a)(8) requires disclosure of the term to maturity in years, or months, or both, as applicable. Where the term exceeds 24 months and equals a whole number of years, a creditor complies with §1026.37(a)(8) by disclosing the number of years, followed by the designation ''years.'' Where the term exceeds 24 months but does not equal a whole number of years, a creditor complies with §1026.37(a)(8) by disclosing the term to maturity as the number of years followed by the designation ''yr.'' and the remaining number of months, followed by the designation ''mo.'' For example, if the term to maturity of the transaction is 185 months, the correct disclosure would be ''15 yr. 5 mo.''

ii. *Terms to maturity of less than 24 months*. If the term to maturity is less than 24 months and does not equal a whole number of years, a creditor complies with §1026.37(a)(8) by disclosing the number of months only, followed by the designation ''mo.'' For example, if the term to maturity of a transaction is six months or 16 months, it would be disclosed as ''6 mo.'' or ''16 mo.,'' respectively. If the term to maturity is 12 months, however it would be disclosed simply as ''1 year.''

2. *Adjustable loan term*. Section 1026.37(a)(8) requires disclosure of the term to maturity of the credit transaction. If the term to maturity is adjustable, *i.e.*, it is not known with certainty at consummation, the creditor complies with §1026.37(a)(8), if it discloses the possible range of the loan term, including the maximum number of years possible under the terms of the legal obligation. For example, if the loan term depends on the value of interest rate adjustments during the term of the loan, to calculate the maximum loan term, the creditor assumes that the interest rate rises as rapidly as possible after consummation, taking into account the terms of the legal obligation, including any applicable caps on interest rate adjustments and lifetime interest rate cap.

3. *Loan term start date*. See comment app. D–7.i for an explanation of how a creditor discloses the loan term of a multiple-advance loan to finance the construction of a

dwelling that may be permanently financed by the same creditor.

37(a)(9) Purpose.

1. *General.* Section 1026.37(a)(9) requires disclosure of the consumer's intended use of the credit. In ascertaining the consumer's intended use, §1026.37(a)(9) requires the creditor to consider all relevant information known to the creditor at the time of the disclosure. If the purpose is not known, the creditor may rely on the consumer's stated purpose. The following examples illustrate when each of the permissible purposes should be disclosed:

i. *Purchase.* The consumer intends to use the proceeds from the transaction to purchase the property that will secure the extension of credit. In a purchase transaction with simultaneous subordinate financing, the simultaneous subordinate loan is also disclosed with the purpose ''Purchase.''

ii. *Refinance.* The consumer refinances an existing obligation already secured by the consumer's dwelling to change the rate, term, or other loan features and may or may not receive cash from the transaction. For example, in a refinance with no cash provided, the new amount financed does not exceed the unpaid principal balance, any earned unpaid finance charge on the existing debt, and amounts attributed solely to the costs of the refinancing. Conversely, in a refinance with cash provided, the consumer refinances an existing mortgage obligation and receives money from the transaction that is in addition to the funds used to pay the unpaid principal balance, any earned unpaid finance charge on the existing debt, and amounts attributed solely to the costs of the refinancing. In such a transaction, the consumer may, for example, use the newly-extended credit to pay off the balance of the existing mortgage and other consumer debt, such as a credit card balance.

iii. *Construction.* Section 1026.37(a)(9)(iii) requires the creditor to disclose that the loan is for construction in transactions where the creditor extends credit to finance only the cost of initial construction (construction-only loan), not renovations to existing dwellings, and in transactions where a multiple advance loan may be permanently financed by the same creditor (construction-permanent loan). In a construction-only loan, the borrower may be required to make interest-only payments during the loan term with the balance commonly due at the end of the construction project. For additional guidance on disclosing construction-permanent loans, see §1026.17(c)(6)(ii), comments 17(c)(6)–2, –3, and –5, and appendix D to this part.

iv. *Home equity loan.* The creditor is required to disclose that the credit is for a ''home equity loan'' if the creditor intends to extend credit for any purpose other than a purchase, refinancing, or construction. This disclosure applies whether the loan is secured by a first or subordinate lien.

2. *Refinance coverage.* The disclosure requirements under §1026.37(a)(9)(ii) apply to credit transactions that meet the definition of a refinancing under §1026.20(a) but without regard to whether they are made by a creditor, holder, or servicer of the existing obligation. Section 1026.20(a) applies only to refinancings undertaken by the original creditor or a holder or servicer of the original debt. *See* comment 20(a)–5.

37(a)(10) Product.

1. *No features.* If the loan product disclosed pursuant to §1026.37(a)(10) does not include any of the features described in §1026.37(a)(10)(ii), only the product type and introductory and first adjustment periods, if applicable, are disclosed. For example:

i. *Adjustable rate.* When disclosing an adjustable rate product, the disclosure of the loan product must be preceded by the length of the introductory period and the frequency of the first adjustment period thereafter. Thus, for example, if the loan product is an adjustable rate with an introductory rate that is fixed for the first five years of the loan term and then adjusts every three years starting in year six, the disclosure required by §1026.37(a)(10) is ''5/3 Adjustable Rate.'' If the first adjustment period is not the period for all adjustments under the terms of the legal obligation, the creditor should still disclose the initial adjustment period and should not disclose other adjustment periods. For example, if the loan product is an adjustable rate with an introductory rate that is fixed for the first five years of the loan term and then adjusts every three years starting in year six, and then annually starting in year fifteen, the disclosure required by §1026.37(a)(10) would still be ''5/3 Adjustable Rate.''

A. *No introductory period.* If the loan product is an adjustable rate with no introductory rate, the creditor should disclose ''0'' where the introductory rate period would ordinarily be disclosed. For example, if the loan product is an adjustable rate that adjusts every three years with no introductory period, the disclosure required by §1026.37(a)(10) is ''0/3 Adjustable Rate.''

B. *Introductory period not yet known.* If the loan product is an adjustable rate with an introductory period that is not yet known at the time of delivery of the Loan Estimate, the creditor should disclose the shortest potential introductory period for the particular loan product offered. For example, if the loan product is an adjustable rate with an introductory period that may be between 36 and 48 months and the rate would then adjust every year, the disclosure required by §1026.37(a)(10) is ''3/1 Adjustable Rate.''

ii. *Step rate.* If the loan product is a step rate with an introductory interest rate that lasts for ten years and adjusts every year thereafter for the next five years, and then adjusts every three years for the next 15 years, the disclosure required by §1026.37(a)(10) is ''10/1 Step Rate.'' If the loan product is a step rate with no introductory rate, the creditor should disclose ''0'' where the introductory rate period would ordinarily be disclosed.

iii. *Fixed rate*. If the loan product is not an adjustable rate or a step rate, as described in §1026.37(a)(10)(i)(A) and (B), even if an additional feature described in §1026.37(a)(10)(ii) may change the consumer's periodic payment, the disclosure required by §1026.37(a)(10)(i) is ''Fixed Rate.''

2. *Additional features*. When disclosing a loan product with at least one of the features described in §1026.37(a)(10)(ii), §1026.37(a)(10)(iii) and (iv) require the disclosure of only the first applicable feature in the order of §1026.37(a)(10)(ii) and that it be preceded by the time period or the length of the introductory period and the frequency of the first adjustment period, as applicable, followed by a description of the loan product and its time period as provided for in §1026.37(a)(10)(i). For example:

i. *Negative amortization*. Some loan products, such as ''payment option'' loans, permit the borrower to make payments that are insufficient to cover all of the interest accrued, and the unpaid interest is added to the principal balance. Where the loan product includes a loan feature that may cause the loan balance to increase, the disclosure required by §1026.37(a)(10)(ii)(A) is preceded by the time period that the borrower is permitted to make payments that result in negative amortization (*e.g.*, ''2 Year Negative Amortization''), followed by the loan product type. Thus, a fixed rate product with a step-payment feature for the first two years of the legal obligation that may negatively amortize is disclosed as ''2 Year Negative Amortization, Fixed Rate.''

ii. *Interest only*. When disclosing an ''Interest Only'' feature, as defined in §1026.18(s)(7)(iv), the applicable time period must precede the label ''Interest Only.'' Thus, a fixed rate loan with only interest due for the first five years of the loan term is disclosed as ''5 Year Interest Only, Fixed Rate.'' If the interest only feature fails to cover the total interest due, then, as required by §1026.37(a)(10)(iii), the disclosure must reference the negative amortization feature and not the interest only feature (*e.g.*, ''5 Year Negative Amortization, Fixed Rate''). See comment app. D–7.ii for an explanation of the disclosure of the time period of an interest only feature for a construction loan or a construction-permanent loan.

iii. *Step payment*. When disclosing a step payment feature (which is sometimes referred to instead as a graduated payment), the period of time at the end of which the scheduled payments will change must precede the label ''Step Payment'' (*e.g.*, ''5 Year Step Payment'') followed by the name of the loan product. Thus, a fixed rate mortgage subject to a 5-year step payment plan is disclosed as a ''5 Year Step Payment, Fixed Rate.''

iv. *Balloon payment*. If a loan product includes a ''balloon payment,'' as that term is defined in §1026.37(b)(5), the disclosure of the balloon payment feature, including the year the payment is due, precedes the disclosure of the loan product. Thus, if the loan product is a step rate with an introductory rate that lasts for three years and adjusts each year thereafter until the balloon payment is due in the seventh year of the loan term, the disclosure required is ''Year 7 Balloon Payment, 3/1 Step Rate.'' If the loan product includes more than one balloon payment, only the earliest year that a balloon payment is due shall be disclosed.

v. *Seasonal payment*. If a loan product includes a seasonal payment feature, §1026.37(a)(10)(ii)(E) requires that the creditor disclose the feature. The feature is not, however, required to be disclosed with any preceding time period. Disclosure of the label ''Seasonal Payment'' without any preceding number of years satisfies this requirement.

3. *Periods not in whole years*.

i. *Terms of 24 months or more*. For product types and features that have introductory periods or adjustment periods that do not equate to a number of whole years, if the period is a number of months that is 24 or greater and does not equate to a whole number of years, §1026.37(a)(10) requires disclosure of the whole number of years followed by a decimal point with the remaining months rounded to two places. For example, if the loan product is an adjustable rate with an introductory period of 30 months that adjusts every year thereafter, the creditor would be required to disclose ''2.5/1 Adjustable Rate.'' If the introductory period were 31 months, the required disclosure would be 2.58/1 Adjustable Rate.''

ii. *Terms of less than 24 months*. For product types and features that have introductory periods or adjustment periods that do not equate to a number of whole years, if the period is less than 24 months, §1026.37(a)(10) requires disclosure of the number of months, followed by the designation ''mo.'' For example, if the product type is an adjustable rate with an 18-month introductory period that adjusts every 18 months starting in the 19th month, the required disclosure would be ''18 mo./18mo. Adjustable Rate.''

iii. *Adjustments more frequent than monthly*. For adjustment periods that change more frequently than monthly, §1026.37(a)(10) requires disclosure of the applicable unit-period, such as daily, weekly, or bi-weekly. For example, for an adjustable rate construction loan with no introductory fixed rate period where the interest rate adjusts every seven days, the disclosure required by §1026.37(a)(10) is ''0/Weekly Adjustable Rate.''

37(a)(11) Loan type.

1. *Other.* If the transaction is a type other than a conventional, FHA, or VA loan, §1026.37(a)(11)(iv) requires the creditor to disclose the loan type as ''Other'' and provide a name or brief description of the loan type. For example, a loan that is guaranteed or funded by the Federal government under the Rural Housing Service (RHS) of the U.S. Department of Agriculture is required to be disclosed under the subcategory ''Other.'' Section 1026.37(a)(11)(iv) requires a brief description of the loan type (*e.g.*, ''RHS''). A loan that is insured or guaranteed by a State agency must also be disclosed as ''Other.''

37(a)(12) Loan identification number (Loan ID #).

1. *Unique identifier.* Section 1026.37(a)(12) requires that the creditor disclose a loan identification number that may be used by the creditor, consumer, and other parties to identify the transaction, labeled as ''Loan ID #.'' The loan identification number is determined by the creditor, which number may contain any alpha-numeric characters. Because the number must allow for the identification of the particular credit transaction under §1026.37(a)(12), a creditor must use a unique loan identification number, *i.e.*, the creditor may not use the same loan identification number for different, but related, loan transactions (such as different loans to the same borrower). Where a creditor issues a revised Loan Estimate for a transaction, the loan identification number must be sufficient to enable identification of the transaction pursuant to §1026.37(a)(12).

37(a)(13) Rate lock.

1. *Interest rate.* For purposes of §1026.37(a)(13), the interest rate is locked for a specific period of time if the creditor has agreed to extend credit to the consumer at a given rate, subject to contingencies that are described in any rate lock agreement between the creditor and consumer.

2. *Expiration date.* The disclosure required by §1026.37(a)(13)(ii) related to estimated closing costs is required regardless of whether the interest rate is locked for a specific period of time or whether the terms and costs are otherwise accepted or extended. If the consumer fails to indicate an intent to proceed with the transaction within 10 business days after the disclosures were originally provided under §1026.19(e)(1)(iii) (or within any longer time period established by the creditor), then, for determining good faith under §1026.19(e)(3)(i) and (ii), a creditor may use a revised estimate of a charge instead of the amount originally disclosed under §1026.19(e)(1)(i). *See* comment 19(e)(3)(iv)(E)–2.

3. *Time zone.* The disclosure required by §1026.37(a)(13) requires the applicable time zone for all times provided, as determined by the creditor. For example, if the creditor is located in New York and determines that the Loan Estimate will expire at 5:00 p.m. in the time zone applicable to its location, while standard time is in effect, the disclosure must include a reference to the Eastern time zone (*i.e.*, 5:00 p.m. EST).

4. *Revised disclosures.* Once the consumer indicates an intent to proceed within the time specified by the creditor under §1026.37(a)(13)(ii), the date and time at which estimated closing costs expire are left blank on any subsequent revised disclosures. The creditor may extend the period of availability to expire beyond the time disclosed under §1026.37(a)(13)(ii). If the consumer indicates an intent to proceed within that longer time period, the date and time at which estimated closing costs expire are left blank on subsequent revised disclosures, if any. *See* comment 19(e)(3)(iv)–5.

37(b) Loan terms.

1. *Legal obligation.* The disclosures required by §1026.37 must reflect good faith estimates of the credit terms to which the parties will be legally bound for the transaction. Accordingly, if certain terms of the transaction are known or reasonably available to the creditor, based on information such as the consumer's selection of a product type or other information in the consumer's application, §1026.37 requires the creditor to disclose those credit terms. For example, if the consumer selects a product type with a prepayment penalty, §1026.37(b)(4) requires disclosure of the maximum amount of the prepayment penalty and period in which the prepayment penalty may be charged as known to the creditor at the time the disclosures are provided.

37(b)(2) Interest rate.

1. *Interest rate at consummation not known.* Where the interest rate that will apply at consummation is not known at the time the creditor must deliver the disclosures required by §1026.19(e), §1026.37(b)(2) requires disclosure of the fully-indexed rate, defined as the index plus the margin at consummation. Although §1026.37(b)(2) refers to the index plus margin ''at consummation,'' if the index value that will be in effect at consummation is unknown at the time the disclosures are provided under §1026.19(e)(1)(iii), *i.e.*, within three business days after receipt of a consumer's application, the fully-indexed rate disclosed under §1026.37(b)(2) may be based on the index in effect at the time the disclosure is delivered. The index in effect at consummation (or the time the disclosure is delivered under §1026.19(e)) need not be used if the contract provides for a delay in the implementation of changes in an index value. For example, if the contract specifies that rate changes are based on the index value in effect 45 days before the change date, creditors may use any index

value in effect during the 45 days before consummation (or any earlier date of disclosure) in calculating the fully-indexed rate to be disclosed. See comment app. D–7.iii for an explanation of the disclosure of the permanent financing interest rate for a construction-permanent loan.

37(b)(3) Principal and interest payment.

1. *Frequency of principal and interest payment.* Pursuant to §1026.37(o)(5)(i), if the contract provides for a unit-period, as defined in appendix J to this part, of a month, such as a monthly payment schedule, the payment disclosed under §1026.37(b)(3) should be labeled ''Monthly Principal & Interest.'' If the contract requires bi-weekly payments of principal or interest, the payment should be labeled ''Bi-Weekly Principal & Interest.'' If a creditor voluntarily permits a payment schedule not provided for in the contract, such as an informal principal-reduction arrangement, the disclosure should reflect only the payment frequency provided for in the contract. *See* §1026.17(c)(1).

2. *Initial periodic payment if not known.* Under §1026.37(b)(3), the initial periodic payment amount that will be due under the terms of the legal obligation must be disclosed. If the initial periodic payment is not known because it will be based on an interest rate at consummation that is not known at the time the disclosures required by §1026.19(e) must be provided, for example, if it is based on an external index that may fluctuate before consummation, §1026.37(b)(3) requires that the disclosure be based on the fully-indexed rate disclosed under §1026.37(b)(2). See comment 37(b)(2)–1 for guidance regarding calculating the fully-indexed rate.

37(b)(4) Prepayment penalty.

1. *Transaction includes a prepayment penalty.* Section 1026.37(b)(4) requires disclosure of a statement of whether the transaction includes a prepayment penalty. If the transaction includes a prepayment penalty, §1026.37(b)(7) sets forth the information that must be disclosed under §1026.37(b)(4) (*i.e.*, the maximum amount of the prepayment penalty that may be imposed under the terms of the loan contract and the date on which the penalty will no longer be imposed). For an example of such disclosure, see form H–24 of appendix H to this part. The disclosure under §1026.37(b)(4) applies to transactions where the terms of the loan contract provide for a prepayment penalty, even though the creditor does not know at the time of the disclosure whether the consumer will, in fact, make a payment to the creditor that would cause imposition of the penalty. For example, if the monthly interest accrual amortization method described in comment 37(b)(4)–2.i is used such that interest is assessed on the balance for a full month even if the consumer makes a full prepayment before the end of the month, the transaction includes a prepayment penalty that must be disclosed pursuant to §1026.37(b)(4).

2. *Examples of prepayment penalties.* For purposes of §1026.37(b)(4), the following are examples of prepayment penalties:

i. A charge determined by treating the loan balance as outstanding for a period of time after prepayment in full and applying the interest rate to such ''balance,'' even if the charge results from interest accrual amortization used for other payments in the transaction under the terms of the loan contract. ''Interest accrual amortization'' refers to the method by which the amount of interest due for each period (*e.g.*, month) in a transaction's term is determined. For example, ''monthly interest accrual amortization'' treats each payment as made on the scheduled, monthly due date even if it is actually paid early or late (until the expiration of any grace period). Thus, under the terms of a loan contract providing for monthly interest accrual amortization, if the amount of interest due on May 1 for the preceding month of April is $3,000, the loan contract will require payment of $3,000 in interest for the month of April whether the payment is made on April 20, on May 1, or on May 10. In this example, if the consumer prepays the loan in full on April 20 and if the accrued interest as of that date is $2,000, then assessment of a charge of $3,000 constitutes a prepayment penalty of $1,000 because the amount of interest actually earned through April 20 is only $2,000.

ii. A fee, such as an origination or other loan closing cost, that is waived by the creditor on the condition that the consumer does not prepay the loan. See comment 37(b)(4)–3.iii below for additional guidance regarding waived bona fide third-party charges imposed by the creditor if the consumer pays all of a covered transaction's principal before the date on which the principal is due sooner than 36 months after consummation.

iii. A minimum finance charge in a simple interest transaction.

iv. Computing a refund of unearned interest by a method that is less favorable to the consumer than the actuarial method, as defined by section 933(d) of the Housing and Community Development Act of 1992, 15 U.S.C. 1615(d). For purposes of computing a refund of unearned interest, if using the actuarial method defined by applicable State law results in a refund that is greater than the refund calculated by using the method described in section 933(d) of the Housing and Community Development Act of 1992, creditors should use the State law definition in determining if a refund is a prepayment penalty.

3. *Fees that are not prepayment penalties.* For purposes of §1026.37(b)(4), fees that are not prepayment penalties include, for example:

i. Fees imposed for preparing and providing documents when a loan is paid in full, if such fees are imposed whether or not the loan is prepaid. Examples include a loan payoff statement, a reconveyance document, or another document releasing the creditor's security interest in the dwelling that secures the loan.

ii. Loan guarantee fees.

iii. A waived bona fide third-party charge imposed by the creditor if the consumer pays all of a covered transaction's principal before the date on which the principal is due sooner than 36 months after consummation. For example, assume that at consummation, the creditor waives $3,000 in closing costs to cover bona fide third-party charges but the terms of the loan agreement provide that the creditor may recoup the $3,000 in waived charges if the consumer repays the entire loan balance sooner than 36 months after consummation. The $3,000 charge is not a prepayment penalty. In contrast, for example, assume that at consummation, the creditor waives $3,000 in closing costs to cover bona fide third-party charges but the terms of the loan agreement provide that the creditor may recoup $4,500 in part to recoup waived charges, if the consumer repays the entire loan balance sooner than 36 months after consummation. The $3,000 that the creditor may impose to cover the waived bona fide third-party charges is not a prepayment penalty, but the additional $1,500 charge is a prepayment penalty and must be disclosed pursuant to §1026.37(b)(4).

4. *Rebate of finance charge.* For an obligation that includes a finance charge that does not take into account each reduction in the principal balance of the obligation, the disclosure under §1026.37(b)(4) reflects whether or not the consumer is entitled to a rebate of any finance charge if the obligation is prepaid in full or part. Finance charges that do not take into account each reduction in the principal balance of an obligation may include precomputed finance charges. If any portion of an unearned precomputed finance charge will not be provided as a rebate upon full prepayment, the disclosure required by §1026.37(b)(4) will be an affirmative answer, indicate the maximum amount of such precomputed finance charge that may not be provided as a rebate to the consumer upon any prepayment, and state when the period during which a full rebate would not be provided terminates, as required by §1026.37(b)(7). If, instead, there will be a full rebate of the precomputed finance charge and no other prepayment penalty imposed on the consumer, to comply with the requirements of §1026.37(b)(4) and (7), the creditor states a negative answer only. If the transaction involves both a precomputed finance charge and a finance charge computed by application of a rate to an unpaid balance, disclosure about both the entitlement to any rebate of the finance charge upon prepayment and any other prepayment penalty are made as one disclosure under §1026.37(b)(4), stating one affirmative or negative answer and an aggregated amount and time period for the information required by §1026.37(b)(7). For example, if in such a transaction, a portion of the precomputed finance charge will not be provided as a rebate and the loan contract also provides for a prepayment penalty based on the amount prepaid, both disclosures are made under §1026.37(b)(4) as one aggregate amount, stating the maximum amount and time period under §1026.37(b)(7). If the transaction instead provides a rebate of the precomputed finance charge upon prepayment, but imposes a prepayment penalty based on the amount prepaid, to comply with §1026.37(b)(4), the creditor states an affirmative answer and the information about the prepayment penalty, as required by §1026.37(b)(7). For further guidance and examples of these types of charges, see comment 18(k)(2)–1. For analogous guidance, see comment 18(k)–2. For further guidance on prepaid finance charges generally, see comment 18(k)–3.

5. *Additional guidance.* For additional guidance generally on disclosure of prepayment penalties, see comment 18(k)–1.

37(b)(5) Balloon payment.

1. *Regular periodic payment.* If a payment is not itself a regular periodic payment and is more than two times any one regular periodic payment during the loan term, then it is disclosed as a balloon payment under §1026.37(b)(5). The regular periodic payments used to determine whether a payment is a balloon payment under §1026.37(b)(5) are the payments of principal and interest (or interest only, depending on the loan features) specified under the terms of the loan contract that are due from the consumer for two or more unit-periods in succession. All regular periodic payments during the loan term are used to determine whether a particular payment is a balloon payment, regardless of whether the regular periodic payments have changed during the loan term due to rate adjustments or other payment changes permitted or required under the loan contract.

i. For example, assume that, under a 15-year step rate mortgage, the loan contract provides for scheduled monthly payments of $300 each during the years one through three and scheduled monthly payments of $700 each during years four through 15. If an irregular payment of $1,000 is scheduled during the final month of year 15, that payment is disclosed as a balloon payment under §1026.37(b)(5), because it is more than two times the regular periodic payment amount of $300 during years one through three. This is the case even though the irregular payment is not more than two times the regular periodic payment of $700 per month during years four through fifteen. The $700 monthly payments during years four through fifteen are not balloon payments even though they are more than two times the regular periodic payments during years one through three, because they are regular periodic payments.

ii. If the loan has an adjustable rate under which the regular periodic payments may increase after consummation, but the amounts of such payment increases (if any) are unknown at the time of consummation, then the regular periodic payments are based on the fully-indexed rate, except as otherwise determined by any premium or discounted rates, the application of any interest rate adjustment caps, or any other known, scheduled rates under the terms specified in the loan contract. For analogous guidance, see comments 17(c)(1)–8 and –10. Similarly, if a loan has an adjustable interest rate which does not adjust the regular periodic payment but would, if the rate increased, increase only the final payment, the amount of the final payment for purposes of the balloon payment determination is based on the fully-indexed rate, except as otherwise determined by any premium or discounted rate caps, or any other known, scheduled rates under the terms specified in the loan contract. For example, assume that, under a 30-year adjustable rate mortgage, (1) the loan contract requires monthly payments of $300 during years one through five, (2) the loan contract permits interest rate increases every three years starting in the sixth year up to the fully-indexed rate, subject to caps on interest rate adjustments specified in the loan contract, (3) based on the application of the interest rate adjustment caps, the interest rate may increase to the fully-indexed rate starting in year nine, and (4) the monthly payment based on the fully-indexed rate is $700. The regular periodic payments during years one through five are $300 per month, because they are known and scheduled. The regular periodic payments during years six through eight are up to $700 per month, based on the fully-indexed rate but subject to the application of interest rate adjustment caps specified under the loan contract. The regular periodic payments during years nine through thirty are $700, based on the fully-indexed rate. Therefore, if an irregular payment of $1,000 is scheduled during the final month of year 30, that payment is disclosed as a balloon payment under §1026.37(b)(5), because it is more than two times the regular periodic payment amount of $300 during years one through five. This is the case even though the irregular payment is not more than two times the regular periodic payment during years nine through thirty (*i.e.*, based on the fully-indexed rate). However, the regular periodic payments during years six through thirty themselves are not balloon payments, even though they may be more than two times the regular periodic payments during years one through five.

iii. For a loan with a negative amortization feature, the regular periodic payment does not take into account the possibility that the consumer may exercise an option to make a payment greater than the scheduled periodic payment specified under the terms of the loan contract, if any.

iv. A final payment that differs from other regular periodic payments because of rounding to account for payment amounts including fractions of cents is still a regular periodic payment and need not be disclosed as a balloon payment under §1026.37(b)(5).

v. The disclosure of balloon payments in the "Projected Payments" table under §1026.37(c) is governed by that section and its commentary, rather than §1026.37(b)(5), except that the determination, as a threshold matter, of whether a payment disclosed under §1026.37(c) is a balloon payment is made in accordance with §1026.37(b)(5) and its commentary.

2. *Single and double payment transactions.* The definition of a "balloon payment" under §1026.37(b)(5) includes the payments under transactions that require only one or two payments during the loan term, even though a single payment transaction does not require regular periodic payments, and a transaction with only two scheduled payments during the loan term may not require regular periodic payments.

37(b)(6) Adjustments after consummation.

1. *Periods not in whole years.* For guidance on how to disclose increases after consummation that occur after a number of months less than 24 but that do not equate to a number of whole years or within a number of days less than a week, see the guidance provided in comment 37(a)(10)–3. For increases that occur after more than 24 months, see the guidance provided in comment 37(b)(8)–1.

37(b)(6)(i) Adjustment in loan amount.

1. *Additional information regarding adjustment in loan amount.* A creditor complies with the requirement under §1026.37(b)(6)(i) to disclose additional information indicating whether the maximum principal balance is potential or is scheduled to occur under the terms of the legal obligation by using the phrase "Can go as high as" or "Goes as high as," respectively. A creditor complies with the requirement under §1026.37(b)(6)(i) to disclose additional information indicating the due date of the last payment that may cause the principal balance to increase by using the phrase "Increases until." See form H–24 of appendix H to this part for the required format of such phrases, which is required for federally related mortgage loans under §1026.37(o)(3).

37(b)(6)(ii) Adjustment in interest rate.

1. *Additional information regarding adjustment in interest rate.* A creditor complies with the requirement under §1026.37(b)(6)(ii) to disclose additional information indicating

the frequency of adjustments to the interest rate and date when the interest rate may first adjust by using the phrases ''Adjusts every'' and ''starting in.'' A creditor complies with the requirement under §1026.37(b)(6)(ii) to disclose additional information indicating the maximum interest rate, and the first date when the interest rate can reach the maximum interest rate using the phrase ''Can go as high as'' and then indicating the date at the end of that phrase or for a scheduled maximum interest rate under a step rate loan, ''Goes as high as.'' If the loan term may increase based on an interest rate adjustment, the disclosure shall indicate the maximum possible loan term using the phrase ''Can increase loan term to.'' See form H–24 of appendix H to this part for the required format of such phrases, which is required for federally related mortgage loans under §1026.37(o)(3).

2. *Interest rates that adjust at multiple intervals.* If the terms of the legal obligation provide for more than one adjustment period, §1026.37(b)(6)(ii) requires disclosure of only the frequency of the first interest rate adjustment. For example, if the interest rate is fixed for five years, then adjusts every two years starting in year six, then adjusts every year starting in year 10, the disclosure required is ''Adjusts every 2 years starting in year 6.''

37(b)(6)(iii) Increase in periodic payment.

1. *Additional information regarding increase in periodic payment.* A creditor complies with the requirement under §1026.37(b)(6)(iii) to disclose additional information indicating the scheduled frequency of adjustments to the periodic principal and interest payment by using the phrases ''Adjusts every'' and ''starting in.'' A creditor complies with the requirement under §1026.37(b)(6)(iii) to disclose additional information indicating the maximum possible periodic principal and interest payment, and the date when the periodic principal and interest payment may first equal the maximum principal and interest payment by using the phrase ''Can go as high as'' and then indicating the date at the end of that phrase or, for a scheduled maximum amount, such as under a step payment loan, ''Goes as high as.'' A creditor complies with the requirement under §1026.37(b)(6)(iii) to indicate that there is a period during which only interest is required to be paid and the due date of the last periodic payment of such period using the phrase ''Includes only interest and no principal until.'' See form H–24 of appendix H to this part for the required format of such phrases, which is required for federally related mortgage loans under §1026.37(o)(3). See comment app. D–7.iv for an explanation of the disclosure of an increase in the periodic payment for a construction or construction-permanent loan.

2. *Periodic principal and interest payments that adjust at multiple intervals.* If there are multiple periods of adjustment under the terms of the legal obligation, §1026.37(b)(6)(iii) requires disclosure of the frequency of only the first adjustment to the periodic principal and interest payment, regardless of the basis for the adjustment. Accordingly, where the periodic principal and interest payment may change because of more than one factor and such adjustments are on different schedules, the frequency disclosed is the adjustment of whichever factor adjusts first. For example, where the interest rate for a transaction is fixed until year six and then adjusts every three years but the transaction also has a negative amortization feature that ends in year seven, §1026.37(b)(6)(iii) requires disclosure that the interest rate will adjust every three years starting in year six because the periodic principal and interest payment adjusts based on the interest rate before it adjusts based on the end of the negative amortization period.

37(b)(7) Details about prepayment penalty and balloon payment.

Paragraph 37(b)(7)(i).

1. *Maximum prepayment penalty.* Section 1026.37(b)(7)(i) requires disclosure of the maximum amount of the prepayment penalty that may be imposed under the terms of the legal obligation. The creditor complies with §1026.37(b)(7)(i) when it assumes that the consumer prepays at a time when the prepayment penalty may be charged and that the consumer makes all payments prior to the prepayment on a timely basis and in the amount required by the terms of the legal obligation. The creditor must determine the maximum of each amount used in calculating the prepayment penalty. For example, if a transaction is fully amortizing and the prepayment penalty is two percent of the loan balance at the time of prepayment, the prepayment penalty amount should be determined by using the highest loan balance possible during the period in which the penalty may be imposed. If more than one type of prepayment penalty applies, the creditor must aggregate the maximum amount of each type of prepayment penalty in the maximum penalty disclosed.

2. *Additional information regarding prepayment penalty.* A creditor complies with the requirement under §1026.37(b)(7)(i) to disclose additional information indicating the maximum amount of the prepayment penalty that may be imposed and the date when the period during which the penalty may be imposed terminates using the phrases ''As high as'' and ''if you pay off the loan during.'' See form H–24 of appendix H to this part for the required format of such phrases, which is required for federally related mortgage loans under §1026.37(o)(3).

Paragraph 37(b)(7)(ii).

1. *Additional information regarding balloon payment.* A creditor complies with the requirement under §1026.37(b)(7)(ii) to disclose additional information indicating the maximum amount of the balloon payment and the due date of such payment using the phrases ''You will have to pay'' and ''at the end of.'' See form H–24 of appendix H to this part for the required format of such phrases, which is required for federally related mortgage loans under §1026.37(o)(3). If the transaction includes more than one balloon payment, a creditor complies with §1026.37(b)(7)(ii) by disclosing the highest of the balloon payments and the due date of that payment.

37(b)(8) Timing.

1. *Whole years.* For adjustments that occur after a period of whole years, the timing of information required by §1026.37(b)(8) starts with year number ''1,'' counting from the date that interest for the first scheduled periodic payment begins to accrue for §1026.37(b)(8)(i), or from the due date of the first periodic payment for §1026.37(b)(8)(ii), or from the date of consummation for §1026.37(b)(8)(iii). For example, an interest rate that is fixed for five years and can first adjust at the beginning of the 61st month from the date that interest for the regularly scheduled periodic payment began to accrue would be disclosed as beginning to adjust in ''year 6.'' A monthly periodic payment that adjusts starting with the 61st scheduled payment likewise would be disclosed as adjusting in ''year 6.''

2. *Periods not in whole years.* For adjustments that occur after a number of months less than 24 that do not equate to a number of whole years or within a number of days less than a week, see the guidance provided in comment 37(a)(10)–3.

37(c) Projected payments.

1. *Definitions.* For purposes of §1026.37(c), the terms ''adjustable rate,'' ''fixed rate,'' ''negative amortization,'' and ''interest only'' have the meanings in §1026.37(a)(10).

2. *Construction loans.* See comment app. D–7.v for an explanation of the projected payments disclosure for a construction or construction-permanent loan.

37(c)(1) Periodic payment or range of payments.

Paragraph 37(c)(1)(i).

1. *Periodic payments.* For purposes of §1026.37(c)(1)(i), the periodic payment is the regularly scheduled payment of principal and interest, mortgage insurance premiums, and escrow payments described in §1026.37(c)(2) without regard to any final payment that differs from other payments because of rounding to account for payment amounts including fractions of cents.

2. *Initial periodic payment or range of payments.* Section 1026.37(c)(1)(i) requires the creditor to disclose the initial periodic payment or range of payments. The disclosure required is of the actual periodic payment or range of payments that corresponds to the interest rate that will apply at consummation, including any initial discounted or premium interest rate. For examples of discounted and premium rate transactions, see comment 17(c)(1)–10.v. For guidance regarding whether the disclosure should reflect a buydown, see comments 17(c)(1)–3 through –5. If the initial periodic payment or range of payments may vary based on an adjustment to an index value that applies at consummation, §1026.37(c)(1)(i) requires that the disclosure of the initial periodic payment or range of payments be based on the fully-indexed rate disclosed under §1026.37(b)(2). See comment 37(b)(2)–1 for guidance regarding calculating the fully-indexed rate.

Paragraph 37(c)(1)(i)(A).

1. *Periodic principal and interest payments.* For purposes of §1026.37(c)(1)(i)(A), periodic principal and interest payments may change when the interest rate, applicable interest rate caps, required periodic principal and interest payments, or ranges of such payments may change. Minor payment variations resulting solely from the fact that months have different numbers of days are not changes to periodic principal and interest payments.

2. *Negative amortization.* In a loan that contains a negative amortization feature, periodic principal and interest payments or the range of such payments may change for purposes of §1026.37(c)(1)(i)(A) at the time the negative amortization period ends under the terms of the legal obligation, meaning the consumer must begin making payments that do not result in an increase of the principal balance. The occurrence of an event requiring disclosure of additional separate periodic payments or ranges of payments should be based on the assumption that the consumer will make payments as scheduled or, if applicable, elect to make the periodic payments that would extend the negative amortization period to the latest time permitted under the terms of the legal obligation. The occurrence of all subsequent events requiring disclosure of additional separate periodic payments or ranges of payments should be based on this assumption. The table required by §1026.37(c) should also reflect any balloon payment that would result from such scheduled payments or election. See §1026.37(c)(1)(ii)(A) for special rules regarding disclosure of balloon payments.

3. *Interest only.* In a loan that contains an interest only feature, periodic principal and interest payments may change for purposes of §1026.37(c)(1)(i)(A) when the interest only period ends, meaning the consumer must begin making payments that do not defer repayment of principal.

Paragraph 37(c)(1)(i)(B).

1. *Balloon payment.* For purposes of §1026.37(c)(1)(i)(B), whether a balloon payment occurs is determined pursuant to §1026.37(b)(5) and its commentary. For guidance on the amount of a balloon payment disclosed on the table required by §1026.37(c), see comment 37(c)(2)(i)–3.

Paragraph 37(c)(1)(i)(C).

1. *General.* ''Mortgage insurance or any functional equivalent'' means the amounts identified in §1026.4(b)(5). For purposes of §1026.37(c), ''mortgage insurance or any functional equivalent'' includes any mortgage guarantee that provides coverage similar to mortgage insurance (such as a United States Department of Veterans Affairs or United States Department of Agriculture guarantee), even if not technically considered insurance under State or other applicable law. The fees for such a guarantee are included in ''mortgage insurance premiums.''

2. *Calculation of mortgage insurance termination.* For purposes of §1026.37(c)(1)(i)(C), mortgage insurance premiums should be calculated based on the declining principal balance that will occur as a result of changes to the interest rate and payment amounts, applying the interest rates applicable to the transaction. Such calculation should take into account any initial discounted or premium interest rate. For example, for an adjustable rate transaction that has a discounted interest rate during an initial five-year period, the creditor makes the calculation using a composite rate based on the rate in effect during the initial five-year period and, thereafter, the fully-indexed rate, unless otherwise required by applicable law. For guidance on calculation of the amount of mortgage insurance premiums to disclose on the table required by §1026.37(c), see §1026.37(c)(2)(ii) and its commentary. See comment 37(b)(2)–1 for guidance regarding calculating the fully-indexed rate.

3. *Disclosure of mortgage insurance termination.* The table required by §1026.37(c) should reflect the consumer's mortgage insurance premiums until the date on which the creditor must automatically terminate coverage under applicable law, even though the consumer may have a right to request that the insurance be cancelled earlier. Unlike termination of mortgage insurance, a subsequent decline in the consumer's mortgage insurance premiums is not, by itself, an event that requires the disclosure of additional separate periodic payments or ranges of payments in the table required by §1026.37(c). For example, some mortgage insurance programs annually adjust premiums based on the declining loan balance. Such annual adjustment to the amount of premiums would not require a separate disclosure of a periodic payment or range payments.

Paragraph 37(c)(1)(i)(D).

1. *Anniversary of the due date of initial periodic payment.* Section 1026.37(c)(1)(i)(D) provides that the anniversary of the due date of the initial periodic payment or range of payments that immediately follows the occurrence of multiple events described in §1026.37(c)(1)(i)(A) during a single year is an event that requires disclosure of additional periodic payments or ranges of payments. Section 1026.37(c)(1)(i)(A) provides that a potential change in the periodic principal and interest payment is an event requiring disclosure of additional separate periodic payments. See comment 37(c)(1)(iii)(B)–1 for an example of the application of §1026.37(c)(1)(i)(D).

Paragraph 37(c)(1)(ii).

Paragraph 37(c)(1)(ii)(A).

1. *Special rule regarding balloon payments that are final payments.* Section 1026.37(c)(1)(ii)(A) is an exception to the general rule in §1026.37(c)(1)(ii), and requires that a balloon payment that is scheduled as a final payment under the terms of the legal obligation is always disclosed as a separate periodic payment or range of payments, in which case the creditor discloses as a single range of payments all events requiring disclosure of additional separate periodic payments or ranges of payments described in §1026.37(c)(1)(i)(A) through (D), other than the final balloon payment, occurring after the second separate periodic payment or range of payments disclosed. Balloon payments that are not scheduled as final payments under the terms of the legal obligation, such as a balloon payment due at the scheduled recast of a loan that permits negative amortization, are disclosed pursuant to the general rule in §1026.37(c)(1)(ii). A balloon payment that is a final payment is disclosed as a single payment, and not combined with other changes to periodic principal and interest payments and disclosed as a range.

2. *Example.* Assume a loan with a term of seven years, where the interest rate adjusts each year for the first three years and is fixed thereafter, that provides for a balloon payment as the final payment, where no mortgage insurance is required, and no escrow account will be established for the payment of charges described in §1026.37(c)(4)(ii). The creditor discloses on the table required by §1026.37(c) in the first column the initial periodic payment or range of payments, in the second column the periodic payment or range of payments that would apply after the first interest rate adjustment, in the third column the periodic payments or ranges of payments that would apply after the second interest rate adjustment until the final balloon payment (disclosed as a single range of payments), and in the fourth column the final balloon payment. Although the balloon payment that is scheduled as the final payment under the terms of the legal

obligation occurs after the third separate periodic payment or range of payments, the creditor discloses the final balloon payment as a separate event requiring disclosure of additional periodic payments or range of payments due to the special rule in §1026.37(c)(1)(ii)(A).

Paragraph 37(c)(1)(ii)(B).

1. *Special rule regarding disclosure of the automatic termination of mortgage insurance.* Section 1026.37(c)(1)(ii)(B) is an exception to the general rule in §1026.37(c)(1)(ii), and requires that the automatic termination of mortgage insurance or any functional equivalent under applicable law is disclosed as a separate periodic payment or range of payments only if the total number of separate periodic payments or ranges of payments otherwise disclosed does not exceed three. This means that the automatic termination of mortgage insurance or any functional equivalent under applicable law is disclosed as its own event only if there is a column in which to disclose it, *i.e.*, there are only three other separate periodic payments or ranges of payments that are required to be disclosed. Where the automatic termination of mortgage insurance or any functional equivalent under applicable law is not disclosed as a separate periodic payment or range of payments, the absence of a required mortgage insurance payment is disclosed with the next disclosed event requiring disclosure of additional separate periodic payments or ranges of payments, as applicable.

2. *Examples of special rule regarding disclosure of the automatic termination of mortgage insurance.* i. Assume a step-rate loan with a 30-year term with an introductory interest rate that lasts for five years, a different interest rate that applies for the next five-year period, a final interest rate adjustment after 10 years, where mortgage insurance would terminate for purposes of §1026.37(c)(1)(i)(C) in the third year, and where no escrow account would be established for the payment of charges described in §1026.37(c)(4)(ii). The creditor would disclose on the table required by §1026.37(c) the initial periodic payment for years one through three (reflecting the principal and interest payment corresponding to the introductory interest rate and payments for mortgage insurance premiums), an additional separate periodic payment for years four and five (reflecting the principal and interest payment corresponding to the introductory rate and no payments for mortgage insurance premiums), an additional separate periodic payment or range of payments for years six through 10 (reflecting the principal and interest payment corresponding to the interest rate that would apply after the introductory rate), and an additional separate periodic payment or range of payments for years 11 through 30 (reflecting the principal and interest payment corresponding to the interest rate that would apply after the second interest rate adjustment until the end of the loan term). In this example, the automatic termination of mortgage insurance would be separately disclosed on the table required by §1026.37(c) because the total number of separate periodic payments or ranges of payments otherwise disclosed pursuant to §1026.37(c)(1) does not exceed three.

ii. Assume the same loan as above, except that the terms of the legal obligation also provide for a third interest rate adjustment that would occur after 15 years. The creditor would disclose on the table required by §1026.37(c) the initial periodic payment for years one through five (reflecting the principal and interest payment corresponding to the introductory interest rate and payments for mortgage insurance premiums), an additional separate periodic payment or range of payments for years six through 10 (reflecting the principal and interest payment corresponding to the interest rate that would apply after the first interest rate adjustment and no payments for mortgage insurance premiums), an additional separate periodic payment or range of payments for years 11 through 15 (reflecting the principal and interest payment corresponding to the interest rate that would apply after the second interest rate adjustment), and an additional separate periodic payment or range of payments for years 16 through 30 (reflecting the principal and interest payment corresponding to the interest rate that would apply after the third interest rate adjustment until the end of the loan term). In this example, the automatic termination of mortgage insurance would not be separately disclosed on the table required by §1026.37(c) because the total number of separate periodic payments or ranges of payments otherwise disclosed pursuant to §1026.37(c)(1) exceeds three. However, the creditor would disclose the termination of mortgage insurance beginning with the periodic payment or range of payments for years six through 10, which is the next disclosed event requiring disclosure of additional separate periodic payments or ranges of payments.

Paragraph 37(c)(1)(iii).

1. *Ranges of payments.* When a range of payments is required to be disclosed under §1026.37(c)(1), §1026.37(c)(1)(iii) requires the creditor to disclose the minimum and maximum amount for both the principal and interest payment under §1026.37(c)(2)(i) and the total periodic payment under §1026.37(c)(2)(iv). The amount required to be disclosed for mortgage insurance premiums pursuant to §1026.37(c)(2)(ii) and the amount payable into an escrow account pursuant to §1026.37(c)(2)(iii) shall not be disclosed as a range.

Paragraph 37(c)(1)(iii)(B).

1. *Multiple events occurring in a single year.* If multiple changes to periodic principal and

interest payments would result in more than one separate periodic payment or range of payments in a single year, §1026.37(c)(1)(iii)(B) requires the creditor to disclose the range of payments that would apply during the year in which the events occur. For example:

i. Assume a loan with a 30-year term with a payment that adjusts every month for the first 12 months and is fixed thereafter, where mortgage insurance is not required, and where no escrow account would be established for the payment of charges described in §1026.37(c)(4)(ii). The creditor discloses as a single range of payments the initial periodic payment and the periodic payment that would apply after each payment adjustment during the first 12 months, which single range represents the minimum payment and maximum payment, respectively. Under §1026.37(c)(1)(i)(D), the creditor also discloses, as an additional separate periodic payment or range of payments, the periodic principal and interest payment or range of payments that would apply after the payment becomes fixed.

ii. Assume instead a loan with a 30-year term with a payment that adjusts upward at three months and at six months and is fixed thereafter, where mortgage insurance is not required, and where no escrow account would be established for the payment of charges described in §1026.37(c)(4)(ii). The creditor discloses as a single range of payments the initial periodic payment, the periodic payment that would apply after the payment adjustment that occurs at three months, and the periodic payment that would apply after the payment adjustment that occurs at six months, which single range represents the minimum payment and maximum payment, respectively, which would apply during the first year of the loan. Under §1026.37(c)(1)(i)(D), the creditor also discloses as an additional separate periodic payment or range of payments, the principal and interest payment that would apply on the first anniversary of the due date of the initial periodic payment or range of payments, because that is the anniversary that immediately follows the occurrence of the multiple payments or ranges of payments that occurred during the first year of the loan.

iii. Assume that the same loan has a payment that, instead of becoming fixed after the adjustment at six months, adjusts once more at 18 months and becomes fixed thereafter. The creditor discloses the same single range of payments for year one. Under §1026.37(c)(1)(i)(D), the creditor separately discloses the principal and interest payment that would apply on the first anniversary of the due date of the initial periodic payment in year two. Under §1026.37(c)(1)(i)(A) and (c)(3)(ii), beginning in the next year in the sequence (*i.e.*, in year three), the creditor separately discloses the periodic payment that would apply after the payment adjustment that occurs at 18 months. See comment 37(c)(3)(ii)–1 regarding subheadings that state the years.

Paragraph 37(c)(1)(iii)(C).

1. *Adjustable rate mortgages.* For an adjustable rate loan, the periodic principal and interest payment at each time the interest rate may change will depend on the rate that applies at the time of the adjustment, which is not known at the time the disclosure is provided. As a result, the creditor discloses the minimum and maximum periodic principal and interest payment that could apply during each period disclosed pursuant to §1026.37(c)(1) after the first period.

37(c)(2) Itemization.

Paragraph 37(c)(2)(i).

1. *General rule for adjustable rate loans.* For an adjustable rate loan, in disclosing the maximum possible payment for principal and interest under §1026.37(c), the creditor assumes that the interest rate will rise as rapidly as possible after consummation, taking into account the terms of the legal obligation, including any applicable caps on interest rate adjustments and lifetime interest rate cap. For a loan with no lifetime interest rate cap, the maximum rate is determined by reference to other applicable laws, such as State usury law. In disclosing the minimum payment for purposes of §1026.37(c), the creditor assumes that the interest rate will decrease as rapidly as possible after consummation, taking into account any introductory rates, caps on interest rate adjustments, and lifetime interest rate floor. For an adjustable rate loan based on an index that has no lifetime interest rate floor, the minimum interest rate is equal to the margin.

2. *Special rule for adjustable rate loans with negative amortization features.* Section 1026.37(c)(2)(i)(B) provides a special rule for calculation of the maximum principal and interest payment in an adjustable rate loan that contains a negative amortization feature. That section provides that the maximum amounts payable for principal and interest after the negative amortization period ends are calculated using the maximum principal amount permitted under the terms of the legal obligation at the end of the negative amortization period. See section §1026.37(c)(1)(i)(A) and associated commentary for guidance regarding when the negative amortization period ends for purposes of §1026.37(c)(2). For example, if the maximum principal balance for the last payment in the negative amortization period is achieved at an interest rate that is not the maximum interest rate permitted under the terms of the legal obligation before the negative amortization period ends, future events requiring disclosure of additional, separate periodic payments or ranges of payments assume that the interest rate in effect at the

end of the negative amortization period was such interest rate, and not the maximum possible interest rate. After the end of the negative amortization period, the general rule under §1026.37(c)(2)(i)(A) regarding assumptions of interest rate changes for the maximum principal and interest payment to be disclosed applies from such interest rate. The minimum payment in an adjustable rate loan that contains a negative amortization feature is determined pursuant to the general rule under §1026.37(c)(2)(i)(A).

3. *Disclosure of balloon payment amounts.* Although the existence of a balloon payment is determined pursuant to §1026.37(b)(5) and its commentary (*see* comment 37(c)(1)(i)(B)–1), balloon payment amounts to be disclosed under §1026.37(c) are calculated in the same manner as periodic principal and interest payments under §1026.37(c)(2)(i). For example, for a balloon payment amount that can change depending on previous interest rate adjustments that are based on the value of an index at the time of the adjustment, the balloon payment amounts are calculated using the assumptions for minimum and maximum interest rates described in §1026.37(c)(2)(i) and its commentary, and should be disclosed as a range of payments.

Paragraph 37(c)(2)(ii).

1. *Mortgage insurance disclosure.* Mortgage insurance premiums should be reflected on the disclosure required by §1026.37(c) even if no escrow account is established for the payment of mortgage insurance premiums. If the consumer is not required to purchase mortgage insurance or any functional equivalent, the creditor discloses the mortgage insurance premium amount as "0." If the creditor is disclosing the automatic termination or the absence of mortgage insurance or any functional equivalent under applicable law or the absence of mortgage insurance or any functional equivalent after coverage has terminated, the creditor discloses the mortgage insurance premium as "-."

2. *Relationship to principal and interest disclosure.* The creditor discloses mortgage insurance premiums pursuant to §1026.37(c)(2)(ii) on the same periodic basis that payments for principal and interest are disclosed pursuant to §1026.37(c)(2)(i), even if mortgage insurance premiums are actually paid on some other periodic basis.

Paragraph 37(c)(2)(iii).

1. *Escrow disclosure.* The disclosure described in §1026.37(c)(2)(iii) is required only if the creditor will establish an escrow account for the payment of some or all of the charges described in §1026.37(c)(4)(ii). If no escrow account for the payment of some or all such charges will be established, the creditor discloses the escrow amount as "0." If an escrow account is established for the payment of amounts described in §1026.37(c)(4)(ii), but no escrow payment is required with a particular periodic payment (such as with a final balloon payment) or range of payments, the escrow payment should be disclosed as "—."

37(c)(3) Subheadings.

Paragraph 37(c)(3)(ii).

1. *Years.* Section 1026.37(c)(3)(ii) requires that each separate periodic payment or range of payments be disclosed under a subheading that states the years during which that payment or range of payments will apply and that such subheadings be stated in a sequence of whole years from the due date of the initial periodic payment. Therefore, for purposes of §1026.37(c), "year" is defined as the twelve-month interval beginning on the due date of the initial periodic payment, and the next whole year begins each anniversary thereafter. If an event requiring the disclosure of an additional separate periodic payment or range of payments occurs on a date other than the anniversary of the due date of the initial periodic payment, and no other events occur during that single year requiring disclosure of multiple events under §1026.37(c)(1)(iii)(B), such event is disclosed beginning in the next year in the sequence, because the separate periodic payment or range of payments that applied during the previous year will also apply during a portion of that year. For example:

i. Assume a fixed rate loan with a term of 124 months (10 years, four months). The creditor would label the disclosure of periodic payments as "Years 1–11."

ii. Assume a loan with a 30-year term that does not require mortgage insurance and requires interest only payments for the first 60 months from the due date of the initial periodic payment, then requires fixed, fully amortizing payments of principal and interest beginning at the 61st month for the duration of the loan, the creditor would label the first disclosure of periodic payments as "Years 1–5" (including the term "only interest" pursuant to §1026.37(c)(2)(i)) and the second disclosure of periodic payments or range of payments as "Years 6–30." If that loan requires interest only payments for the first 54 months from the due date of the initial periodic payment, then requires fixed, fully amortizing payments of principal and interest for the duration of the loan, because the change in the periodic payment occurs on a date other than the anniversary of the due date of the initial periodic payment and the previous payment applies during that year, the creditor would likewise label the first disclosure of periodic payments as "Years 1–5" (including the term "only interest" pursuant to §1026.37(c)(2)(i)) and the second disclosure of periodic payments or range of payments as "Years 6–30." If the loan that requires interest only payments for the first 54 months also requires mortgage insurance that would automatically terminate under applicable law after the 100th month from the due date of the initial periodic payment, the creditor would label the first disclosure of periodic payments as ''Years 1–5'' (including the term ''only interest'' pursuant to §1026.37(c)(2)(i)), the second disclosure of periodic payments or range of payments as ''Years 6–9,'' and the third disclosure of periodic payments or range of payments as ''Years 10–30.''

2. *Loans with variable terms.* If the loan term may increase based on an adjustment of the interest rate, the creditor must disclose the maximum loan term possible under the legal obligation. To calculate the maximum loan term, the creditor assumes that the interest rate rises as rapidly as possible, taking into account the terms of the legal obligation, including any applicable caps on interest rate adjustments and lifetime interest rate cap. *See* comment 37(a)(8)–2.

37(c)(4) Taxes, insurance, and assessments.

Paragraph 37(c)(4)(ii).

1. *Definition of taxes, insurance, and assessments.* See the commentary under §1026.43(b)(8) for guidance on the charges that are included in taxes, insurance, and assessments for purposes of §1026.37(c)(4)(ii), except that the portion of that commentary related to amounts identified in §1026.4(b)(5) is inapplicable to the disclosure required by §1026.37(c)(4)(ii).

Paragraph 37(c)(4)(iv).

1. *Description of other amounts.* Section 1026.37(c)(4)(iv) requires the creditor to disclose a statement of whether the amount disclosed pursuant to §1026.37(c)(4)(ii) includes payments for property taxes, amounts identified in §1026.4(b)(8) (homeowner's insurance premiums), and other amounts described in §1026.37(c)(4)(ii), along with a description of any such other amounts. If the amount disclosed pursuant to §1026.37(c)(4)(ii) requires the creditor to disclose a description of more than one amount other than amounts for payment of property taxes or homeowner's insurance premiums, the creditor may disclose a descriptive statement of one such amount along with an indication that additional amounts are also included, such as by using the phrase ''and additional costs.''

2. *Amounts paid by the creditor using escrow account funds.* Section 1026.37(c)(4)(iv) requires the creditor to disclose an indication of whether the amounts disclosed under §1026.37(c)(4)(ii) will be paid by the creditor using escrow account funds. If only a portion of the amounts disclosed under §1026.37(c)(4)(ii), including, without limitation, property taxes, homeowner's insurance, and assessments, will be paid by the creditor using escrow account funds, the creditor may indicate that only a portion of the amounts disclosed will be paid using escrow account funds, such as by using the word ''some.''

37(d) Costs at closing.

37(d)(2) Optional alternative table for transactions without a seller or for simultaneous subordinate financing.

1. *Optional use.* The optional alternative disclosure of the estimated cash to close provided for in §1026.37(d)(2) may be used by a creditor only in a transaction without a seller or a simultaneous subordinate financing transaction. In a purchase transaction, the optional alternative disclosure may be used for the simultaneous subordinate financing Loan Estimate only if the first-lien Closing Disclosure will record the entirety of the seller's transaction. Creditors may only use this alternative estimated cash to close disclosure in conjunction with the alternative disclosure under §1026.37(h)(2).

2. *Method of indication.* The indication of whether the estimated cash is either due from or payable to the consumer can be made by the use of check boxes as shown in form H–24(D) of appendix H to this part.

37(f) Closing cost details; loan costs.

1. *General description.* The items disclosed under §1026.37(f) include services that the creditor or mortgage broker require for consummation, such as underwriting, appraisal, and title services.

2. *Mortgage broker.* Commentary under §1026.19(e)(1)(ii) discusses the requirements and responsibilities of mortgage brokers that provide the disclosures required by §1026.19(e), which include the disclosures set forth in §1026.37(f).

3. *Construction loan inspection and handling fees.* Inspection and handling fees for the staged disbursement of construction loan proceeds, including draw fees, are loan costs associated with the transaction for purposes of §1026.37(f). If inspection and handling fees are collected at or before consummation, the total of such fees is disclosed in the loan costs table. If inspection and handling fees will be collected after consummation, the total of such fees is disclosed in a separate addendum and the fees are not counted for purposes of the calculating cash to close table. See comment 37(f)(6)–3 for a description of an addendum used to disclose inspection and handling fees that will be collected after consummation. See also comments 38(f)–2 and app. D–7.vii. If the number of inspections and disbursements is not known at the time the disclosures are provided, the creditor discloses the fees that will be collected based on the best information reasonably available to the creditor at the time the disclosure is provided. *See* comment 19(e)(1)(i)–1. See §1026.17(e) and its commentary for an explanation of the effect of subsequent events that cause inaccuracies in disclosures.

37(f)(1) Origination charges.

1. *Origination charges.* Charges included under the subheading ''Origination Charges'' pursuant to §1026.37(f)(1) are those charges paid by the consumer to each creditor and

loan originator for originating and extending the credit, regardless of how such fees are denominated. In accordance with §1026.37(o)(4), the dollar amounts disclosed under §1026.37(f)(1) must be rounded to the nearest whole dollar and the percentage amounts must be disclosed as an exact number up to two or three decimal places, except that decimal places shall not be disclosed if the percentage is a whole number. See comment 19(e)(3)(i)–3 for a discussion of when a fee is considered to be ''paid to'' a person. See §1026.36(a) and associated commentary for a discussion of the meaning of ''loan originator'' in connection with limits on compensation in a consumer credit transaction secured by a dwelling.

2. *Indirect loan originator compensation.* Only charges paid directly by the consumer to compensate a loan originator are included in the amounts listed under §1026.37(f)(1). Compensation of a loan originator paid indirectly by the creditor through the interest rate is not itemized on the Loan Estimate required by §1026.19(e). However, pursuant to §1026.38(f)(1), such compensation is itemized on the Closing Disclosure required by §1026.19(f).

3. *Description of charges.* Other than for points charged in connection with the transaction to reduce the interest rate, for which specific language must be used, the creditor may use a general label that uses terminology that, under §1026.37(f)(5), is consistent with §1026.17(a)(1), clearly and conspicuously describes the service that is disclosed as an origination charge pursuant to §1026.37(f)(1). Items that are listed under the subheading ''Origination Charges'' may include, for example, application fee, origination fee, underwriting fee, processing fee, verification fee, and rate-lock fee.

4. *Points.* If there are no points charged in connection with the transaction to reduce the interest rate, the creditor leaves blank the percentage of points used in the label and the dollar amount disclosed under §1026.37(f)(1)(i).

5. *Itemization.* Creditors determine the level of itemization of ''Origination Charges'' that is appropriate under §1026.37(f)(1) in relation to charges paid by the consumer to the creditor, subject to the limitations in §1026.37(f)(1)(ii). For example, the following charges should be itemized separately: compensation paid directly by a consumer to a loan originator that is not also the creditor; or a charge imposed to pay for a loan level pricing adjustment assessed on the creditor, which the creditor passes onto the consumer as a charge at consummation and not as an adjustment to the interest rate.

37(f)(2) Services you cannot shop for.

1. *Services disclosed.* Items included under the subheading ''Services You Cannot Shop For'' pursuant to §1026.37(f)(2) are for those services that the creditor requires in connection with the transaction that would be provided by persons other than the creditor or mortgage broker and for which the creditor does not permit the consumer to shop in accordance with §1026.19(e)(1)(vi). Comment 19(e)(1)(vi)–1 clarifies that a consumer is not permitted to shop if the consumer must choose a provider from a list provided by the creditor. Comment 19(e)(3)(i)–1 addresses determining good faith in providing estimates under §1026.19(e), including estimates for services for which the consumer cannot shop. Comments 19(e)(3)(iv)–1 through –3 discuss limits and requirements applicable to providing revised estimates for services for which the consumer cannot shop.

2. *Examples of charges.* Examples of the services and amounts to be disclosed pursuant to §1026.37(f)(2) might include an appraisal fee, appraisal management company fee, credit report fee, flood determination fee, government funding fee, homeowner's association certification fee, lender's attorney fee, tax status research fee, third-party subordination fee, title—closing protection letter fee, title—lender's title insurance policy, and an upfront mortgage insurance fee, provided that the fee is charged at consummation and is not a prepayment of future premiums over a specific future time period or a payment into an escrow account. Government funding fees include a United States Department of Veterans Affairs or United States Department of Agriculture guarantee fee, or any other fee paid to a government entity as part of a governmental loan program, that is paid at consummation.

3. *Title insurance services.* The services required to be labeled beginning with ''Title –'' pursuant to §1026.37(f)(2) or (3) are those required for the issuance of title insurance policies to the creditor in connection with the consummation of the transaction or for conducting the closing. These services may include, for example:

i. Examination and evaluation, based on relevant law and title insurance underwriting principles and guidelines, of the title evidence to determine the insurability of the title being examined and what items to include or exclude in any title commitment and policy to be issued;

ii. Preparation and issuance of the title commitment or other document that discloses the status of the title as it is proposed to be insured, identifies the conditions that must be met before the policy will be issued, and obligates the insurer to issue a policy of title insurance if such conditions are met;

iii. Resolution of underwriting issues and taking the steps needed to satisfy any conditions for the issuance of the policies;

iv. Preparation and issuance of the policy or policies of title insurance; and

v. Premiums for any title insurance coverage for the benefit of the creditor.

4. *Lender's title insurance policy*. Section 1026.37(f)(2) and (3) requires disclosure of the amount the consumer will pay for the lender's title insurance policy. However, an owner's title insurance policy that covers the consumer and is not required to be purchased by the creditor is only disclosed pursuant to §1026.37(g). Accordingly, the creditor must quote the amount of the lender's title insurance coverage pursuant to §1026.37(f)(2) or (3) as applicable based on the type of lender's title insurance policy required by its underwriting standards for that loan. The amount disclosed for the lender's title insurance policy pursuant to §1026.37(f)(2) or (3) is the amount of the premium without any adjustment that might be made for the simultaneous purchase of an owner's title insurance policy. This amount may be disclosed as ''Title —Premium for Lender's Coverage,'' or in any similar manner that clearly indicates the amount of the premium disclosed pursuant to §1026.37(f)(2) is for the lender's title insurance coverage. See comment 37(g)(4)–1 for a discussion of the disclosure of the premium for an owner's title insurance policy that covers the consumer.

37(f)(3) Services you can shop for.

1. *Services disclosed*. Items included under the subheading ''Services You Can Shop For'' pursuant to §1026.37(f)(3) are for those services: That the creditor requires in connection with its decision to make the loan; that would be provided by persons other than the creditor or mortgage broker; and for which the creditor allows the consumer to shop in accordance with §1026.19(e)(1)(vi). Comments 19(e)(3)(ii)–1 through –3, and –5 address the determination of good faith in providing estimates of charges for services for which the consumer can shop. Comment 19(e)(3)(iii)–2 discusses the determination of good faith when the consumer chooses a provider that is not on the list the creditor provides to the consumer when the consumer is permitted to shop consistent with §1026.19(e)(1)(vi). Comments 19(e)(3)(iv)–1 through –3 discuss limits and requirements applicable to providing revised estimates for services for which the consumer can shop.

2. *Example of charges*. Examples of the services to be listed under this subheading pursuant to §1026.37(f)(3) might include a pest inspection fee, survey fee, title—closing agent fee, and title—closing protection letter fee.

3. *Title insurance*. See comments 37(f)(2)–3 and –4 for guidance on services that are to be labeled beginning with ''Title —'' and on calculating and labeling the amount disclosed for lender's title insurance pursuant to §1026.37(f)(3). See comment 37(g)(4)–1 for a discussion of the disclosure of the premium for owner's title insurance coverage.

37(f)(5) Item descriptions and ordering.

1. *Clear and conspicuous standard*. Section 1026.37(f)(5) requires creditors to label the loan costs disclosed pursuant §1026.37(f) using terminology that describes each item. A creditor complies with this requirement if it uses terminology that is clear and conspicuous, consistent with §1026.17(a)(1), and describes the service or administrative function that the charge pays for in a manner that is reasonably understood by consumers within the space provided in form H–24 of appendix H to this part. For example, if a creditor imposes a fee on a consumer to cover the costs associated with underwriting the transaction, the creditor would comply with §1026.37(f)(5) if it labeled the cost ''Underwriting Fee.'' A label that uses abbreviations or acronyms that are not reasonably understood by consumers would not comply with §1026.37(f)(5).

37(f)(6) Use of addenda.

1. *State law disclosures*. If a creditor is required by State law to make additional disclosures that, pursuant to §1026.37(f)(6)(i), cannot be included in the disclosures required under §1026.37(f), the creditor may make those additional State law disclosures on a document whose pages are separate from, and are not presented as part of, the disclosures prescribed in §1026.37, for example, as an addendum to the Loan Estimate. *See* comment 37(o)(1)–1.

2. *Reference to addendum*. If an addendum is used as permitted under §1026.37(f)(6)(ii), an example of a label that complies with the requirement for an appropriate reference on the last line is: ''See attached page for additional items you can shop for.''

3. *Addendum for post-consummation inspection and handling fees*. A creditor makes the disclosures required by §1026.37(f) and comment 37(f)–3 for construction loan inspection and handling fees collected after consummation by disclosing the total of such fees under the heading ''Inspection and Handling Fees Collected After Closing'' in an addendum, which may be the addendum pursuant to §1026.37(f)(6) or any other addendum or additional page under §1026.37. *See* comment 37(o)(1)–1. For purposes of comment 38(f)–2, the addendum may be any addendum or additional page under §1026.38. If the actual amount of such fees is not known at the time the disclosures are provided, the disclosures in the addendum are based upon the best information reasonably available to the creditor at the time the disclosure is provided. *See* comment 19(e)(1)(i)–1. For example, such information could include amounts the creditor has previously charged in similar construction transactions or the amount of estimated inspection and handling fees used by the creditor for purposes of setting the construction loan's commitment amount.

37(g) Closing cost details; other costs.

1. *General description*. The items listed under the heading of ''Other Costs'' pursuant to §1026.37(g) include services that are ancillary to the creditor's decision to evaluate the collateral and the consumer for the loan.

The amounts disclosed for these items are: Established by government action; determined by standard calculations applied to ongoing fixed costs; or based on an obligation incurred by the consumer independently of any requirement imposed by the creditor. Except for prepaid interest under §1026.37(g)(2)(iii), or charges for optional credit insurance provided by the creditor, the creditor does not retain any of the amounts or portions of the amounts disclosed as other costs.

2. *Charges pursuant to property contract*. The creditor is required to disclose charges that are described in §1026.37(g)(1) through (3). Other charges that are required to be paid at or before closing pursuant to the property contract for sale between the consumer and seller are disclosed on the Loan Estimate to the extent the creditor has knowledge of those charges when it issues the Loan Estimate, consistent with the good faith standard under §1026.19(e). A creditor has knowledge of those charges where, for example, it has the real estate purchase and sale contract. *See also* §1026.37(g)(4) and comment 37(g)(4)–3.

37(g)(1) Taxes and other government fees.

1. *Recording fees*. Recording fees listed under §1026.37(g)(1) are fees assessed by a government authority to record and index the loan and title documents as required under State or local law. Recording fees are assessed based on the type of document to be recorded or its physical characteristics, such as the number of pages. Unlike transfer taxes, recording fees are not based on the sale price of the property or loan amount. For example, a fee for recording a subordination agreement that is $20, plus $3 for each page over three pages, is a recording fee, but a fee of $1,250 based on 0.5 percent of the loan amount is a transfer tax, and not a recording fee.

2. *Other government charges*. Any charges or fees imposed by a State or local government that are not transfer taxes are aggregated with recording fees and disclosed under §1026.37(g)(1)(i).

3. *Transfer taxes—terminology*. In general, transfer taxes listed under §1026.37(g)(1) are State and local government fees on mortgages and home sales that are based on the loan amount or sales price, while recording fees are State and local government fees for recording the loan and title documents. The name that is used under State or local law to refer to these amounts is not determinative of whether they are disclosed as transfer taxes or as recording fees and other taxes under §1026.37(g)(1).

4. *Transfer taxes—consumer*. Only transfer taxes paid by the consumer are disclosed on the Loan Estimate pursuant to §1026.37(g)(1). State and local government transfer taxes are governed by State or local law, which determines if the seller or consumer is ultimately responsible for paying the transfer taxes. For example, if State law indicates a lien can attach to the consumer's acquired property if the transfer tax is not paid, the transfer tax is disclosed. If State or local law is unclear or does not specifically attribute transfer taxes to the seller or the consumer, the creditor is in compliance with requirements of §1026.37(g)(1) if the amount of the transfer tax disclosed is not less than the amount apportioned to the consumer using common practice in the locality of the property.

5. *Transfer taxes—seller*. Transfer taxes paid by the seller in a purchase transaction are not disclosed on the Loan Estimate under §1026.37(g)(1), but are disclosed on the Closing Disclosure pursuant to §1026.38(g)(1)(ii).

6. *Deletion and addition of items.* The lines and labels required by §1026.37(g)(1) may not be deleted, even if recording fees or transfer taxes are not charged to the consumer. No additional items may be listed under the subheading in §1026.37(g)(1).

37(g)(2) Prepaids.

1. *Examples*. Prepaid items required to be disclosed pursuant to §1026.37(g)(2) include the interest due at consummation for the period of time before interest begins to accrue for the first scheduled periodic payment and certain periodic charges that are required by the creditor to be paid at consummation. Each periodic charge listed as a prepaid item indicates, as applicable, the time period that the charge will cover, the daily amount, the percentage rate of interest used to calculate the charge, and the total dollar amount of the charge. Examples of periodic charges that are disclosed pursuant to §1026.37(g)(2) include:

i. Real estate property taxes due within 60 days after consummation of the transaction;

ii. Past-due real estate property taxes;

iii. Mortgage insurance premiums;

iv. Flood insurance premiums; and

v. Homeowner's insurance premiums.

2. *Interest rate*. The interest rate disclosed pursuant to §1026.37(g)(2)(iii) is the same interest rate disclosed pursuant to §1026.37(b)(2).

3. *Terminology*. For purposes of §1026.37(g)(2), the term ''property taxes'' has the same meaning as in §1026.43(b)(8) and further described in comment 43(b)(8)–2; the term ''homeowner's insurance'' means the amounts identified in §1026.4(b)(8); and the term ''mortgage insurance'' has the same meaning as ''mortgage insurance or any functional equivalent'' in §1026.37(c), which means the amounts identified in §1026.4(b)(5).

4. *Deletion of items.* The lines and labels required by §1026.37(g)(2) may not be deleted, even if amounts for those labeled items are not charged to the consumer. If an amount for a labeled item is not charged to the consumer, the time period, daily amount, and percentage used in the labels are left blank.

37(g)(3) Initial escrow payment at closing.

1. *Listed item not charged.* Pursuant to §1026.37(g)(3), each periodic charge to be included in the escrow or reserve account must be itemized under the ''Initial Escrow Payment at Closing'' subheading, with a relevant label, monthly payment amount, and number of months expected to be collected at consummation. If an item described in §1026.37(g)(3)(i) through (iii) is not charged to the consumer, the monthly payment amount and time period used in the labels are left blank.

2. *Aggregate escrow account calculation.* The aggregate escrow account adjustment required under §1026.38(g)(3) and 12 CFR 1024.17(d)(2) is not included on the Loan Estimate under §1026.37(g)(3).

3. *Terminology.* As used in §1026.37(g)(3), the term ''property taxes'' has the same meaning as in §1026.43(b)(8) and further described in comment 43(b)(8)–2; the term ''homeowner's insurance'' means the amounts identified in §1026.4(b)(8); and the term ''mortgage insurance'' has the same meaning as ''mortgage insurance or any functional equivalent'' in §1026.37(c).

4. *Deletion of items.* The lines and labels required by §1026.37(g)(3) may not be deleted, even if amounts for those labeled items are not charged to the consumer.

5. *Escrowed tax payments for different time frames.* Payments for property taxes that are paid at different time periods can be itemized separately when done in accordance with 12 CFR 1024.17, as applicable. For example, a general property tax covering a fiscal year from January 1 to December 31 can be listed as a property tax under §1026.37(g)(3)(i); and a separate property tax to fund schools that cover a fiscal year from November 1 to October 31 can be added as a separate item under §1026.37(g)(3)(v).

37(g)(4) Other.

1. *Owner's title insurance policy rate.* The amount disclosed for an owner's title insurance premium pursuant to §1026.37(g)(4) is based on a basic owner's policy rate, and not on an ''enhanced'' title insurance policy premium, except that the creditor may instead disclose the premium for an ''enhanced'' policy when the ''enhanced'' title insurance policy is required by the real estate sales contract, if such requirement is known to the creditor when issuing the Loan Estimate. This amount should be disclosed as ''Title—Owner's Title Policy (optional),'' or in any similar manner that includes the introductory description ''Title –'' at the beginning of the label for the item, the parenthetical description ''(optional)'' at the end of the label, and clearly indicates the amount of the premium disclosed pursuant to §1026.37(g)(4) is for the owner's title insurance coverage. See comment 37(f)(2)–4 for a discussion of the disclosure of the premium for lender's title insurance coverage.

2. *Simultaneous title insurance premium rate in purchase transactions.* The premium for an owner's title insurance policy for which a special rate may be available based on the simultaneous issuance of a lender's and an owner's policy is calculated and disclosed pursuant to §1026.37(g)(4) as follows:

i. The title insurance premium for a lender's title policy is based on the full premium rate, consistent with §1026.37(f)(2) or (f)(3).

ii. The owner's title insurance premium is calculated by taking the full owner's title insurance premium, adding the simultaneous issuance premium for the lender's coverage, and then deducting the full premium for lender's coverage.

3. *Designation of optional items.* Products disclosed under §1026.37(g)(4) for which the parenthetical description ''(optional)'' is included at the end of the label for the item include only items that are separate from any item disclosed on the Loan Estimate under paragraphs other than §1026.37(g)(4). For example, such items may include optional owner's title insurance, credit life insurance, debt suspension coverage, debt cancellation coverage, warranties of home appliances and systems, and similar products, when coverage is written in connection with a credit transaction that is subject to §1026.19(e). However, because the requirement in §1026.37(g)(4)(ii) applies to separate products only, additional coverage and endorsements on insurance otherwise required by the lender are not disclosed under §1026.37(g)(4). See comments 4(b)(7) and (b)(8)–1 through –3 and comments 4(b)(10)–1 and –2 for guidance on determining when credit life insurance, debt suspension coverage, debt cancellation coverage, and similar coverage is written in connection with a transaction subject to §1026.19(e).

4. *Examples.* Examples of other items that are disclosed under §1026.37(g)(4) if the creditor is aware of those items when it issues the Loan Estimate include commissions of real estate brokers or agents, additional payments to the seller to purchase personal property pursuant to the property contract, homeowner's association and condominium charges associated with the transfer of ownership, and fees for inspections not required by the creditor but paid by the consumer pursuant to the property contract. Although the consumer is obligated for these costs, they are not imposed upon the consumer by the creditor or loan originator. Therefore, they are not disclosed with the parenthetical description ''(optional)'' at the end of the label for the item, and they are disclosed pursuant to §1026.37(g) rather than §1026.37(f). Even if such items are not required to be disclosed on the Loan Estimate under §1026.37(g)(4), however, they may be required to be disclosed on the Closing Disclosure pursuant to §1026.38. Comment 19(e)(3)(iii)-3 discusses application of the

good faith requirement for services chosen by the consumer that are not required by the creditor.

37(g)(6) Total closing costs.

Paragraph 37(g)(6)(ii).

1. *Lender credits.* Section 1026.19(e)(1)(i) requires disclosure of lender credits as provided in §1026.37(g)(6)(ii). Such lender credits include non-specific lender credits as well as specific lender credits. *See* comment 19(e)(3)(i)–5.

2. *Credits or rebates from the creditor to offset a portion or all of the closing costs.* For loans where a portion or all of the closing costs are offset by a credit or rebate provided by the creditor (sometimes referred to as ''no-cost'' loans), whether all or a defined portion of the closing costs disclosed under §1026.37(f) or (g) will be paid by a credit or rebate from the creditor, the creditor discloses such credit or rebate as a lender credit under §1026.37(g)(6)(ii). The creditor should ensure that the lender credit disclosed under §1026.37(g)(6)(ii) is sufficient to cover the estimated costs the creditor represented to the consumer as not being required to be paid by the consumer at consummation, regardless of whether such representations pertained to specific items.

37(g)(7) Item descriptions and ordering.

1. *Clear and conspicuous standard.* See comment 37(f)(5)–1 for guidance regarding the requirement to label items using terminology that describes each item.

37(g)(8) Use of addenda.

1. *State law disclosures.* If a creditor is required by State law to make additional disclosures that, pursuant to §1026.37(g)(8), cannot be included in the disclosures required under §1026.37(g), the creditor may make those additional State law disclosures on a separate document whose pages are physically separate from, and are not presented as part of, the disclosures prescribed in §1026.37. *See* comment 37(o)(1)–1.

37(h) Calculating cash to close.

37(h)(1) For all transactions.

1. *Labels for amounts disclosed.* Section 1026.37(h)(1) describes the amounts that are used to calculate the estimated amount of cash or other funds that the consumer must provide at consummation. The labels that are to be used under §1026.37(h)(1) are illustrated by form H–24(A) of appendix H to this part.

2. *Simultaneous subordinate financing.* On the Loan Estimate for simultaneous subordinate financing purchase transactions, the sale price disclosed under §1026.37(a)(7)(i) is not used under §1026.37(h)(1) for the calculating cash to close table calculations that include the sale price as a component of the calculation. For example, sale price is generally included in the closing costs financed calculation under §1026.37(h)(1)(ii) as a component of the estimated total amount of payments to third parties. However, for simultaneous subordinate financing transactions, the estimated total amount of payments to third parties would not include the sale price. The estimated total amount of payments to third parties only includes payments occurring in the simultaneous subordinate financing transaction other than payments toward the sale price.

37(h)(1)(ii) Closing costs financed.

1. *Calculation of amount.* The amount of closing costs financed disclosed under §1026.37(h)(1)(ii) is determined by subtracting the estimated total amount of payments to third parties not otherwise disclosed under §1026.37(f) and (g) from the loan amount disclosed under §1026.37(b)(1). The estimated total amount of payments to third parties includes the sale price disclosed under §1026.37(a)(7)(i), if applicable, unless otherwise excluded under comment 37(h)(1)–2. Other examples of payments to third parties not otherwise disclosed under §1026.37(f) and (g) include the amount of construction costs for transactions that involve improvements to be made on the property and payoffs of secured or unsecured debt. If the result of the calculation is zero or negative, the amount of $0 is disclosed under §1026.37(h)(1)(ii). If the result of the calculation is a positive number, that amount is disclosed as a negative number under §1026.37(h)(1)(ii), but only to the extent that the absolute value of the amount disclosed under §1026.37(h)(1)(ii) does not exceed the total amount of closing costs disclosed under §1026.37(g)(6).

2. *Loan amount.* The loan amount disclosed under §1026.37(b)(1), a component of the closing costs financed calculation, is the total amount the consumer will borrow, as reflected by the face amount of the note.

37(h)(1)(iii) Down payment and other funds from borrower.

1. *Down payment and funds from borrower calculation.* For purposes of §1026.37(h)(1)(iii)(A)(*1*), the down payment and funds from borrower amount is calculated as the difference between the sale price of the property disclosed under §1026.37(a)(7)(i) and the sum of the loan amount and any amount of existing loans assumed or taken subject to that will be disclosed on the Closing Disclosure under §1026.38(j)(2)(iv). The calculation is independent of any loan program or investor requirements.

2. *Funds for borrower.* Section 1026.37(h)(1)(iii)(A)(*2*) requires that, in a purchase transaction as defined in paragraph (a)(9)(i) of this section that is a simultaneous subordinate financing transaction or that involves improvements to be made on the property, or when the sum of the loan amount disclosed under §1026.37(b)(1) and any amount of existing loans assumed or taken subject to that will be disclosed under §1026.38(j)(2)(iv) exceeds the sale price disclosed under §1026.37(a)(7)(i), the amount of funds from

the consumer is determined in accordance with §1026.37(h)(1)(v). Section 1026.37(h)(1)(iii)(B) requires that, for all non-purchase transactions, the amount of estimated funds from the consumer is determined in accordance with §1026.37(h)(1)(v). Pursuant to §1026.37(h)(1)(v), the amount to be disclosed under §1026.37(h)(1)(iii)(A)(*2*) or (B) is determined by subtracting the sum of the loan amount disclosed under §1026.37(b)(1) and any amount of existing loans assumed or taken subject to that will be disclosed under §1026.38(j)(2)(iv) (excluding any closing costs financed disclosed under §1026.37(h)(1)(ii)) from the total amount of all existing debt being satisfied in the transaction. The total amount of all existing debt being satisfied in the transaction is the sum of the amounts that will be disclosed on the Closing Disclosure in the summaries of transactions table under §1026.38(j)(1)(ii), (iii), and (v), as applicable. When the result of the calculation is positive, that amount is disclosed under §1026.37(h)(1)(iii) as ''Down Payment/Funds from Borrower,'' and $0 is disclosed under §1026.37(h)(1)(v) as ''Funds for Borrower.'' When the result of the calculation is negative, that amount is disclosed as a negative number under §1026.37(h)(1)(v) as ''Funds for Borrower,'' and $0 is disclosed under §1026.37(h)(1)(iii) as ''Down Payment/Funds from Borrower.'' When the result is $0, $0 is disclosed as ''Down Payment/Funds from Borrower'' and ''Funds for Borrower'' under §1026.37(h)(1)(iii) and (v), respectively.

37(h)(1)(iv) Deposit.

1. Section 1026.37(h)(1)(iv)(A) requires disclosure of a deposit in a purchase transaction. The deposit to be disclosed under §1026.37(h)(1)(iv)(A) is any amount that the consumer has agreed to pay to a party identified in the real estate purchase and sale agreement to be held until consummation of the transaction, which is often referred to as an earnest money deposit. In a purchase transaction in which no such deposit is paid in connection with the transaction, §1026.37(h)(1)(iv)(A) requires the creditor to disclose $0. In any other type of transaction, §1026.37(h)(1)(iv)(B) requires disclosure of the deposit amount as $0.

37(h)(1)(v) Funds for borrower.

1. *No funds for borrower.* When the down payment and other funds from the borrower is determined in accordance with §1026.37(h)(1)(iii)(A)(*1*), the amount disclosed under §1026.37(h)(1)(v) as funds for the borrower is $0.

2. *Total amount of existing debt satisfied in the transaction.* The amounts disclosed under §1026.37(h)(1)(iii)(A)(*2*) or (B), as applicable, and (h)(1)(v) are determined by subtracting the sum of the loan amount disclosed under §1026.37(b)(1) and any amount of existing loans assumed or taken subject to that will be disclosed on the Closing Disclosure under §1026.38(j)(2)(iv) (excluding any closing costs financed disclosed under §1026.37(h)(1)(ii)) from the total amount of all existing debt being satisfied in the transaction. The total amount of all existing debt being satisfied in the transaction is the sum of the amounts that will be disclosed on the Closing Disclosure in the summaries of transactions table under §1026.38(j)(1)(ii), (iii), and (v), as applicable.

37(h)(1)(vi) Seller credits.

1. *Non-specific seller credits to be disclosed.* Non-specific seller credits, *i.e.*, general payments from the seller to the consumer that do not pay for a particular fee on the disclosures provided under §1026.19(e)(1), known to the creditor at the time of delivery of the Loan Estimate, are disclosed under §1026.37(h)(1)(vi). For example, a creditor may learn the amount of seller credits that will be paid in the transaction from information obtained from the consumer, from a review of the purchase and sale contract, or from information obtained from a real estate agent in the transaction.

2. *Seller credits for specific charges.* To the extent known by the creditor at the time of delivery of the Loan Estimate, specific seller credits, *i.e.*, seller credits for specific items disclosed under §1026.37(f) and (g), may be either disclosed under §1026.37(h)(1)(vi) or reflected in the amounts disclosed for those specific items under §1026.37(f) and (g). For example, if the creditor knows at the time of the delivery of the Loan Estimate that the seller has agreed to pay half of a $100 required pest inspection fee, the creditor may either disclose the required pest inspection fee as $100 under §1026.37(f) with a $50 seller credit disclosed under §1026.37(h)(1)(vi) or disclose the required pest inspection fee as $50 under §1026.37(f), reflecting the specific seller credit in the amount disclosed for the pest inspection fee. If the creditor knows at the time of the delivery of the Loan Estimate that the seller has agreed to pay the entire $100 pest inspection fee, the creditor may either disclose the required pest inspection fee as $100 under §1026.37(f) with a $100 seller credit disclosed under §1026.37(h)(1)(vi) or disclose nothing under §1026.37(f), reflecting that the specific seller credit will cover the entire pest inspection fee.

37(h)(1)(vii) Adjustments and other credits.

1. *Other credits known at the time the Loan Estimate is issued.* Amounts expected to be paid at closing by third parties not otherwise associated with the transaction, such as gifts from family members and not otherwise identified under §1026.37(h)(1), are included in the amount disclosed under §1026.37(h)(1)(vii). Amounts expected to be provided in advance of closing by third parties, including family members, not otherwise associated with the transaction are not required to be disclosed under §1026.37(h)(1)(vii).

2. *Persons that may make payments causing adjustment and other credits.* Persons, as defined under §1026.2(a)(22), means natural persons or organizations. Accordingly, persons that may pay amounts disclosed under §1026.37(h)(1)(vii) include, for example, any individual family members providing gifts or a developer or home builder organization providing a credit in the transaction.

3. *Credits.* Only credits from persons other than the creditor or seller can be disclosed pursuant to §1026.37(h)(1)(vii). Seller credits and credits from the creditor are disclosed pursuant to §1026.37(h)(1)(vi) and §1026.37(g)(6)(ii), respectively.

4. *Other credits to be disclosed.* Credits other than those from the creditor or seller are disclosed under §1026.37(h)(1)(vii). Disclosure of other credits is, like other disclosures under §1026.37, subject to the good faith requirement under §1026.19(e)(1)(i). See §1026.19(e)(1)(i) and comments 17(c)(2)(i)–1 and 19(e)(1)(i)–1. The creditor may obtain information regarding items to be disclosed under §1026.37(h)(1)(vii), for example, from the consumer, from a review of the purchase and sale contract, or from information obtained from a real estate agent in the transaction.

5. *Proceeds from subordinate financing or other source.* Funds that are provided to the consumer from the proceeds of subordinate financing, local or State housing assistance grants, or other similar sources are included in the amount disclosed under §1026.37(h)(1)(vii) on the first-lien transaction Loan Estimate.

6. *Reduction in amounts for adjustments.* Adjustments that require additional funds from the consumer in a transaction disclosed using the formula under §1026.37(h)(1)(iii)(A)(*1*) or pursuant to the real estate purchase and sale contract, such as for additional personal property that will be disclosed on the Closing Disclosure under §1026.38(j)(1)(iii) or adjustments that will be disclosed on the Closing Disclosure under §1026.38(j)(1)(v), are only included in the amount disclosed under §1026.37(h)(1)(vii) if such amounts are not included in the calculation under §1026.37(h)(1)(iii)(A)(*2*) or (B) or §1026.37(h)(1)(v) as debt being satisfied in the transaction. Other examples of adjustments for additional funds from the consumer include payoffs of secured or unsecured debt in a purchase transaction disclosed using the formula under §1026.37(h)(1)(iii)(A)(*1*) or prorations for property taxes and homeowner's association dues. The total amount disclosed under §1026.37(h)(1)(vii) is a sum of adjustments requiring additional funds from the consumer, calculated as positive amounts, and other credits, such as those provided for in comment 37(h)(1)(vii)–1, calculated as negative amounts.

37(h)(1)(viii) Estimated cash to close.

1. *Result of cash to close calculation.* The sum of the amounts disclosed pursuant to §1026.37(h)(1)(i) through (vii) is disclosed under §1026.37(h)(1)(viii) as either a positive number, a negative number, or zero. A positive number indicates the amount that the consumer will pay at consummation. A negative number indicates the amount that the consumer will receive at consummation. A result of zero indicates that the consumer will neither pay nor receive any amount at consummation.

37(h)(2) Optional alternative calculating cash to close table for transactions without a seller or for simultaneous subordinate financing.

1. *Optional use.* The optional alternative disclosure of the calculating cash to close table in §1026.37(h)(2) may only be provided by a creditor in a transaction without a seller or for simultaneous subordinate financing. In a purchase transaction, the optional alternative disclosure may be used for the simultaneous subordinate financing Loan Estimate only if the first-lien Closing Disclosure will record the entirety of the seller's transaction. The use of this alternative table for transactions without a seller or for simultaneous subordinate financing is optional, but creditors may only use this alternative estimated cash to close disclosure in conjunction with the alternative disclosure under §1026.37(d)(2).

37(h)(2)(iii) Payoffs and payments.

1. *Examples.* Examples of the amounts incorporated in the total amount disclosed under §1026.37(h)(2)(iii) include, but are not limited to: Payoffs of existing liens secured by the property identified under §1026.37(a)(6) such as existing mortgages, deeds of trust, judgments that have attached to the real property, mechanics' and materialmen's liens, and local, State and Federal tax liens; payments of unsecured outstanding debts of the consumer; construction costs associated with the transaction that the consumer will be obligated to pay in any transaction in which the creditor is otherwise permitted to use the alternative calculating cash to close table; and payments to other third parties for outstanding debts of the consumer, excluding settlement services, as required to be paid as a condition for the extension of credit. Amounts that will be paid with funds provided by the consumer, including partial payments, such as a portion of construction costs, or amounts that will be paid by third parties and will be disclosed on the Closing Disclosure under §1026.38(t)(5)(vii)(B), are calculated as credits, using positive numbers, in the total amount disclosed under §1026.37(h)(2)(iii).

2. *Disclosure of subordinate financing.* i. *First-lien Loan Estimate.* On the Loan Estimate for a first-lien transaction disclosed with the optional alternative table pursuant

to §1026.37(h)(2), such as a refinance transaction that also has simultaneous subordinate financing, the proceeds of the simultaneous subordinate financing are included, as a positive number, in the total amount disclosed under §1026.37(h)(2)(iii). The total amount disclosed under §1026.37(h)(2)(iii) is a negative number unless the proceeds from the subordinate financing and any amounts entered as credits as discussed in comment 37(h)(2)(iii)–1 equal or exceed the total amount of other payoffs and payments that are included in the calculation under §1026.37(h)(2)(iii). If the proceeds from the subordinate financing and any amounts entered as credits as discussed in comment 37(h)(2)(iii)–1 equal or exceed the total amount of other payoffs and payments that are included in the calculation under §1026.37(h)(2)(iii), the total amount disclosed under §1026.37(h)(2)(iii) is disclosed as $0 or a positive number.

ii. *Simultaneous subordinate financing Loan Estimate*. On the simultaneous subordinate financing Loan Estimate disclosed with the optional alternative table pursuant to §1026.37(h)(2), the proceeds of the subordinate financing that will be applied to the first-lien transaction may be included in the payoffs and payments disclosure under §1026.37(h)(2)(iii).

37(h)(2)(iv) Cash to or from consumer.

1. *Method of indication*. The indication of whether the estimated cash to close is either due from or payable to the consumer is made by the use of check boxes, which is illustrated by form H–24(D) of appendix H to this part.

37(h)(2)(v) Closing costs financed.

1. *Limitation on amount disclosed*. The amount disclosed under §1026.37(h)(2)(v) is limited to the total amount of closing costs disclosed under §1026.37(g)(6), even if the difference between §1026.37(h)(2)(i) and §1026.37(h)(2)(iii) is greater than the amount disclosed under §1026.37(g)(6).

37(i) Adjustable payment table.

1. *When table is not permitted to be disclosed*. The disclosure described in §1026.37(i) is required only if the periodic principal and interest payment may change after consummation based on a loan term other than a change to the interest rate, or the transaction contains a seasonal payment product feature as described in §1026.37(a)(10)(ii)(E). If the transaction does not contain such loan terms, this table shall not appear on the Loan Estimate.

2. *Periods to be disclosed*. Section 1026.37(i)(1) through (4) requires disclosure of the periods during which interest only, optional payment, step payment, and seasonal payment product features will be in effect. The periods required to be disclosed should be disclosed by describing the number of payments counting from the first periodic payment due after consummation. The period of seasonal payments required to be disclosed by §1026.37(i)(4), to be clear and conspicuous, should be disclosed with a noun that identifies the unit-period, because such feature may apply on a regular basis during the loan term that does not depend on when regular periodic payments begin. The disclosures required by §1026.37(i)(1) through (4) may include abbreviations to fit in the space provided for the information on form H–24, provided the information is disclosed in a clear and conspicuous manner. For example:

i. *Period from date of consummation*. If a loan has an interest only period for the first 60 regular periodic payments due after consummation, the disclosure states ''for your first 60 payments.''

ii. *Period during middle of loan term*. If the loan has an interest only period between the 61st and 85th payments, the disclosure states ''from your 61st to 85th payment.''

iii. *Multiple successive periods*. If there are multiple periods during which a certain adjustable payment term applies, such as a period of step payments that occurs from the first through 12th payments, does not occur from the 13th through 24th payments, and occurs again from the 25th through 36th payments, the period disclosed is the entire span of all such periods. Accordingly, such period is disclosed as ''for your first 36 payments.''

iv. *Seasonal payments*. For a seasonal payment product with a unit-period of a month that does not require periodic payments for the months of June, July, and August each year during the loan term, because such feature depends on calendar months and not on when regular periodic payments begin, the period is disclosed as ''from June to August.'' For a transaction with a quarterly unit-period that does not require a periodic payment every third quarter during the loan term and does not depend on calendar months, the period is disclosed as ''every third payment.'' In the same transaction, if the seasonal payment feature ends after the 20th quarter, the period is disclosed as ''every quarter until the 20th quarter.'' As described above in this comment 37(i)–2, the creditor may abbreviate ''quarter'' to ''quart.'' or ''Q.''

37(i)(5) Principal and interest payments.

1. *Statement of periodic payment frequency*. The subheading required by §1026.37(i)(5) must include the unit-period of the transaction, such as ''quarterly,'' ''bi-weekly,'' or ''annual.'' This unit-period should be the same as disclosed under §1026.37(b)(3). *See* §1026.37(o)(5)(i).

2. *Initial payment adjustment unknown*. The disclosure required by §1026.37(i)(5) must state the number of the first payment for which the regular periodic principal and interest payment may change. This payment is typically set forth in the legal obligation. However, if the exact payment number of the first adjustment is not known at the time

the creditor provides the Loan Estimate, the creditor must disclose the earliest possible payment that may change under the terms of the legal obligation, based on the information available to the creditor at the time, as the initial payment number and amount.

3. *Subsequent changes.* The disclosure required by §1026.37(i)(5) must state the frequency of adjustments to the regular periodic principal and interest payment after the initial adjustment, if any, expressed in years, except if adjustments are more frequent than once every year, in which case the disclosure should be expressed as payments. If there is only one adjustment of the periodic payment under the terms of the legal obligation (for example, if the loan has an interest only period for the first 60 payments and there are no adjustments to the payment after the end of the interest only period), the disclosure should state: ''No subsequent changes.'' If the loan has graduated increases in the regular periodic payment every 12th payment, the disclosure should state: ''Every year.'' If the frequency of adjustments to the periodic payment may change under the terms of the legal obligation, the disclosure should state the smallest period of adjustments that may occur. For example, if an increase in the periodic payment is scheduled every sixth payment for 36 payments, and then every 12th payment for the next 24 payments, the disclosure should state: ''Every 6th payment.''

4. *Maximum payment.* The disclosure required by §1026.37(i)(5) must state the larger of the maximum scheduled or maximum potential amount of a regular periodic principal and interest payment under the terms of the legal obligation, as well as the payment number of the first periodic principal and interest payment that can reach such amount. If the disclosed payment is scheduled, §1026.37(i)(5) requires that the disclosure state the payment number when such payment is reached with the preceding text, ''starting at.'' If the disclosed payment is only potential, as may be the case for a loan that permits optional payments, the disclosure states the earliest payment number when such payment can be reached with the preceding text, ''as early as.'' Section 1026.37(i)(5) requires that the first possible periodic principal and interest payment that can reach the maximum be disclosed. For example, for a fixed interest rate optional-payment loan with scheduled payments that result in negative amortization under the terms of the legal obligation, the maximum periodic payment disclosed should be based on the consumer having elected to make the periodic payments that would increase the principal balance to the maximum amount at the latest time possible before the loan begins to fully amortize, which would cause the periodic principal and interest payment to be the maximum possible. For example, if the earliest payment that could reach the maximum principal balance was the 41st payment at which time the loan would begin to amortize and the periodic principal and interest payment would be recalculated, but the last payment that permitted the principal balance to increase was the 60th payment, the disclosure required by §1026.37(i)(5) must assume the consumer only reaches the maximum principal balance at the 60th payment because this would result in the maximum possible principal and interest payment under the terms of the legal obligation. The disclosure must state the maximum periodic principal and interest payment based on this assumption and state ''as early as the 61st payment.''

5. *Payments that do not pay principal.* Although the label of the disclosure required by §1026.37(i)(5) is ''Principal and Interest Payments,'' and the section refers to periodic principal and interest payments, it includes a scheduled periodic payment that only covers some or all of the interest that is due and not any principal (*i.e.*, an interest only or negatively amortizing payment).

37(j) Adjustable interest rate table.

1. *When table is not permitted to be disclosed.* The disclosure described in §1026.37(j) is required only if the interest rate may increase after consummation, either based on changes to an index or scheduled changes to the interest rate. If the legal obligation does not permit the interest rate to adjust after consummation, such as for a ''Fixed Rate'' product under §1026.37(a)(10), this table is not permitted to appear on the Loan Estimate. The creditor may not disclose a blank table or a table with ''N/A'' inserted within each row.

37(j)(1) Index and Margin

1. *Index and margin.* The index disclosed pursuant to §1026.37(j)(1) must be stated such that a consumer reasonably can identify it. A common abbreviation or acronym of the name of the index may be disclosed in place of the proper name of the index, if it is a commonly used public method of identifying the index. For example, ''SOFR'' may be disclosed instead of Secured Overnight Financing Rate. The margin should be disclosed as a percentage. For example, if the contract determines the interest rate by adding 4.25 percentage points to the index, the margin should be disclosed as ''4.25%.''

37(j)(2) Increases in interest rate.

1. *Adjustments not based on an index.* If the legal obligation includes both adjustments to the interest rate based on an external index and scheduled and pre-determined adjustments to the interest rate, such as for a ''Step Rate'' product under §1026.37(a)(10), the disclosure required by §1026.37(j)(1), and not §1026.37(j)(2), must be provided pursuant to §1026.37(j)(2). The disclosure described in §1026.37(j)(2) is stated only if the product

type does not permit the interest rate to adjust based on an external index.

37(j)(3) Initial interest rate.

1. *Interest rate at consummation.* In all cases, the interest rate in effect at consummation must be disclosed as the initial interest rate, even if it will apply only for a short period, such as one month.

37(j)(4) Minimum and maximum interest rate.

1. *Minimum interest rate.* The minimum interest rate required to be disclosed by §1026.37(j)(4) is the minimum interest rate that may occur at any time during the term of the transaction, after any introductory or "teaser" interest rate expires, under the terms of the legal obligation, such as an interest rate "floor." If the terms of the legal obligation do not state a minimum interest rate, the minimum interest rate that applies to the transaction under applicable law must be disclosed. If the terms of the legal obligation do not state a minimum interest rate, and no other minimum interest rate applies to the transaction under applicable law, the amount of the margin is disclosed.

2. *Maximum interest rate.* The maximum interest rate required to be disclosed pursuant to §1026.37(j)(4) is the maximum interest rate permitted under the terms of the legal obligation, such as an interest rate "cap." If the terms of the legal obligation do not specify a maximum interest rate, the maximum interest rate permitted by applicable law, such as State usury law, must be disclosed.

37(j)(5) Frequency of adjustments.

1. *Exact month unknown.* The disclosure required by §1026.37(j)(5) must state the first month for which the interest rate may change. This month is typically scheduled in the terms of the legal obligation. However, if the exact month is not known at the time the creditor provides the Loan Estimate, the creditor must disclose the earliest possible month under the terms of the legal obligation, based on the best information available to the creditor at the time.

37(j)(6) Limits on interest rate changes.

1. *Different limits on subsequent interest rate adjustments.* If more than one limit applies to the amount of adjustments to the interest rate after the initial adjustment, the greatest limit on subsequent adjustments must be disclosed. For example, if the initial interest rate adjustment is capped at two percent, the second adjustment is capped at two and a half percent, and all subsequent adjustments are capped at three percent, the disclosure required by §1026.37(j)(6)(ii) states "3%."

37(k) Contact information.

1. *NMLSR ID.* Section 1026.37(k) requires the disclosure of an Nationwide Mortgage Licensing System and Registry (NMLSR ID) number for each creditor, mortgage broker, and loan officer identified on the Loan Estimate. The NMLSR ID is a unique number or other identifier generally assigned to individuals registered or licensed through NMLSR to provide loan originating services. For more information, see the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act) sections 1503(3) and (12) and 1504 (12 U.S.C. 5102(3) and (12) and 5103), and its implementing regulations (*i.e.*, 12 CFR 1007.103(a) and 1008.103(a)(2)). An entity may also have an NMLSR ID. Thus, if the creditor, mortgage broker, or loan officer has obtained an NMLSR ID, the NMLSR IDs must be provided in the disclosures required by §1026.37(k)(1) and (2).

2. *License number or unique identifier.* Section 1026.37(k)(1) and (2) requires the disclosure of a license number or unique identifier for the creditor, mortgage broker, and loan officer if such entity or individual has not obtained an NMLSR ID. In such event, if the applicable State, locality, or other regulatory body with responsibility for licensing and/or registering such entity's or individual's business activities has issued a license number or other unique identifier to such entity or individual, that number is disclosed. In addition, §1026.37(k)(1) and (2) require the abbreviation of the State of the jurisdiction or regulatory body that issued such license or registration is required to be included before the word "License" in the label required by §1026.37(k)(1) and (2). If no such license or registration is required to be disclosed, such as if an NMLSR number is disclosed, the space provided for such an abbreviation in form H–24 of appendix H to this part may be left blank. A U.S. Postal Service State abbreviation complies with §1026.37(k)(1) and (2), if applicable.

3. *Contact.* Section 1026.37(k)(2) requires the disclosure of the name and NMLSR ID of the person who is the primary contact for the consumer, labeled "Loan Officer." The loan officer is generally the natural person employed by the creditor or mortgage broker disclosed under §1026.37(k)(1) who interacts most frequently with the consumer and who has an NMLSR ID or, if none, a license number or other unique identifier to be disclosed under §1026.37(k)(2), as applicable.

4. *Email address and phone number.* Section 1026.37(k)(3) requires disclosure of the loan officer's email address and phone number. Disclosure of a general number or email address for the loan officer's lender or mortgage broker, as applicable, satisfies this requirement if no such information is generally available for such person.

37(l) Comparisons.

37(l)(1) In five years.

1. *Loans with terms of less than five years.* In transactions with a scheduled loan term of less than 60 months, to comply with §1026.37(l)(1), the creditor discloses the amounts paid through the end of the loan term.

Paragraph 37(l)(1)(i).

1. *Calculation of total payments in five years.* The amount disclosed under §1026.37(l)(1)(i) is the sum of principal, interest, mortgage insurance, and loan costs scheduled to be paid through the end of the 60th month after the due date of the first periodic payment. For guidance on how to calculate interest for mortgage loans that are Adjustable Rate products under §1026.37(a)(10)(i)(A) for purposes of §1026.37(l)(1)(i), see comment 17(c)(1)–10. In addition, for purposes of §1026.37(l)(1)(i), the creditor should assume that the consumer makes payments as scheduled and on time. For purposes of §1026.37(l)(1)(i), mortgage insurance means ''mortgage insurance or any functional equivalent'' as defined under comment 37(c)(1)(i)(C)–1 and includes prepaid or escrowed mortgage insurance. Loan costs are those costs disclosed under §1026.37(f).

2. *Negative amortization loans.* For loans that have a negative amortization feature under §1026.37(a)(10)(ii)(A), the creditor calculates the total payments in five years using the scheduled payments, even if it is a negatively amortizing payment amount, until the consumer must begin making fully amortizing payments under the terms of the legal obligation.

Paragraph 37(l)(1)(ii).

1. *Calculation of principal paid in five years.* The disclosure required by §1026.37(l)(1)(ii) is calculated in the same manner as the disclosure required by §1026.37(l)(1)(i), except that the disclosed amount reflects only the total payments to principal through the end of the 60th month after the due date of the first periodic payment.

37(l)(3) Total interest percentage.

1. *General.* When calculating the total interest percentage, the creditor assumes that the consumer will make each payment in full and on time and will not make any additional payments. The creditor includes prepaid interest that the consumer will pay when calculating the total interest percentage. Prepaid interest that is disclosed as a negative number under §§1026.37(g)(2) or 1026.38(g)(2) is included as a negative value when calculating the total interest percentage.

2. *Adjustable rate and step rate mortgages.* For Adjustable Rate products under §1026.37(a)(10)(i)(A), §1026.37(l)(3) requires that the creditor compute the total interest percentage in accordance with comment 17(c)(1)–10. For Step Rate products under §1026.37(a)(10)(i)(B), §1026.37(l)(3) requires that the creditor compute the total interest percentage in accordance with §1026.17(c)(1) and its associated commentary.

3. *Negative amortization loans.* For loans that have a negative amortization feature under §1026.37(a)(10)(ii)(A), §1026.37(l)(3) requires that the creditor compute the total interest percentage using the scheduled payment, even if it is a negatively amortizing payment amount, until the consumer must begin making fully amortizing payments under the terms of the legal obligation.

37(m) Other considerations.

37(m)(1) Appraisal.

1. *Applicability.* The disclosure required by §1026.37(m)(1) is only applicable to transactions subject to §1026.19(e) that are also subject either to 15 U.S.C. 1639h or 1691(e) or both, as implemented by this part or Regulation B, 12 CFR part 1002, respectively. Accordingly, if a transaction is not also subject to either or both of these provisions, as implemented by this part or Regulation B, respectively, the disclosure required by §1026.37(m)(1) may be omitted from the Loan Estimate as described by comment 37–1 as illustrated by form H–24 of appendix H to this part. For transactions subject to section 1639h but not section 1691(e), the creditor may delete the word ''promptly'' from the disclosure required by §1026.37(m)(1)(ii).

2. *Consummation.* Section 1026.37(m)(1) requires the creditor to disclose that it will provide a copy of any appraisal, even if the transaction is not consummated. On form H–24, the disclosure required by §1026.37(m)(1) states that the creditor will provide an appraisal, even if the ''loan does not close.'' Pursuant to §1026.37(o)(3), the disclosure required by §1026.37(m)(1) is that illustrated by form H–24.

37(m)(2) Assumption.

1. *Disclosure.* Section 1026.37(m)(2) requires the creditor to disclose whether or not a third party may be allowed to assume the loan on its original terms if the property is sold or transferred by the consumer. In many cases, the creditor cannot determine, at the time the disclosure is made, whether a loan may be assumable at a future date on its original terms. For example, the assumption clause commonly used in mortgages sold to the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation conditions an assumption on a variety of factors, such as the creditworthiness of the subsequent borrower, the potential for impairment of the creditor's security, and the execution of an assumption agreement by the subsequent borrower. If the creditor can determine that such assumption is not permitted, the creditor complies with §1026.37(m)(2) by disclosing that the loan is not assumable. In all other situations, including where assumption of a loan is permitted or is dependent on certain conditions or factors, or uncertainty exists as to the future assumability of a mortgage loan, the creditor complies with §1026.37(m)(2) by disclosing that, under certain conditions, the creditor may allow a third party to assume the loan on its original terms.

2. *Original terms.* For purposes of §1026.37(m)(2), the imposition of an assumption fee is not a departure from the original terms of the obligation but a modification of

the legal obligation, such as a change in the contract interest rate, represents a departure from the original terms.

37(m)(3) Homeowner's insurance.

1. *Optional disclosure.* Section 1026.37(m)(3) provides that creditors may, but are not required to, disclose a statement of whether homeowner's insurance is required on the property and whether the consumer may choose the insurance provider, labeled ''Homeowner's Insurance.''

2. *Relation to the finance charge.* Section 1026.4(d)(2) describes the conditions under which a creditor may exclude premiums for homeowner's insurance from the finance charge. For transactions subject to §1026.19(e), a creditor satisfies §1026.4(d)(2)(i) by disclosing the statement described in §1026.37(m)(3).

37(m)(4) Late payment.

1. *Definition.* Section 1026.37(m)(4) requires a disclosure if charges are added to an individual delinquent installment by a creditor that otherwise considers the transaction ongoing on its original terms. Late payment charges do not include: (i) The right of acceleration; (ii) fees imposed for actual collection costs, such as repossession charges or attorney's fees; (iii) referral and extension charges; or (iv) the continued accrual of simple interest at the contract rate after the payment due date. However, an increase in the interest rate on account of a late payment by the consumer is a late payment charge to the extent of the increase.

2. *Applicability of State law.* Many State laws authorize the calculation of late charges as either a percentage of the delinquent payment amount or a specified dollar amount, and permit the imposition of the lesser or greater of the two calculations. The language provided in the disclosure may reflect the requirements and alternatives allowed under State law.

37(m)(6) Servicing.

1. *Creditor's intent.* Section 1026.37(m)(6) requires the creditor to disclose whether it intends to service the loan directly or transfer servicing to another servicer after consummation. A creditor complies with §1026.37(m)(6) if the disclosure reflects the creditor's intent at the time the Loan Estimate is issued.

37(m)(7) Liability after foreclosure.

1. *When statement is not permitted to be disclosed.* The disclosure described by §1026.37(m)(7) is required under the condition specified by §1026.37(m)(7), specifically, if the purpose of the credit transaction is a refinance under §1026.37(a)(9)(ii). Under any other conditions, this statement is not permitted to appear in the Loan Estimate.

37(m)(8) Construction loans.

1. *Clear and conspicuous statement regarding redisclosure for construction loans.* For construction loans in transactions involving new construction, where the creditor reasonably expects the settlement date to be 60 days or more after the provision of the disclosures required under §1026.19(e)(1)(i), providing the statement, ''You may receive a revised Loan Estimate at any time prior to 60 days before consummation'' under the master heading ''Additional Information About This Loan'' and the heading ''Other Considerations'' pursuant to §1026.37(m)(8) satisfies the requirements set forth in §1026.19(e)(3)(iv)(F) that the statement be made clearly and conspicuously on the disclosure.

37(n) Signature statement.

1. *Signature line optional.* Whether a signature line is provided under §1026.37(n) is determined solely by the creditor. If a signature line is provided, however, the disclosure must include the statement required by §1026.37(n)(1).

2. *Multiple consumers.* If there is more than one consumer who will be obligated in the transaction, the first consumer signs as the applicant and each additional consumer signs as a co-applicant. If there is not enough space under the heading ''Confirm Receipt'' to provide signature lines for every consumer in the transaction, the creditor may add additional signature pages, as needed, at the end of the form for the remaining consumers' signatures. However, the creditor is required to disclose the heading and statement required by §1026.37(n)(1) on such additional pages.

3. *Consumer's name.* The creditor may insert the consumer's name under the signature line, rather than using the designation ''Applicant'' or ''Co-Applicant'' as illustrated in form H–24 of appendix H to this part, but is not required to do so pursuant to §1026.37(n)(1).

37(o) Form of disclosures.

37(o)(1) General requirements.

1. *Clear and conspicuous; segregation.* The clear and conspicuous standard requires that the disclosures required by §1026.37 be legible and in a readily understandable form. Section 1026.37(o)(1)(i) requires that the disclosures be grouped together and segregated from everything else. For example, creditors may not add additional pages in between the pages of the Loan Estimate, or attach to the Loan Estimate additional pages that are not provided for under §1026.37 after the last page of the Loan Estimate. As required by §1026.37(o)(3)(i), the disclosures for any transaction that is a federally related mortgage loan under Regulation X, 12 CFR 1024.2, must be made using the standard form H–24 of appendix H to this part. Accordingly, use of that form constitutes compliance with the clear and conspicuous and segregation requirements of §1026.37(o). In addition, §1026.37(o)(1)(ii) requires creditors to disclose on the Loan Estimate only the information required by §1026.37(a) through (n), except as otherwise provided by §1026.37(o), and in the

same order, and positioned relative to the master headings, headings, subheadings, labels, and similar designations in the same manner, as shown in form H–24, set forth in appendix H to this part. For example, creditors may not use form H–24, but include in the Loan Terms table under the subheading ‘‘Can this amount increase after closing?’’ information that is not required by §1026.37(b)(6).

2. *Balloon payment financing with leasing characteristics.* In certain credit sale or loan transactions, a consumer may reduce the dollar amount of the payments to be made during the transaction by agreeing to make, at the end of the loan term, a large final payment based on the expected residual value of the property. The consumer may have a number of options with respect to the final payment, including, among other things, retaining the property and making the final payment, refinancing the final payment, or transferring the property to the creditor in lieu of the final payment. Such transactions may have some of the characteristics of lease transactions subject to Regulation M (12 CFR part 1013), but are considered credit transactions where the consumer assumes the indicia of ownership, including the risks, burdens, and benefits of ownership, upon consummation. These transactions are governed by the disclosure requirements of this part instead of Regulation M. Under §1026.37(o)(1)(ii), creditors may not include any additional information with the disclosures required by §1026.37, except as provided in §1026.37(o)(5). Thus, the disclosures must show the large final payment as a balloon payment in the projected payments table required by §1026.37(c) and should not, for example, reflect the other options available to the consumer at maturity.

37(o)(2) Headings and labels.

1. *Estimated amounts.* Section 1026.37(o)(2) incorporates the ‘‘estimated’’ designations reflected on form H–24 of appendix H to this part into the disclosure requirements of §1026.37, even if the relevant provision of §1026.37 does not expressly require or permit disclosure of the word ‘‘estimate.’’ Where form H–24 uses the abbreviation ‘‘est.’’ in place of the word ‘‘estimated,’’ §1026.37(o)(2) also incorporates that designation into its requirement. For example, §1026.37(c)(2)(iv) requires disclosure of the total periodic payment labeled ‘‘Total Monthly Payment,’’ but the label on form H–24 contains the designation ‘‘Estimated’’ and thus, the label required by §1026.37(c)(2)(iv) must contain the designation ‘‘Estimated.’’ Although many of the disclosures required by §1026.38 cross-reference their counterparts in §1026.37, §1026.38(t) incorporates the ‘‘estimated’’ designations reflected on form H–25, not form H–24.

37(o)(3) Form.

1. *Non-federally related mortgage loans.* For a non-federally related mortgage loan, the creditor is not required to use form H–24 of appendix H to this part, although its use as a model form for such transactions, if properly completed with accurate content, constitutes compliance with the clear and conspicuous and segregation requirements of §1026.37(o)(1)(i). Even when the creditor elects not to use the model form, §1026.37(o)(1) requires that the disclosures be grouped together and segregated from everything else; contain only the information required by §1026.37(a) through (n); and be provided in the same order as they occur in form H–24, using the same relative positions of the headings, labels, and similar designations as shown in the form. In addition, §1026.37(o)(2) requires that the creditor include the designation of ‘‘estimated’’ for all headings, subheading, labels, and similar designations required by §1026.37 for which form H–24 contains the ‘‘estimated’’ designation in such heading, subheading, label, or similar designation. The disclosures required by §1026.37 comply with the requirement to be in a format substantially similar to form H–24 when provided on letter size (8.5″ x 11″) paper.

37(o)(4) Rounding.

1. *Rounding.* Consistent with §1026.2(b)(4), except as otherwise provided in §1026.37(o)(4), any amount required to be disclosed by §1026.37 is not permitted to be rounded and is disclosed using decimal places where applicable, unless otherwise provided.

2. *Calculations.* If a dollar amount that is required to be rounded by §1026.37(o)(4)(i) on the Loan Estimate is a total of one or more dollar amounts that are not required or permitted to be rounded, the total amount must be rounded consistent with §1026.37(o)(4)(i), but such component amounts used in the calculation must use such unrounded numbers. In addition, if any such unrounded component amount is required to be disclosed under §1026.37, consistent with §1026.2(b)(4), it should be disclosed as an unrounded number. If an amount that is required to be rounded by §1026.37(o)(4)(i) on the Loan Estimate is a total of one or more components that are also required to be rounded by §1026.37(o)(4)(i), the total amount must be calculated using such rounded amounts. For example, the subtotals required to be disclosed by §1026.37(f)(1), (2), and (3) are calculated using the rounded amounts disclosed under those subsections. *See also* comment 37(o)(4)(i)(C)–1. However, the amounts required to be disclosed by §1026.37(l) reference actual amounts for their components, rather than other amounts disclosed under §1026.37 and rounded pursuant to §1026.37(o)(4)(i), and thus, they are calculated using unrounded numbers.

37(o)(4)(i) Nearest dollar.

Paragraph 37(o)(4)(i)(A).

1. *Rounding of dollar amounts.* Section 1026.37(o)(4)(i)(A) requires that certain dollar amounts be rounded to the nearest whole dollar. For example, under §1026.37(o)(4)(i)(A), periodic mortgage insurance payments are rounded and disclosed to the nearest dollar, such that a periodic mortgage insurance payment of $164.50 is disclosed under §1026.37(c)(2)(ii) as $165, but a periodic mortgage insurance payment of $164.49 is disclosed as $164. The per-diem amount disclosed under §1026.37(g)(2)(iii) and the monthly amounts for the initial escrow payment at closing disclosed pursuant to §1026.37(g)(3)(i) through (iii) and (v) do not include partial cents. Dollar amounts are rounded or truncated to the nearest whole cent. For example, under §1026.37(g)(2)(iii), the creditor discloses per-diem interest of $68.1254 as $68.13 or $68.12. See form H–24(B) in appendix H to this part for an illustration of per-diem amounts for homeowner's insurance disclosed pursuant to §1026.37(g)(3)(i).

Paragraph 37(o)(4)(i)(B).

1. *Rounding of loan amount.* Section 1026.37(o)(4)(i)(B) requires the loan amount to be disclosed truncated at the decimal place if the loan amount is a whole number. For example, if §1026.37(b)(1) requires disclosure of a loan amount of $481,516.23, the creditor discloses the amount as $481,516.23. However, if the loan amount required to be disclosed were $481,516.00, the creditor would disclose $481,516.

Paragraph 37(o)(4)(i)(C).

1. *Rounding of the total monthly payment.* Section 1026.37(o)(4)(i)(C) requires the total monthly payment amount disclosed under §1026.37(c)(2)(iv) to be rounded if any of its components are rounded. For example, if the total monthly payment disclosed under §1026.37(c)(2)(iv) is composed of a $2,000.49 periodic principal and interest payment required to be disclosed by §1026.37(c)(2)(i) and a $164.49 periodic mortgage insurance payment required to be disclosed by §1026.37(c)(2)(ii), the creditor would calculate the total monthly payment by adding the exact periodic principal and interest payment of $2,000.49 and the rounded periodic mortgage insurance payment of $164, round the total, and disclose $2,164.

37(o)(4)(ii) Percentages.

1. *Decimal places.* Section 1026.37(o)(4)(ii) requires the percentage amounts disclosed rounding exact amounts to three decimal places, but the creditor does not disclose trailing zeros to the right of the decimal point. For example, a 2.4999 percent annual percentage rate is disclosed as ''2.5%'' under §1026.37(o)(4)(ii). Similarly, a 7.005 percent annual percentage rate is disclosed as ''7.005%,'' and a 7.000 percent annual percentage rate is disclosed as ''7%.''

37(o)(5) Exceptions.

1. *Permissible changes.* The changes required or permitted by §1026.37(o)(5) are permitted for federally related mortgage loans for which the use of form H–24 is required under §1026.37(o)(3). For non-federally related mortgage loans, the changes required or permitted by §1026.37(o)(5) do not affect the substance, clarity, or meaningful sequence of the disclosure and therefore, are permissible. Any changes to the disclosure not specified in §1026.37(o)(5) or not permitted by other provisions of §1026.37 are not permissible for federally related mortgage loans. Creditors in non-federally related mortgage loans making any changes that affect the substance, clarity, or meaningful sequence of the disclosure will lose their protection from civil liability under TILA section 130.

2. *Manual completion.* Section 1026.37(o) does not require the creditor to use a computer, typewriter, or other word processor to complete the disclosure form. The information and amounts required to be disclosed by §1026.37 on form H–24 of appendix H to this part may be filled in by hand printing or using any other method, provided the information is clear and legible and complies with the formatting required by form H–24, including replicating bold font where required.

3. *Contact information.* If a transaction involves more than one creditor or mortgage broker, the space provided on form H–24 of appendix H to this part for the contact information required by §1026.37(m) may be altered to add additional labels to accommodate the additional information of such parties, provided that the information required by §1026.37(l), (m), and (n) are disclosed on the same page as illustrated by form H–24. If the space provided on form H–24 of appendix H to this part does not allow for the disclosure of such contact and other information on the same page, an additional page may be added to provide the required contact information with an appropriate reference to the additional page.

4. *Unit-period.* Section 1026.37(o)(5)(i) provides that wherever form H–24 or §1026.37 uses ''monthly'' to describe the frequency of any payments or uses ''month'' to describe the applicable unit-period, the creditor is required to substitute the appropriate term to reflect the fact that the transaction's terms provide for other than monthly periodic payments, such as bi-weekly or quarterly payments. For purposes of §1026.37, the term ''unit-period'' has the same meaning as in appendix J to Regulation Z.

5. *Additional page.* Information required or permitted to be disclosed by §1026.37 on a separate page should be formatted similarly to form H–24 of appendix H to this part, so as not to affect the substance, clarity, or meaningful sequence of the disclosure. In addition, information provided on additional pages should be consolidated on as few pages as necessary to not affect the substance,

clarity, or meaningful sequence of the disclosure.

6. *Translation.* Section 1026.37(o)(5)(ii) permits the translation of form H–24 into languages other than English, consistent with §1026.27. Pursuant to §1026.37(o)(5)(ii) creditors may modify form H–24 to the extent that translation prevents the headings, labels, designations, and required disclosure items under §1026.37 from fitting in the space provided on form H–24. For example, if the translation of a required label does not fit within the line provided for such label in form H–24, the label may be disclosed over two lines. See form H–28 of appendix H to this part for Spanish translations of form H–24.

Section 1026.38—Content of Disclosures for Certain Mortgage Transactions (Closing Disclosure)

1. *Disclosures not applicable.* Where a disclosure is not applicable to a particular transaction, form H–25 of appendix H to this part may not be modified to state ''not applicable'' or ''N/A.'' The portion of the form pertaining to the inapplicable disclosure may be left blank unless otherwise provided by §1026.38. For example, the disclosure required by §1026.38(r) of the consumer's or seller's real estate broker may be left blank for a transaction that does not involve real estate brokers, such as a refinance or home equity loan. As provided in §1026.38(m) and (n), however, the adjustable payment and adjustable interest rate tables required by those paragraphs may be included only if those disclosures are applicable to the transaction and otherwise must be excluded.

2. *Format.* See §1026.38(t) and its commentary for guidance on the proper format to be used in making the disclosures, as well as required and permissible modifications.

3. *Good faith requirement.* The disclosures required by §1026.38 are required to reflect the actual terms of the legal obligation between the parties, and the actual costs associated with the settlement of the transaction. Creditors and settlement agents may estimate disclosures as provided pursuant to §1026.19(f)(1)(i) when the actual term or cost is unknown at the time the disclosures are made. *See* §§1026.17(c)(2) and 1026.19(f)(1)(i) and comments 17(c)(2)(i)–1 and –2, and 19(f)(1)(i)–2.

4. *Reductions in principal balance.* A principal reduction that occurs immediately or very soon after closing must be disclosed in the summaries of transactions table on the standard Closing Disclosure pursuant to §1026.38(j)(1)(v) or in the payoffs and payments table on the alternative Closing Disclosure pursuant to §1026.38(t)(5)(vii)(B). The disclosure of a principal reduction under §1026.38(j)(1)(v) or (t)(5)(vii)(B) includes the following elements: (1) The amount of the principal reduction; (2) the phrase ''principal reduction'' or a similar phrase; (3) for a principal reduction disclosure under §1026.38(t)(5)(vii)(B) only, the name of the payee; (4) if applicable to the transaction, the phrase ''Paid Outside of Closing'' or ''P.O.C.'' and the name of the party making the payment; and (5) if the principal reduction is used to satisfy the requirements of §1026.19(f)(2)(v), a statement that the principal reduction is being provided to offset charges that exceed the legal limits, using any language that meets the clear and conspicuous standard under §1026.38(t)(1)(i). If a creditor is required to disclose the name of the party making the payment or that the principal reduction is being provided to offset charges that exceed the legal limits, and there is insufficient space under the §1026.38(j)(1)(v) or (t)(5)(vii)(B) disclosure for these elements of the principal reduction disclosure, the creditor may omit these elements from the §1026.38(j)(1)(v) or (t)(5)(vii)(B) disclosure. If the creditor omits these elements from the §1026.38(j)(1)(v) or (t)(5)(vii)(B) disclosure, the creditor must provide a complete principal reduction disclosure under an appropriate heading on an additional page, in accordance with §1026.38(j) and (t)(5)(ix), as applicable, with a reference to the abbreviated principal reduction disclosure under §1026.38(j)(1)(v) or (t)(5)(vii)(B).

i. *Principal reduction not paid with closing funds.* A principal reduction is disclosed in the summaries of transactions table under §1026.38(j)(1)(v) and marked with the phrase ''Paid Outside of Closing'' or the abbreviation ''P.O.C.'' pursuant to §1026.38(j)(4)(i), or in the payoffs and payments table under §1026.38(t)(5)(vii)(B) marked with the phrase ''Paid Outside of Closing'' or the abbreviation ''P.O.C.,'' if it is not paid from closing funds. For a principal reduction disclosed under §1026.38(j)(1)(v) that is not paid from closing funds, the amount of the principal reduction is not included in computing the summaries of transactions totals under §1026.38(j) or the cash to close disclosures under §1026.38(i). For a principal reduction disclosed under §1026.38(t)(5)(vii)(B) that is not paid from closing funds, the amount of the principal reduction is not included in computing the total payoffs and payments amount disclosed under §1026.38(t)(5)(vii)(B) or the cash to close amount disclosed under §1026.38(e)(5)(ii). For example, a creditor providing a $500 principal reduction to satisfy the refund requirements of §1026.19(f)(2)(v) discloses the principal reduction under §1026.38(j)(1)(v) by providing in Section K of the summaries of transactions table a statement such as ''$500.00 Principal Reduction for exceeding legal limits P.O.C. Lender,'' and not including the amount of the principal reduction in the summaries of transactions totals under §1026.38(j) or the calculating cash to close disclosures under

§1026.38(i). Alternatively, if there is insufficient space under §1026.38(j)(1)(v) for a creditor to disclose the name of the party making the payment or a statement that the principal reduction is being provided to offset charges that exceed the legal limits, a creditor may disclose a statement such as ‘‘$500.00 Principal Reduction P.O.C.’’ under §1026.38(j)(1)(v) and a statement on an additional page such as ‘‘$500.00 Principal Reduction for exceeding legal limits P.O.C. Lender. See Section K on page 3.’’

ii. *Principal reduction paid with closing funds*. A principal reduction is disclosed in the summaries of transactions table under §1026.38(j)(1)(v) or in the payoffs and payments table under §1026.38(t)(5)(vii)(B) without the phrase ‘‘Paid Outside of Closing’’ or the abbreviation ‘‘P.O.C.’’ if it is paid from closing funds. The amount of a principal reduction that is paid with closing funds is included in the applicable calculations required under §1026.38. For example, in a refinance transaction using the alternative tables on the Closing Disclosure, a creditor discloses a $1,000 principal reduction to reduce the cash provided to the consumer by providing in the payoffs and payments table under §1026.38(t)(5)(vii)(B) a statement such as ‘‘Principal Reduction to Consumer’’ under the column heading ‘‘TO’’ and ‘‘$1,000.00’’ under the column heading ‘‘AMOUNT,’’ and by including such amount in the total payoffs and payments amount under §1026.38(t)(5)(vii)(B) and in the cash to close amount under §1026.38(e)(5)(ii). In this example, the creditor must disclose the following elements under §1026.38(t)(5)(vii)(B): The amount of the principal reduction, the phrase ‘‘principal reduction’’ or a similar phrase, and the name of the payee. The creditor should not include in the disclosure the phrase ‘‘Paid Outside of Closing’’ or ‘‘P.O.C.’’ and the name of the party making the payment, or a statement that the principal reduction is being provided to offset charges that exceed the legal limits, because those principal reduction disclosure elements are not applicable to the transaction in this particular example. The creditor may not use an addendum for the principal reduction disclosure in this example.

38(a) General information.

38(a)(3) Closing information.

38(a)(3)(i) Date issued.

1. *Applicable date*. For general guidance on identifying the date issued for the Closing Disclosure, see the commentary to §1026.37(a)(4).

38(a)(3)(iii) Disbursement date.

1. *Simultaneous subordinate financing disbursement date*. The disbursement date on the simultaneous subordinate financing Closing Disclosure is the date some or all of the subordinate financing loan amount disclosed under §1026.38(b) is expected to be paid to the consumer or a third party other than a settlement agent.

38(a)(3)(iv) Settlement agent.

1. *Entity name*. Section 1026.38(a)(3)(iv) requires the name of the entity that employs the settlement agent. The name of the individual conducting the closing is not required.

38(a)(3)(v) File number.

1. *Alpha-numeric characters*. The file number required by §1026.38(a)(3)(v) may contain any alpha-numeric characters and need not be limited to numbers.

38(a)(3)(vi) Property.

1. *Alternative property*. For guidance on disclosing the location of a property for which an address is unavailable, see the commentary to §1026.37(a)(6). Where personal property also secures the credit transaction, a description of that property may be disclosed, at the creditor's option, pursuant to §1026.38(a)(3)(vi). If the form does not provide enough space to disclose a description of personal property under §1026.38(a)(3)(vi), at the creditor's option an additional page may be used and appended to the end of the form provided that the creditor complies with the requirements of §1026.38(t)(3).

2. *Multiple properties*. Where more than one property secures the credit transaction, §1026.38(a)(3)(vi) requires disclosure of all property addresses. If the addresses of all properties securing the transaction do not fit in the space allocated on the Closing Disclosure, an additional page with the addresses of all such properties may be appended to the end of the form.

38(a)(3)(vii) Sale price.

1. *No seller*. In transactions where there is no seller, such as in a refinancing, §1026.38(a)(3)(vii)(B) requires the creditor to disclose the appraised value of the property. To comply with this requirement, the creditor discloses the value determined by the appraisal or valuation used to determine approval of the credit transaction. If the creditor has not obtained an appraisal, the creditor may disclose the estimated value of the property. Where an estimate is disclosed, rather than an appraisal, the label for the disclosure is changed to ‘‘Estimated Prop. Value.’’ The creditor may use the estimate provided by the consumer at application but, if it has performed its own estimate of the property value for purposes of approving the credit transaction by the time the disclosure is provided to the consumer, the creditor must disclose the estimate it used for purposes of approving the credit transaction. For transactions involving construction where there is no seller, the creditor must disclose the value of the property that is used to determine the approval of the credit transaction, including improvements to be made on the property if those improvements are used in determining the approval of the credit transaction.

2. *Personal property*. For guidance on how to disclose the sale price of a transaction that includes personal property under §1026.38(a)(3)(vii), see comment 37(a)(7)–2.

38(a)(4) Transaction information.

1. *Multiple borrowers and sellers*. The name and address of each consumer and seller in the transaction must be provided under the heading ''Transaction Information.'' If the form does not provide enough space to include the required information for each consumer and seller, an additional page may be used and appended to the end of the form provided that the creditor complies with the requirements of §1026.38(t)(3). For additional guidance on disclosing multiple borrowers, see comment 37(a)(5)–1.

2. *No seller transactions or simultaneous subordinate financing transactions*. In transactions where there is no seller, such as in a refinancing or home equity loan, or for simultaneous subordinate financing purchase transactions if the first-lien Closing Disclosure will record the entirety of the seller's transaction, the disclosure under §1026.38(a)(4)(ii) may be left blank. *See also* §1026.38(t)(5)(vii)(A).

3. *Multiple creditors*. See comment 37(a)(3)–1 regarding identification requirements for multiple creditors.

4. *Consumers*. Section 1026.38(a)(4)(i) requires disclosure of the consumer's name and mailing address, labeled ''Borrower.'' For purposes of §1026.38(a)(4)(i), the term ''consumer'' is limited to persons to whom the credit is offered or extended. For guidance on how to disclose multiple consumers, see comment 38(a)(4)–1.

38(a)(5) Loan information.

1. *General*. See commentary to §1026.37(a)(8) through (12) for guidance on the general requirements and definitions applicable to §1026.38(a)(5)(i) through (v).

38(a)(5)(v) Loan identification number.

1. *Same identification number as Loan Estimate*. The loan identification number disclosed pursuant to §1026.38(a)(5)(v) must be one that enables the creditor, consumer, and other parties to identify the transaction as the same transaction disclosed on the Loan Estimate. The loan identification number may contain any alpha-numeric characters. If a creditor uses the same loan identification number on several revised Loan Estimates to the consumer, but adds after such number a hyphen and a number to denote the number of revised Loan Estimates in sequence, the creditor must disclose the loan identification number before such hyphen on the Closing Disclosure to identify the transaction as the same for which the initial and revised Loan Estimates were provided.

38(b) Loan terms.

1. *Guidance*. See the commentary to §1026.37(b) for guidance on the content of the disclosures required by §1026.38(b).

38(c) Projected payments.

1. *In general*. For guidance on the disclosure of the projected payments table, see §1026.37(c) and its commentary.

38(c)(1) Projected payments or range of payments.

1. *Escrow account analysis*. The amount of estimated escrow payments disclosed on the Closing Disclosure is accurate if it differs from the estimated escrow payment disclosed on the Loan Estimate because of the escrow account analysis described in Regulation X, 12 CFR 1024.17.

38(d) Costs at closing.

38(d)(2) Alternative table for transactions without a seller or for simultaneous subordinate financing.

1. *Required use*. The disclosure of the alternative cash to close table in §1026.38(d)(2) may only be provided by a creditor in a transaction without a seller or for a simultaneous subordinate financing transaction. In a purchase transaction, the alternative disclosure may be used for the simultaneous subordinate financing Closing Disclosure only if the first-lien Closing Disclosure records the entirety of the seller's transaction. The use of this alternative table for transactions without a seller or for simultaneous subordinate financing transactions is required if the Loan Estimate provided to the consumer disclosed the optional alternative table under §1026.37(d)(2) and must be used in conjunction with the use of the alternative calculating cash to close disclosure under §1026.38(e). See comments 38(j)–3 and 38(k)(2)(vii)–1 for disclosure requirements applicable to the first-lien transaction when the alternative disclosures are used for a simultaneous subordinate financing transaction and a seller contributes to the costs of the subordinate financing. See also comments 38(t)(5)(vii)(B)–1 and –2 for the requirement to disclose the seller's contributions, if any, toward the subordinate financing in the payoffs and payments table on the simultaneous subordinate financing Closing Disclosure.

2. *Method of indication*. The indication of whether the cash is either due from or payable to the consumer is made by the use of check boxes as shown in form H–25(J) of appendix H to this part. Forms H–25(E) and H–25(G) of appendix H to this part contain examples of the use of these checkboxes.

38(e) Alternative calculating cash to close table for transactions without a seller or for simultaneous subordinate financing.

1. *Required use*. The disclosure of the table in §1026.38(e) may only be provided by a creditor in a transaction without a seller or for a simultaneous subordinate financing transaction. In a purchase transaction, the alternative disclosure may be used for the simultaneous subordinate financing Closing Disclosure only if the first-lien Closing Disclosure records the entirety of the seller's

transaction. The use of this alternative calculating cash to close table for transactions without a seller or for simultaneous subordinate financing is required for transactions in which the Loan Estimate provided to the consumer disclosed the optional alternative table under §1026.37(h)(2), and must be used in conjunction with the alternative disclosure under §1026.38(d)(2).

2. *More prominent disclosures.* Section 1026.38(e)(1)(iii), (2)(iii), (3)(iii), and (4)(iii) requires that statements are given as to whether the ''Final'' amount disclosed under each subparagraph (ii) of §1026.38(e)(1) through (e)(4) is different than or equal to, and in some cases whether the amount is greater than or less than, the corresponding ''Loan Estimate'' amount disclosed under each subparagraph (i) of §1026.38(e)(1) through (e)(4). These statements are more prominent than the other disclosures under §1026.38(e). The statement of whether the estimated and final amounts are different, stated as a ''Yes'' or ''No'' in capital letters and in boldface, under the subheading ''Did this change?,'' as shown on forms H–25(E) and H–25(G) of appendix H to this part, complies with the requirement to state whether the amounts are different more prominently. Such statement of ''No'' satisfies the requirement to state that the estimated and final amounts are equal, and these sections do not provide for any narrative text to be included with such statement. The prominence requirement also requires that, in the event an increase or decrease in costs has occurred, certain words within the narrative text to be included under the subheading ''Did this change?'' for a ''Yes'' answer are displayed more prominently than other disclosures. For example, under §1026.38(e)(2)(iii)(A), this more prominent statement could take the form of the phrases ''Total Loan Costs (D)'' and ''Total Other Costs (I)'' being shown in boldface, as shown on forms H–25(E) and H–25(G) of appendix H to this part. See comment 38(e)–4 for further guidance regarding the prominence of such statements.

3. *Statements of differences.* The dollar amounts disclosed under §1026.38 generally are shown to two decimal places unless otherwise required. *See* comment 38(t)(4)–1. Any amount in the ''Final'' column of the alternative calculating cash to close table under §1026.38(e) is shown to two decimal places unless otherwise required. Pursuant to §1026.38(t)(4)(i)(C), however, any amount in the ''Loan Estimate'' column of the alternative calculating cash to close table under §1026.38(e) is rounded to the nearest dollar amount to match the corresponding estimated amount disclosed on the Loan Estimate's calculating cash to close table under §1026.37(h). For purposes of §1026.38(e)(1)(iii), (2)(iii), and (4)(iii), each statement of a change between the amounts disclosed on the Loan Estimate and the Closing Disclosure is based on the actual, non-rounded estimate that would have been disclosed on the Loan Estimate under §1026.37(h) if it had been shown to two decimal places rather than a whole dollar amount. For example, if the amounts in the ''Loan Estimate'' column of the total closing costs row disclosed under §1026.38(e)(2)(i) is $12,500, but the non-rounded estimate of total closing costs is $12,500.35, and the ''Final'' column of the total closing costs row disclosed under §1026.38(e)(2)(ii) is $12,500.35, then, even though the table would appear to show a $0.35 increase in total closing costs, no statement of such increase is given under §1026.38(e)(2)(iii).

4. *Statements that the consumer should see details.* The provisions of §1026.38(e)(2)(iii)(A) and (e)(4)(iii)(A) each require a statement that the consumer should see certain details of the closing costs disclosed under §1026.38(f), (g), or (t). Forms H–25(E) and H–25(G) of appendix H to this part contain examples of these statements. For example, §1026.38(e)(4)(iii)(A) requires a statement that the consumer should see the details disclosed pursuant to §1026.38(t)(5)(vii)(B), and, as shown on forms H–25(E) and H–25(G) of appendix H to this part, the statement, ''See Payoffs and Payments,'' in which the words ''Payoffs and Payments'' are in boldface, complies with this provision.

5. *Statement of increase or decrease.* Section 1026.38(e)(1)(iii)(A) requires a statement of whether the loan amount increased or decreased. A creditor complies with this requirement by disclosing, ''This amount increased'' or ''This amount decreased'' with the words ''increase'' and ''decrease'' in boldface font.

6. *Estimated amounts.* The amounts disclosed on the alternative calculating cash to close table under the subheading ''Loan Estimate'' under §1026.38(e)(1)(i), (2)(i), (4)(i), and (5)(i) are the amounts disclosed on the most recent Loan Estimate provided to the consumer under §1026.19(e).

38(e)(1) Loan amount.

Paragraph 38(e)(1)(iii)(A).

1. *Statements of increases or decreases.* Section 1026.38(e)(1)(iii)(A) requires a statement of whether the amount increased or decreased from the estimated amount. The statement, ''This amount increased,'' in which the word ''increased'' is in boldface font and is replaced with the word ''decreased'' as applicable, complies with this requirement.

38(e)(2) Total closing costs.

Paragraph 38(e)(2)(i).

1. *Reference to disclosure of total closing costs.* Under §1026.38(e)(2)(i), the amount disclosed is labeled ''Total Closing Costs,'' and such label is accompanied by a reference to the disclosure of ''Total Closing Costs'' under §1026.38(h)(1). This reference may take

the form, for example, of a cross-reference in parenthesis to the row on the table disclosed under §1026.38(h) that includes the itemized amount for ''Total Closing Costs,'' as shown on form H–25 of appendix H to this part.

Paragraph 38(e)(2)(iii)(A).

1. *Statements and references regarding the total loan costs and total other costs.* Under §1026.38(e)(2)(iii)(A), the statements under the subheading ''Did this change?'' that the consumer should see the total loan costs and total other costs subtotals disclosed on the Closing Disclosure under §1026.38(f)(4) and (g)(5) are made only if and to the extent the difference in the ''Total Closing Costs'' is attributable to differences in itemized charges that are included in either or both of such subtotals.

i. For example, if an increase in the ''Total Closing Costs'' is attributable only to an increase in the appraisal fee (which is an itemized charge on the Closing Disclosure under the subheading ''Services Borrower Did Not Shop For,'' itself under the heading ''Loan Costs''), then a statement is given under the subheading ''Did this change?'' that the consumer should see the total loan costs subtotal disclosed on the Closing Disclosure under §1026.38(f)(4). If the increase in ''Total Closing Costs'' is attributable only to an increase in recording fees (which is an itemized charge on the Closing Disclosure under the subheading ''Taxes and Other Government Fees,'' itself under the heading ''Other Costs''), then a statement is given under the subheading ''Did this change?'' that the consumer should see the total other costs subtotal disclosed on the Closing Disclosure under §1026.38(g)(5). If, however, the increase is attributable in part to an increase in the appraisal fee and in part to an increase in the recording fee, then a statement is given under the subheading ''Did this change?'' that the consumer should see the total loan costs and total other costs subtotals disclosed on the Closing Disclosure under §1026.38(f)(4) and (g)(5).

ii. For guidance regarding the requirement that this statement be accompanied by a reference to the disclosures of the total loan costs and total other costs under §1026.38(f)(4) and (g)(5), see comment 38(e)(2)(i)–1. For an example of such reference, see form H–25 of appendix H to this part.

2. *Disclosure of excess amounts above limitations on increases in closing costs.*

i. Because certain closing costs, individually, are generally subject to the limitations on increases in closing costs under §1026.19(e)(3)(i) (*e.g.,* fees paid to the creditor, transfer taxes, fees paid to an affiliate of the creditor), while other closing costs are collectively subject to the limitations on increases in closing costs under §1026.19(e)(3)(ii) (*e.g.,* recording fees, fees paid to an unaffiliated third party identified by the creditor if the creditor permitted the consumer to shop for the service provider), §1026.38(e)(2)(iii)(A) requires the creditor or closing agent to calculate subtotals for each type of excess amount, and then add such subtotals together to yield the dollar amount to be disclosed in the table. See commentary to §1026.19(e)(3) for additional guidance on calculating excess amounts above the limitations on increases in closing costs under §1026.19(e)(3).

ii. Under §1026.38(e)(2)(iii)(A), calculation of the excess amounts above the limitations on increases in closing costs takes into account that the itemized, estimated closing costs disclosed on the Loan Estimate will not result in charges to the consumer if the service is not actually provided at or before consummation. For example, if the Loan Estimate included under ''Services You Cannot Shop For'' a $30 charge for a ''title courier fee,'' but the title company elects to hand-deliver the title documents package to the creditor at no charge, the $30 fee is not factored into the calculation of the ''Total Closing Costs'' that are subject to the limitations on increases in closing costs. However, if the title courier fee was assessed, but at only $15, the charge is factored into the calculation because the third party service was actually provided, albeit at a lower amount than estimated. For an example, see form H–25 of appendix H to this part.

iii. Under §1026.38(e)(2)(iii)(A), calculation of the excess amounts above the limitations on increases in closing costs takes into account that certain itemized charges listed on the Loan Estimate under the subheading ''Services You Can Shop For'' may be subject to different limitations depending on the circumstances. Although §1026.19(e)(3)(iii) provides exceptions to the general rule, such a charge would generally be subject to the limitations under §1026.19(e)(3)(i) if the consumer decided to use a provider affiliated with the creditor. However, the same charge would instead be subject to the limitations under §1026.19(e)(3)(ii) if the consumer selected a third party service provider unaffiliated with but identified by the creditor, and the creditor permitted the consumer to shop for the service provider. See commentary to §1026.19(e)(3) for additional guidance on calculating excess amounts above the limitations on increases in closing costs under §1026.19(e)(3).

3. *Statements regarding excess amount and any credit to the consumer.* Section 1026.38(e)(2)(iii)(A) requires a statement that an increase in closing costs exceeds legal limits by the dollar amount of the excess and a statement directing the consumer to the disclosure of lender credits under §1026.38(h)(3) or a principal reduction under §1026.38(t)(5)(vii)(B), if provided under §1026.19(f)(2)(v). See form H–25(F) in appendix

H to this part for examples of such statements under §1026.38(h)(3). *See also* comments 38–4 and 38(h)(3)–2.

38(e)(3) Closing costs paid before closing.

Paragraph 38(e)(3)(i).

1. *Estimate of closing costs paid before closing.* Under §1026.38(e)(3)(i), the ''Loan Estimate'' amount for ''Closing Costs Subtotal Paid Before Closing'' is always shown as ''$0,'' because an estimate of such amount is not disclosed on the Loan Estimate.

Paragraph 38(e)(3)(iii)(B).

1. *Equal amount.* Under §1026.38(e)(3)(iii)(B), the creditor gives a statement that the ''Final'' amount disclosed under §1026.38(e)(3)(ii) is equal to the ''Loan Estimate'' amount disclosed under §1026.38(e)(3)(i), only if the ''Final'' amount is $0, because the ''Loan Estimate'' amount is always disclosed as $0 under §1026.38(e)(3)(i). *See* comment 38(e)(3)(i)–1.

38(f) Closing cost details; loan costs.

1. *Lender-paid charges and specific lender credits.* Charges that are designated as paid by others under §1026.38(f) and (g), below, may include the letter ''L'' in parentheses, *i.e.* ''(L),'' to the left of the amount in the column to designate those charges paid by the creditor pursuant to the legal obligation between the creditor and consumer.

2. *Construction loan inspection and handling fees.* Construction loan inspection and handling fees are loan costs associated with the transaction for purposes of §1026.38(f). For information on how to disclose inspection and handling fees for the staged disbursement of construction loan proceeds if the amount or number of such fees or when they will be collected is not known at or before consummation, see comments 37(f)–3, 37(f)(6)–3, and app. D–7.vii. See §1026.17(e) and its commentary concerning the effect of subsequent events that cause inaccuracies in disclosures.

38(f)(1) Origination charges.

1. *Guidance in other comments.* For a description of origination charges and discount points, see comments 37(f)(1)–1, –2, and –3.

2. *Loan originator compensation.* All compensation paid to a loan originator, as defined by §1026.36(a)(1), that is a third-party associated with the transaction, regardless of the party that pays the compensation, must be disclosed pursuant to §1026.38(f)(1). Compensation from the consumer to a third-party loan originator is designated as borrower-paid at or before closing, as applicable, on the Closing Disclosure. Compensation from the creditor to a third-party loan originator is designated as paid by others on the Closing Disclosure. Compensation to a third-party loan originator from both the consumer and the creditor in the transaction is prohibited under §1026.36(d)(2).

3. *Calculating compensation to a loan originator from the creditor.* The amount disclosed as paid from the creditor to a third-party loan originator under §1026.38(f)(1) is the dollar value of salaries, commissions, and any financial or similar compensation provided to a third-party loan originator by the creditor that are considered to be points and fees under §1026.32(b)(1)(ii). For additional guidance and examples on the calculation of compensation paid to the third-party loan originator from the creditor, see comments 32(b)(1)(ii)–1, —2, –3, and –4.

38(f)(2) Services borrower did not shop for.

1. *Guidance in other comments.* For examples of services, costs, and their descriptions disclosed under §1026.38(f)(2), see comments 37(f)(2)–1, –2, –3, and –4.

38(f)(3) Services borrower did shop for.

1. *Provider on written list.* Items that were disclosed pursuant to §1026.37(f)(3) cannot be disclosed under §1026.38(f)(3) when the consumer selected a provider contained on the written list provided under §1026.19(e)(1)(vi)(C). Instead, such costs are disclosed pursuant to §1026.38(f)(2).

38(f)(5) Subtotal of loan costs.

1. *Charges subtotaled.* The only charges that are loan costs that are subtotaled pursuant to §1026.38(f)(5) are those costs designated borrower-paid at or before closing. Charges which are loan costs designated seller-paid at or before closing, or paid by others, are not subtotaled pursuant to §1026.38(f)(5). The subtotal of charges that are seller-paid at or before closing or paid by others is disclosed under §1026.38(h)(2).

38(g) Closing costs details; other costs.

38(g)(1) Taxes and other government fees.

1. *Guidance.* For additional guidance on taxes and other government fees, see comments 37(g)(1)–1, –2, –3, and –4.

2. *Transfer taxes—itemization.* The creditor may itemize the transfer taxes paid on as many lines as necessary pursuant to §1026.38(g)(1) in order to disclose all of the transfer taxes paid as part of the transaction. The taxes should be allocated in the applicable columns as borrower-paid at or before closing, seller-paid at or before closing, or paid by others, as provided by State or local law, the terms of the legal obligation, or the real estate purchase contract.

3. *Recording fees.* i. *Fees for recording deeds and security instruments.* Section 1026.38(g)(1)(i)(A) requires, on the first line under the subheading ''Taxes and Other Government Fees'' and before the columns described in §1026.38(g), disclosure of the total fees expected to be paid to State and local governments for recording deeds and, separately, the total fees expected to be paid to State and local governments for recording security instruments. On a line labeled ''Recording Fees,'' form H–25 of appendix H to this part illustrates such disclosures with the additional labels ''Deed'' and ''Mortgage,'' respectively.

ii. *Total of all recording fees.* Section 1026.38(g)(1)(i)(B) requires, on the first line under the subheading ''Taxes and Other Government Fees'' and in the applicable column described in §1026.38(g), disclosure of the total amounts paid for recording fees, including but not limited to the amounts subject to §1026.38(g)(1)(i)(A). The total amount disclosed under §1026.38(g)(1)(i)(B) also includes recording fees expected to be paid to State and local governments for recording any other instrument or document to preserve marketable title or to perfect the creditor's security interest in the property. See comments 37(g)(1)–1, –2, and –3 for discussions of the difference between transfer taxes and recording fees.

38(g)(2) Prepaids.

1. *Guidance.* For additional guidance on prepaids, see comments 37(g)(2)–1 and –2.

2. *Negative prepaid interest.* The prepaid interest amount is disclosed as a negative number if the calculation of prepaid interest results in a negative number.

3. *No prepaid interest.* If interest is not collected for any period between closing and the date from which interest will be collected with the first monthly payment, then $0.00 is disclosed under §1026.38(g)(2).

4. *Interest rate for prepaid interest.* The dollar amounts disclosed pursuant to §1026.38(g)(2) must be based on the interest rate disclosed under §1026.38(b), as required by §1026.37(b)(2).

5. *Property taxes.* For a description of items that constitute property taxes, see comment 43(b)(8)–2.

38(g)(3) Initial escrow payment at closing.

1. *Initial escrow account itemization.* The creditor must state the amount that it will require the consumer to place into a reserve or escrow account at consummation to be applied to recurring charges for property taxes, homeowner's and similar insurance, mortgage insurance, homeowner's association dues, condominium dues, and other periodic charges. Each periodic charge to be included in the escrow or reserve account must be itemized under the ''Initial Escrow Payment at Closing'' subheading, with a relevant label, monthly payment amount, and number of months collected at closing.

2. *Aggregate accounting.* The method used to determine the aggregate adjustment for the purposes of establishing the escrow account is described in 12 CFR 1024.17(d)(2). Examples of this calculation methodology can be found in appendix E to 12 CFR part 1024. The aggregate adjustment, as illustrated by form H–25 of appendix H to this part, is disclosed as the last listed item in the amounts disclosed under §1026.38(g)(3).

3. *Escrowed tax payments for different timeframes.* Payments for property taxes that are paid at different time periods can be itemized separately when done in accordance with 12 CFR 1024.17. For example, a general property tax covering a fiscal year from January 1 to December 31 can be listed as a property tax under §1026.38(g)(3) and a separate property tax to fund schools that cover a fiscal year from November 1 to October 31 can be added as a separate itemized amount under §1026.38(g)(3).

4. *Property taxes.* For a description of items that constitute property taxes, see comment 43(b)(8)–2.

5. *Definition of escrow account.* For a description of the amounts included in the initial escrow account disclosure under §1026.38(g)(3), see the definition of ''escrow account'' in 12 CFR 1024.17(b).

38(g)(4) Other.

1. *Costs disclosed.* The costs disclosed under §1026.38(g)(4) include all real estate brokerage fees, homeowner's or condominium association charges paid at consummation, home warranties, inspection fees, and other fees that are part of the real estate closing but not required by the creditor or not disclosed elsewhere under §1026.38.

2. *Owner's title insurance premium.* In a jurisdiction where simultaneous issuance title insurance rates are permitted, any owner's title insurance premium disclosed under §1026.38(g)(4) is calculated by using the full owner's title insurance premium, adding any simultaneous issuance premium for issuance of lender's coverage, and then deducting the full premium for lender's coverage disclosed under §1026.38(f)(2) or (f)(3). Section 1026.38(g)(4)(i) requires that the disclosure of the cost of the premium for an owner's title insurance policy include ''Title—'' at the beginning of the label. In addition, §1026.38(g)(4)(ii) requires that the disclosure of the cost of the premium for an owner's title insurance policy include the parenthetical ''(optional)'' at the end of the label when designated borrower-paid at or before closing.

3. *Guidance.* For additional guidance on the use of the term ''(optional)'' under §1026.38(g)(4)(ii), see comment 37(g)(4)–3.

4. *Real estate commissions.* The amount of real estate commissions pursuant to §1026.38(g)(4) must be the total amount paid to any real estate brokerage as a commission, regardless of the identity of the party holding any earnest money deposit. Additional charges made by real estate brokerages or agents to the seller or consumer are itemized separately as additional items for services rendered, with a description of the service and an identification of the person ultimately receiving the payment.

38(g)(6) Subtotal of costs.

1. *Costs subtotaled.* The only costs that are subtotaled pursuant to §1026.38(g)(6) are those costs that are designated borrower-paid at or before closing. Costs that are designated seller-paid at or before closing, or paid by others, are not subtotaled pursuant to §1026.38(g)(6). The subtotal of charges that

are designated seller-paid at or before closing or paid by others is disclosed under §1026.38(h)(2).

38(h) Closing cost totals.

Paragraph 38(h)(2).

1. *Charges paid by seller and by others subtotaled.* All loan costs and other costs that are designated seller-paid at or before closing, or paid by others, are also totaled under §1026.38(h)(2).

Paragraph 38(h)(3).

1. *General lender credits.* When the consumer receives a generalized credit from the creditor for closing costs, the amount of the credit must be disclosed under §1026.38(h)(3). However, if such credit is attributable to a specific loan cost or other cost listed in the Closing Cost Details tables, pursuant to §1026.38(f) or (g), that amount should be reflected in the Paid by Others column in the Closing Cost Details tables under §1026.38(f) or (g). For a description of lender credits from the creditor, see comment 17(c)(1)–19. For a discussion of general lender credits and lender credits for specific charges, see comment 19(e)(3)(i)–5.

2. *Credits for excess charges.* Credits from the creditor to offset an amount charged in excess of the limitations described in §1026.19(e)(3) are disclosed pursuant to §1026.38(h)(3), along with a statement that such amount was paid to offset an excess charge, with funds other than closing funds. If an excess charge to the consumer is discovered after consummation and a refund provided, the corrected disclosure must be provided to the consumer under §1026.19(f)(2)(v). For an example, see form H–25(F) of appendix H to this part.

Paragraph 38(h)(4).

1. *Consistent terminology and order of charges.* On the Closing Disclosure the creditor must label the corresponding services and costs disclosed under §1026.38(f) and (g) using terminology that describes each item, as applicable, and must use terminology or the prescribed label, as applicable, that is consistent with that used on the Loan Estimate to identify each corresponding item. In addition, §1026.38(h)(4) requires the creditor to list the items disclosed under each subcategory of charges in a consistent order. If costs move between subheadings under §1026.38(f)(2) and (f)(3), listing the costs in alphabetical order in each subheading category is considered to be in compliance with §1026.38(h)(4). See comment 37(f)(5)–1 for guidance regarding the requirement to use terminology that describes the items to be disclosed.

38(i) Calculating cash to close.

1. *More prominent disclosures.* Section 1026.38(i)(1)(iii), (2)(iii), (3)(iii), (4)(iii), (5)(iii), (6)(iii), (7)(iii), and (8)(iii) requires that statements are given as to whether the ''Final'' amount disclosed under each subparagraph (ii) of §1026.38(i)(1) through (i)(8) is different or equal to, and in some cases whether the amount is greater than or less than, the corresponding ''Loan Estimate'' amount disclosed under each subparagraph (i) of §1026.38(i)(1) through (i)(8). These statements are more prominent than the other disclosures under §1026.38(i). The statement of whether the estimated and final amounts are different, stated as a ''Yes'' or ''No'' in capital letters and in boldface font, under the subheading ''Did this change?,'' as shown on form H–25 of appendix H to this part, complies with the requirement to state whether the amounts are different more prominently. Such statement of ''No'' satisfies the requirement to state that the estimated and final amounts are equal, and these sections do not provide for any narrative text to be included with such statement. The prominence requirement also requires that, in the event an increase or decrease in costs has occurred, certain words within the narrative text to be included under the subheading ''Did this change?'' for a ''Yes'' answer are displayed more prominently than other disclosures. For example, under §1026.38(i)(1)(iii)(A), this more prominent statement could take the form of the phrases ''Total Loan Costs'' and ''Total Other Costs'' being shown in boldface, as shown on form H–25 of appendix H to this part. See comments 38(i)–3 and –4 for further guidance regarding the prominence of such statements.

2. *Statements of differences.* The dollar amounts disclosed under §1026.38 generally are shown to two decimal places unless otherwise required. *See* comment 38(t)(4)–1. Any amount in the ''Final'' column of the calculating cash to close table under §1026.38(i) is shown to two decimal places unless otherwise required. Under §1026.38(t)(4)(i)(C), however, any amount in the ''Loan Estimate'' column of the calculating cash to close table under §1026.38(i) is rounded to the nearest dollar amount to match the corresponding estimated amount disclosed on the Loan Estimate's calculating cash to close table under §1026.37(h). For purposes of §1026.38(i)(1)(iii), (3)(iii), (4)(iii), (5)(iii), (6)(iii), (7)(iii), and (8)(iii), each statement of a change between the amounts disclosed on the Loan Estimate and the Closing Disclosure is based on the actual, non-rounded estimate that would have been disclosed on the Loan Estimate under §1026.37(h) if it had been shown to two decimal places rather than a whole dollar amount. For example, if the amount in the ''Loan Estimate'' column of the total closing costs row disclosed under §1026.38(i)(1)(i) is $12,500, but the non-rounded estimate of total closing costs is $12,500.35, and the amount in the ''Final'' column of the total closing costs row disclosed under §1026.38(i)(1)(ii) is $12,500.35, then, even though the table would appear to show a

$0.35 increase in total closing costs, no statement of such increase is given under §1026.38(i)(1)(iii).

3. *Statements that the consumer should see details.* The provisions of §1026.38(i)(4)(iii)(A), (5)(iii)(A), (7)(iii)(A), and (8)(iii)(A) each require a statement that the consumer should see certain details of the closing costs disclosed under §1026.38(j). Form H–25 of appendix H to this part contains some examples of these statements. For example, §1026.38(i)(5)(iii)(A) requires a statement that the consumer should see the details disclosed under §1026.38(j)(2)(ii). The following statement, which is similar to that shown on form H–25(B) of appendix H to this part for §1026.38(i)(7)(iii)(A), ''See Deposit in Section L,'' in which the words ''Section L'' are in boldface font, complies with this provision. In addition, for example, the statement ''See details in Sections K and L,'' in which the words ''Sections K and L'' are in boldface font, complies with the requirement under §1026.38(i)(8)(iii)(A). See form H–25(B) of appendix H to this part for an example of the statement required by §1026.38(i)(8)(iii)(A). See also comment 38(i)(7)(iii)(A)–1 for additional examples that comply with the requirements under §1026.38(i)(7)(iii)(A).

4. *Statements of increases or decreases.* The provisions of §1026.38(i)(4)(iii)(A), (i)(5)(iii)(A), and (i)(6)(iii)(A) each require a statement of whether the amount increased or decreased from the estimated amount. For the statement required by §1026.38(i)(6)(iii)(A), the statement ''This amount increased,'' in which the word ''increased'' is in boldface and is replaced with the word ''decreased'' as applicable, complies with this requirement. For the statements required by §1026.38(i)(4)(iii)(A) and (i)(5)(iii)(A), the statement, ''You increased this payment,'' in which the word ''increased'' is in boldface and is replaced with the word ''decreased'' as applicable, complies with these requirements.

5. *Estimated amounts.* The amounts disclosed in the ''Loan Estimate'' column of the calculating cash to close table under §1026.38(i)(1)(i), (3)(i), (4)(i), (5)(i), (6)(i), (7)(i), (8)(i), and (9)(i) are the amounts disclosed on the most recent Loan Estimate provided to the consumer.

38(i)(1) Total closing costs.

Paragraph 38(i)(1)(iii)(A).

1. *Statements and references regarding the total loan costs and total other costs.* Under §1026.38(i)(1)(iii)(A), the statements under the subheading ''Did this change?'' that the consumer should see the total loan costs and total other costs subtotals disclosed on the Closing Disclosure under §1026.38(f)(4) and (g)(5) is made only if and to the extent the difference in the ''Total Closing Costs'' is attributable to differences in itemized charges that are included in either or both of such subtotals.

i. For example, if an increase in the ''Total Closing Costs'' is attributable only to an increase in the appraisal fee (which is an itemized charge on the Closing Disclosure under the subheading ''Services Borrower Did Not Shop For,'' itself under the heading ''Loan Costs''), then a statement is given under the subheading ''Did this change?'' that the consumer should see the total loan costs subtotal disclosed on the Closing Disclosure under §1026.38(f)(4). If the increase in ''Total Closing Costs'' is attributable only to an increase in recording fees (which is an itemized charge on the Closing Disclosure under the subheading ''Taxes and Other Government Fees,'' itself under the heading ''Other Costs''), then a statement is given under the subheading ''Did this change?'' that the consumer should see the total other costs subtotal disclosed on the Closing Disclosure under §1026.38(g)(5). If, however, the increase is attributable in part to an increase in the appraisal fee and in part to an increase in the recording fee, then a statement is given under the subheading ''Did this change?'' that the consumer should see the total loan costs and total other costs subtotals disclosed on the Closing Disclosure under §1026.38(f)(4) and (g)(5).

ii. For guidance regarding the requirement that this statement be accompanied by a reference to the disclosures of the total loan costs and total other costs under §1026.38(f)(4) and (g)(5), see comment 38(i)–1. For an example of such reference, see form H–25 of appendix H to this part.

2. *Disclosure of excess amounts above limitations on increases in closing costs.*

i. Because certain closing costs, individually, are generally subject to the limitations on increases in closing costs under §1026.19(e)(3)(i) (*e.g.*, fees paid to the creditor, transfer taxes, fees paid to an affiliate of the creditor), while other closing costs are collectively subject to the limitations on increases in closing costs under §1026.19(e)(3)(ii) (*e.g.*, recording fees, fees paid to an unaffiliated third party identified by the creditor if the creditor permitted the consumer to shop for the service provider), §1026.38(i)(1)(iii)(A) requires the creditor or closing agent to calculate subtotals for each type of excess amount, and then add such subtotals together to yield the dollar amount to be disclosed in the table. See commentary to §1026.19(e)(3) for additional guidance on calculating excess amounts above the limitations on increases in closing costs under §1026.19(e)(3).

ii. Under §1026.38(i)(1)(iii)(A), calculation of the excess amounts above the limitations on increases in closing costs takes into account that the itemized, estimated closing costs disclosed on the Loan Estimate will not result in charges to the consumer if the service is not actually provided at or before consummation. For example, if the Loan Estimate included under ''Services You Cannot Shop For'' a $30 charge for a ''title courier fee,'' but the title company elects to hand-deliver the title documents package to the creditor at no charge, the $30 fee is not factored into the calculation of the ''Total Closing Costs'' that are subject to the limitations on increases in closing costs. However, if the title courier fee was assessed, but at only $15, the charge is factored into the calculation because the third-party service was actually provided, albeit at a lower amount than estimated.

iii. Under §1026.38(i)(1)(iii)(A), calculation of the excess amounts above the limitations on increases in closing costs takes into account that certain itemized charges listed on the Loan Estimate under the subheading ''Services You Can Shop For'' may be subject to different limitations depending on the circumstances. Although §1026.19(e)(3)(iii) provides exceptions to the general rule, such a charge would generally be subject to the limitations under §1026.19(e)(3)(i) if the consumer decided to use a provider affiliated with the creditor. However, the same charge would instead be subject to the limitations under §1026.19(e)(3)(ii) if the consumer selected a third-party service provider unaffiliated with but identified by the creditor, and the creditor permitted the consumer to shop for the service provider. See commentary to §1026.19(e)(3) for additional guidance on calculating excess amounts above the limitations on increases in closing costs under §1026.19(e)(3).

3. *Statements regarding excess amount and any credit to the consumer.* Section 1026.38(i)(1)(iii)(A)(*3*) requires statements that an increase in closing costs exceeds legal limits by the dollar amount of the excess and a statement directing the consumer to the disclosure of lender credits under §1026.38(h)(3), or a principal reduction under §1026.38(j)(1)(v), if either is provided under §1026.19(f)(2)(v). See form H–25(F) of appendix H to this part for examples of such statements under §1026.38(h)(3). *See also* comments 38–4 and 38(h)(3)–2.

38(i)(2) Closing costs paid before closing.

Paragraph 38(i)(2)(i).

1. *Estimate of closing costs paid before closing.* Under §1026.38(i)(2)(i), the ''Loan Estimate'' amount for ''Closing Costs Paid Before Closing'' is always shown as ''$0,'' because an estimate of such amount is not disclosed on the Loan Estimate.

Paragraph 38(i)(2)(iii)(B).

1. *Equal amount.* Under §1026.38(i)(2)(iii)(B), the creditor or closing agent will give a statement that the ''Final'' amount disclosed under §1026.38(i)(2)(ii) is equal to the ''Loan Estimate'' amount disclosed under §1026.38(i)(2)(i), only if the ''Final'' amount is $0, because the ''Loan Estimate'' amount is always disclosed as $0 pursuant to §1026.38(i)(2)(i). *See* comment 38(i)(2)(i)–1.

38(i)(3) Closing costs financed.

1. *Calculation of amount.* i. *Generally.* The amount of closing costs financed disclosed under §1026.38(i)(3) is determined by subtracting the total amount of payments to third parties not otherwise disclosed under §1026.38(f) and (g) from the loan amount disclosed under §1026.38(b). The total amount of payments to third parties includes the sale price of the property disclosed under §1026.38(j)(1)(ii). Other examples of payments to third parties not otherwise disclosed under §1026.38(f) and (g) include the amount of construction costs for transactions that involve improvements to be made on the property, and payoffs of secured or unsecured debt. If the result of the calculation is zero or negative, the amount of $0 is disclosed under §1026.38(i)(3). If the result of the calculation is positive, that amount is disclosed as a negative number under §1026.38(i)(3), but only to the extent that the absolute value of the amount disclosed under §1026.38(i)(3) does not exceed the total amount of closing costs disclosed under §1026.38(h)(1).

ii. *Simultaneous subordinate financing.* For simultaneous subordinate financing transactions, no sale price will be disclosed under §1026.38(j)(1)(ii), and therefore no sale price will be included in the closing costs financed calculation as a payment to third parties. The total amount of payments to third parties only includes payments occurring in the simultaneous subordinate financing transaction other than payments toward the sale price.

2. *Loan amount.* The loan amount disclosed under §1026.38(b), a component of the closing costs financed calculation, is the total amount the consumer will borrow, as reflected by the face amount of the note.

38(i)(4) Down payment/funds from borrower.

Paragraph 38(i)(4)(ii)(A).

1. *Down payment and funds from borrower calculation.* Under §1026.38(i)(4)(ii)(A)(*1*), the down payment and funds from borrower amount is calculated as the difference between the sale price of the property disclosed under §1026.38(a)(3)(vii)(A) and the sum of the loan amount disclosed under §1026.38(b) and any amount of existing loans assumed or taken subject to that is disclosed under §1026.38(j)(2)(iv), except as required by §1026.38(i)(4)(ii)(A)(*2*). The calculation is independent of any loan program or investor requirements. The ''Final'' amount disclosed for ''Down Payment/Funds from Borrower'' reflects any change, following delivery of the Loan Estimate, in the amount of down payment and other funds required of the consumer. This change might result, for example, from an increase in the purchase price of the property.

2. *Funds for borrower*. Section 1026.38(i)(4)(ii)(A)(*2*) requires that, in a purchase transaction as defined in §1026.37(a)(9)(i) that is a simultaneous subordinate financing transaction or that involves improvements to be made on the property, or when the sum of the loan amount disclosed under §1026.38(b) and any amount of existing loans assumed or taken subject to that is disclosed under §1026.38(j)(2)(iv) exceeds the sale price disclosed under §1026.38(a)(3)(vii)(A), the amount of funds from the consumer is determined in accordance with §1026.38(i)(6)(iv). Pursuant to §1026.38(i)(6)(iv), the ''Final'' amount of ''Down Payment/Funds from Borrower'' to be disclosed under §1026.38(i)(4)(ii)(A)(*2*) is determined by subtracting the sum of the loan amount and any amount of existing loans assumed or taken subject to that is disclosed under §1026.38(j)(2)(iv) (excluding any closing costs financed disclosed under §1026.38(i)(3)(ii)) from the total amount of all existing debt being satisfied in the transaction disclosed under §1026.38(j)(1)(ii), (iii), and (v). The amount of ''Down Payment/Funds from Borrower'' under the subheading ''Final'' is disclosed either as a positive number or $0, depending on the result of the calculation. When the result of the calculation is positive, that amount is disclosed under §1026.38(i)(4)(ii)(A)(*2*) as ''Down Payment/Funds from Borrower,'' and $0 is disclosed under §1026.38(i)(6)(ii) as ''Funds for Borrower.'' When the result of the calculation is negative, that amount is disclosed under §1026.38(i)(6)(ii) as ''Funds for Borrower,'' and $0 is disclosed under §1026.38(i)(4)(ii)(A)(*2*) as ''Down Payment/Funds from Borrower.'' When the result is $0, $0 is disclosed as ''Down Payment/Funds from Borrower'' and ''Funds for Borrower'' under §1026.38(i)(4)(ii)(A)(*2*) and (6)(ii), respectively. An increase in the amount of ''Down Payment/Funds from Borrower'' under the subheading ''Final'' relative to the corresponding amount under the subheading ''Loan Estimate'' might result, for example, from a decrease in the loan amount or an increase in the amount of existing debt being satisfied in the transaction. For additional discussion of the determination of the ''Down Payment/Funds from Borrower'' amount, see comment 38(i)(6)(ii)–1.

Paragraph 38(i)(4)(ii)(B).

1. *Funds for borrower*. Section 1026.38(i)(4)(ii)(B) requires that, in all transactions not subject to §1026.38(i)(4)(ii)(A), the ''Final'' amount disclosed for ''Down Payment/Funds from Borrower'' is the amount determined in accordance with §1026.38(i)(6)(iv). Pursuant to §1026.38(i)(6)(iv), the ''Final'' amount of ''Down Payment/Funds from Borrower'' to be disclosed under §1026.38(i)(4)(ii)(B) is determined by subtracting the sum of the loan amount disclosed under §1026.38(b) and any amount of existing loans assumed or taken subject to that is disclosed under §1026.38(j)(2)(iv) (excluding any closing costs financed disclosed under §1026.38(i)(3)(ii)) from the total amount of all existing debt being satisfied in the transaction disclosed under §1026.38(j)(1)(ii), (iii), and (v). The ''Final'' amount of ''Down Payment/Funds from Borrower'' is disclosed either as a positive number or $0, depending on the result of the calculation. When the result of the calculation is positive, that amount is disclosed under §1026.38(i)(4)(ii)(B) as ''Down Payment/Funds from Borrower,'' and $0 is disclosed under §1026.38(i)(6)(ii) as ''Funds for Borrower.'' When the result of the calculation is negative, that amount is disclosed under §1026.38(i)(6)(ii) as ''Funds for Borrower,'' and $0 is disclosed under §1026.38(i)(4)(ii)(B) as ''Down Payment/Funds from Borrower.'' When the result is $0, $0 is disclosed as ''Down Payment/Funds from Borrower'' and ''Funds for Borrower'' under §1026.38(i)(4)(ii)(B) and (6)(ii), respectively. An increase in the ''Final'' amount of ''Down Payment/Funds from Borrower'' relative to the corresponding ''Loan Estimate'' amount might result, for example, from a decrease in the loan amount or an increase in the amount of existing debt being satisfied in the transaction. For additional discussion of the determination of the ''Down Payment/Funds from Borrower'' amount, see comment 38(i)(6)(ii)–1.

Paragraph 38(i)(4)(iii)(A).

1. *Statement of differences*. Section 1026.38(i)(4)(iii)(A) requires, as applicable, a statement that the consumer has increased or decreased this payment, along with a statement that the consumer should see the details disclosed under §1026.38(j)(1) or (j)(2), as applicable. The applicable disclosure to be referenced corresponds to the label on the Closing Disclosure under which the information accounting for the increase in the ''Down Payment/Funds from Borrower'' amount is disclosed. For example, in a transaction that is a purchase as defined in §1026.37(a)(9)(i), if the purchase price of the property has increased and therefore caused the ''Down Payment/Funds from Borrower'' amount to increase, the statement, ''You increased this payment. See details in Section K,'' with the words ''increased'' and ''Section K'' in boldface, complies with this requirement. In a purchase or refinancing transaction, in the event the amount of the credit extended by the creditor has decreased and therefore caused the ''Down Payment/Funds from Borrower'' amount to increase, the statement can read, for example, ''You increased this payment. See details in Section L,'' with the same in boldface.

38(i)(5) Deposit.

1. *When no deposit.* Section 1026.38(i)(5) requires the disclosure in the calculating cash to close table of the deposit required to be

disclosed under § 1026.37(h)(1)(iv) and under § 1026.38(j)(2)(ii), under the subheadings ''Loan Estimate'' and ''Final,'' respectively. Under § 1026.37(h)(1)(iv), for all transactions other than a purchase transaction as defined in § 1026.37(a)(9)(i), the amount required to be disclosed is $0. In a purchase transaction in which no deposit is paid in connection with the transaction, under §§ 1026.37(h)(1)(iv) and 1026.38(i)(5)(i) and (ii) the amount required to be disclosed is $0.

38(i)(6) Funds for borrower.

Paragraph 38(i)(6)(ii).

1. *Final funds for borrower.* Section 1026.38(i)(6)(ii) provides that the ''Final'' amount for ''Funds for Borrower'' is determined in accordance with § 1026.38(i)(6)(iv). Under § 1026.38(i)(6)(iv), the ''Final'' amount of ''Funds for Borrower'' to be disclosed under § 1026.38(i)(6)(ii) is determined by subtracting the sum of the loan amount disclosed under § 1026.38(b) and any amount of existing loans assumed or taken subject to that is disclosed under § 1026.38(j)(2)(iv) (excluding any closing costs financed disclosed under § 1026.38(i)(3)(ii)) from the total amount of all existing debt being satisfied in the transaction disclosed under § 1026.38(j)(1)(ii), (iii), and (v). The amount is disclosed under § 1026.38(i)(6)(ii) either as a negative number or as $0, depending on the result of the calculation. The ''Final'' amount of ''Funds for Borrower'' disclosed under § 1026.38(i)(6)(ii) is an amount to be disbursed to the consumer or a designee of the consumer at consummation, if any.

2. *No funds for borrower.* When the down payment and funds from the borrower is determined in accordance with § 1026.38(i)(4)(ii)(A)(*1*), the amount disclosed under § 1026.38(i)(6)(ii) as ''Funds for Borrower'' is $0.

38(i)(7) Seller credits.

Paragraph 38(i)(7)(ii).

1. *Final seller credits.* Under § 1026.38(i)(7)(ii), the ''Final'' amount of ''Seller Credits'' reflects any change, following the delivery of the Loan Estimate, in the amount of funds given by the seller to the consumer for generalized (*i.e.*, lump sum) credits for closing costs or for allowances for items purchased separately (*e.g.*, if the seller is a builder). Seller credits are distinguished from payments by the seller for items attributable to periods of time prior to consummation, which are among the ''Adjustments and Other Credits'' separately disclosed pursuant to § 1026.38(i)(8). For additional guidance regarding seller credits, see comments 38(j)(2)(v)–1 and –2.

Paragraph 38(i)(7)(iii)(A).

1. *Statement that the consumer should see details.* Under § 1026.38(i)(7)(iii)(A), if the amount disclosed under § 1026.38(i)(7)(ii) in the ''Final'' column is not equal to the amount disclosed under § 1026.38(i)(7)(i) in the ''Loan Estimate'' column (unless the difference is due to rounding), the creditor must disclose a statement that the consumer should see the details disclosed either: (1) Under § 1026.38(j)(2)(v) in the summaries of transactions table and the seller-paid column of the closing cost details table under § 1026.38(f) or (g); or (2) if the difference is attributable only to general seller credits disclosed under § 1026.38(j)(2)(v), or only to specific seller credits disclosed in the seller-paid column of the closing cost details table under § 1026.38(f) or (g), under only the applicable provision. If, for example, a decrease in the seller credits disclosed under § 1026.38(i)(7)(ii) is attributable only to a decrease in general (*i.e.*, lump sum) seller credits, then a statement is given under the subheading ''Did this change?'' in the calculating cash to close table that the consumer should see the details disclosed under § 1026.38(j)(2)(v) in the summaries of transactions table and the seller-paid column of § 1026.38(f) or (g), or that the consumer should see the details disclosed under § 1026.38(j)(2)(v) in the summaries of transactions table. Form H–25(B) in appendix H to this part demonstrates this disclosure where the decrease in seller credits is attributable only to a decrease in general seller credits and the creditor choses only to reference the applicable provision; form H–25(B)'s statement ''See Seller Credits in Section L,'' in which the words ''Section L'' are in boldface font, complies with this requirement. Where the decrease in the seller credits disclosed under § 1026.38(i)(7)(ii) is attributable to specific and general seller credits, or the creditor does not elect to reference only the applicable provision, then a statement is given under the subheading ''Did this change?'' that the consumer should see both the details disclosed under § 1026.38(j)(2)(v) in the summaries of transactions table and the seller-paid column of the closing cost details table under § 1026.38(f) or (g). For example, the statement ''See Seller-Paid column on page 2 and Seller Credits in Section L,'' in which the words ''Seller-Paid'' and ''Section L'' are in boldface font, complies with this requirement.

38(i)(8) Adjustments and other credits.

Paragraph 38(i)(8)(ii).

1. *Adjustments and other credits.* Under § 1026.38(i)(8)(ii), the ''Final'' amount for ''Adjustments and Other Credits'' would include, for example, prorations of taxes or homeowner's association fees, utilities used but not paid for by the seller, rent collected in advance by the seller from a tenant for a period extending beyond the consummation, and interest on loan assumptions. This category also includes generalized credits toward closing costs given by parties other than the seller. For additional guidance regarding adjustments and other credits, see commentary to §§ 1026.37(h)(1)(vii) and

1026.38(j)(2)(vi) and (xi). If the calculation required by §1026.38(i)(8)(ii) yields a negative number, the creditor or closing agent discloses the amount as a negative number.

38(i)(9) Cash to close.

Paragraph 38(i)(9)(ii).

1. *Final cash to close amount.* The ''Final'' amount of ''Cash to Close'' disclosed under §1026.38(i)(9)(ii) is the same as the amount disclosed on the Closing Disclosure as ''Cash to Close'' under §1026.38(j)(3)(iii). If the calculation required by §1026.38(i)(9)(ii) yields a negative number, the creditor or closing agent discloses the amount as a negative number.

2. *More prominent disclosure.* Section 1026.38(i)(9)(ii) requires that the disclosure of the ''Final'' amount of ''Cash to Close'' be more prominent than the other disclosures under §1026.38(i). Such more prominent disclosure can take the form, for example, of boldface font, as shown on form H–25 of appendix H to this part.

38(j) Summary of borrower's transaction.

1. *In general.* It is permissible to have two separate Closing Disclosures in a transaction: one that reflects the consumer's costs and credits only, which is provided to the consumer, and one that reflects the seller's costs and credits only, which is provided to the seller. *See* §1026.38(t)(5)(v) and (vi). Some State laws may prohibit provision of information about the consumer to the seller and about the seller to the consumer.

2. *Addenda.* Additional pages may be attached to the Closing Disclosure to add lines, as necessary, to accommodate the complete listing of all items required to be shown on the Closing Disclosure under §1026.38(j) and (k), and for the purpose of including customary recitals and information used locally in real estate closings (for example, breakdown of payoff figures, a breakdown of the consumer's total monthly mortgage payments, an accounting of debits received and check disbursements, a statement stating receipt of funds, applicable special stipulations between consumer and seller, and the date funds are transferred). *See* §1026.38(t)(5)(ix). A reference such as ''See attached page for additional information'' should be placed in the applicable section of the Closing Disclosure.

3. *Identical amounts.* The amounts disclosed under the following provisions of §1026.38(j) are the same as the amounts disclosed under the corresponding provisions of §1026.38(k): §1026.38(j)(1)(ii) and (k)(1)(ii); §1026.38(j)(1)(iii) and (k)(1)(iii); if the amount disclosed under §1026.38(j)(1)(v) is attributable to contractual adjustments between the consumer and seller, §1026.38(j)(1)(v) and (k)(1)(iv); §1026.38(j)(1)(vii) and (k)(1)(vi); §1026.38(j)(1)(viii) and (k)(1)(vii); §1026.38(j)(1)(ix) and (k)(1)(viii); §1026.38(j)(1)(x) and (k)(1)(ix); §1026.38(j)(2)(iv) and (k)(2)(iv); unless seller contributions toward simultaneous subordinate financing are disclosed under §1026.38(t)(5)(vii)(B) on the simultaneous subordinate financing Closing Disclosure and §1026.38(k)(2)(vii) on the first-lien Closing Disclosure, §1026.38(j)(2)(v) and (k)(2)(vii); §1026.38(j)(2)(viii) and (k)(2)(x); §1026.38(j)(2)(ix) and (k)(2)(xi); §1026.38(j)(2)(x) and (k)(2)(xii); and §1026.38(j)(2)(xi) and (k)(2)(xiii).

38(j)(1) Itemization of amounts due from borrower.

Paragraph 38(j)(1)(ii).

1. *Contract sales price and personal property.* Section 1026.38(j)(1)(ii) requires disclosure of the contract sales price of the property being sold, excluding the price of any tangible personal property if the consumer and seller have agreed to a separate price for such items. On the simultaneous subordinate financing Closing Disclosure, no contract sales price is disclosed under §1026.38(j)(1)(ii). Personal property is defined by State law, but could include such items as carpets, drapes, and appliances. Manufactured homes are not considered personal property under §1026.38(j)(1)(ii).

Paragraph 38(j)(1)(v).

1. *Contractual adjustments.* Section 1026.38(j)(1)(v) requires disclosure of amounts not otherwise disclosed under §1026.38(j) that are owed to the seller but payable to the consumer after the real estate closing. For example, the following items must be disclosed and listed under the heading ''Adjustments'' under §1026.38(j), to the extent applicable:

i. The balance in the seller's reserve account held in connection with an existing loan, if assigned to the consumer in a loan assumption transaction;

ii. Any rent that the consumer will collect after the real estate closing for a period of time prior to the real estate closing; and

iii. The treatment of any tenant security deposit.

2. *Other consumer charges.* The amounts disclosed under §1026.38(j)(1)(v) which are for charges owed by the consumer at the real estate closing not otherwise disclosed under §1026.38(f), (g), and (j) will not have a corresponding credit in the summary of the seller's transaction under §1026.38(k)(1)(iv). For example, the amounts paid to any holders of existing liens on the property in a refinance transaction, construction costs in connection with the transaction that the consumer will be obligated to pay, payoff of other secured or unsecured debt, any outstanding real estate property taxes, and principal reductions are disclosed under §1026.38(j)(1)(v) without a corresponding credit in the summary of the seller's transaction under §1026.38(k)(1)(iv). See comment 38–4 for an explanation of how to disclose a principal reduction under §1026.38(j)(1)(v).

3. *Simultaneous subordinate financing Closing Disclosure.* On the simultaneous subordinate financing Closing Disclosure, the proceeds of

the subordinate financing applied to the first-lien transaction may be included in the summaries of transactions table under §1026.38(j)(1)(v). See also comments 37(h)(1)(v)–2 and 37(h)(1)(vii)–6 for an explanation of how to disclose on the Loan Estimate amounts that will be disclosed on the Closing Disclosure under §1026.38(j)(1)(v).

Paragraph 38(j)(1)(x).

1. *Additional adjustments.* Examples of items for which adjustments may be made include taxes, other than those disclosed pursuant to §1026.38(j)(1)(vii) and (viii), paid in advance for an entire year or other period, when the real estate closing occurs prior to the expiration of the year or other period for which they were paid. Additional examples of items for which adjustments may be made include:

i. Flood and hazard insurance premiums, if the consumer is being substituted as an insured under the same policy;

ii. Mortgage insurance in loan assumptions;

iii. Planned unit development or condominium association assessments paid in advance;

iv. Fuel or other supplies on hand, purchased by the seller, which the consumer will use when the consumer takes possession of the property; and

v. Ground rent paid in advance.

38(j)(2) Itemization of amounts already paid by or on behalf of borrower.

Paragraph 38(j)(2)(ii).

1. *Deposit.* All amounts paid into a trust account by the consumer pursuant to the contract of sale for real estate, any addenda thereto, or any other agreement between the consumer and seller must be disclosed under §1026.38(j)(2)(ii). If there is no deposit paid in a transaction, that amount is left blank on the Closing Disclosure.

2. *Reduction of deposit when deposit used to pay for closing charges prior to closing.* If the consumer's deposit has been applied toward a charge for a closing cost, the amount applied should not be included in the amount disclosed pursuant to §1026.38(j)(2)(ii), but instead should be shown on the appropriate line for the closing cost in the Closing Cost Detail tables pursuant to §1026.38(f) or (g), designated borrower-paid before closing.

Paragraph 38(j)(2)(iii).

1. *First user loan.* For purposes of §1026.38(j), a first user loan is a loan to finance construction of a new structure or purchase of a new manufactured home that is known at the time of consummation to be real property under State law, where the structure was constructed for sale or the manufactured home was purchased for purposes of resale and the loan is used as or converted to a loan to finance purchase by the first user. For other loans subject to §1026.19(f) that finance construction of a new structure or purchase of a manufactured home that is known at the time of consummation to be real property under State law, the sales price of the land and the construction cost or purchase price of the manufactured home should be disclosed separately and the amount of the loan in the current transaction must be disclosed. The remainder of the Closing Disclosure should be completed taking into account adjustments and charges related to the temporary financing and permanent financing that are known at the time of consummation.

Paragraph 38(j)(2)(iv).

1. *Assumption of existing loan obligation of seller by consumer.* The outstanding amount of any loans that the consumer is assuming, or subject to which the consumer is taking title to the property must be disclosed under §1026.38(j)(2)(iv). When more than one loan is being assumed, the total amount of all outstanding loans being assumed should be disclosed under §1026.38(j)(2)(iv).

Paragraph 38(j)(2)(v).

1. *General seller credits.* When the consumer receives a generalized credit from the seller for closing costs or where the seller (typically a builder) is making an allowance to the consumer for items to purchase separately, the amount of the credit must be disclosed. However, if the seller credit is attributable to a specific loan cost or other cost listed in the Closing Cost Details tables, pursuant to §1026.38(f) or (g), that amount should be reflected in the seller-paid column in the Closing Cost Details tables under §1026.38(f) or (g).

2. *Other seller credits.* Any other obligations of the seller to be paid directly to the consumer, such as for issues identified at a walk-through of the property prior to closing, are disclosed under §1026.38(j)(2)(v).

Paragraph 38(j)(2)(vi).

1. *Credits from any party other than the seller or creditor.* Section 1026.38(j)(2)(vi) requires disclosure of a description and the amount of items paid by or on behalf of the consumer and not disclosed elsewhere under §1026.38(j)(2). For example, credits a consumer receives from a real estate agent or other third party, other than a seller or creditor, are disclosed pursuant to §1026.38(j)(2)(vi). However, if the credit is attributable to a specific closing cost listed in the Closing Cost Details tables under §1026.38(f) or (g), that amount should be reflected in the paid by others column on the Closing Cost Details tables and not in the disclosure required under §1026.38(j)(2)(vi). Similarly, if a real estate agent rebates a portion of the agent's commission to the consumer, the rebate should be listed as a credit along with a description of the rebate, which must include the name of the party giving the credit.

2. *Subordinate financing proceeds on first-lien Closing Disclosure*. Any financing arrangements or other new loans not otherwise disclosed under §1026.38(j)(2)(iii) or (iv) must be disclosed under §1026.38(j)(2)(vi) on the first-lien Closing Disclosure. For example, if the consumer is using a second mortgage loan to finance part of the purchase price, whether from the same creditor, another creditor, or the seller, the principal amount of the second loan must be disclosed with a brief explanation on the first-lien Closing Disclosure. In this example, the principal amount of the subordinate financing is disclosed on the summaries of transactions table for the borrower's transaction either on line 04 under the subheading ''L. Paid Already by or on Behalf of Borrower at Closing,'' or under the subheading ''Other Credits.'' If the net proceeds of the subordinate financing are less than the principal amount of the subordinate financing, the net proceeds must also be listed, and may be listed on the same line as the principal amount of the subordinate financing on the first-lien Closing Disclosure. For an example, see form H–25(C) of appendix H to this part.

3. *Satisfaction of existing subordinate liens by consumer*. For payments to subordinate lien holders by or on behalf of the consumer, disclosure of any amounts paid with funds other than closing funds, as defined under §1026.38(j)(4)(ii), in connection with the second mortgage payoff are required to be disclosed under §1026.38(j)(2)(vi), with a statement that such amounts were paid outside of closing funds. For an example, see form H–25(D) of appendix H to this part.

4. *Transferred escrow balances*. In a refinance transaction, any transferred escrow balance is listed as a credit pursuant to §1026.38(j)(2)(vi), along with a description of the transferred escrow balance.

5. *Gift funds*. A credit must be disclosed only for any money or other payments made at closing by third parties, including family members, not otherwise associated with the transaction, along with a description of the nature of the funds provided under §1026.38(j)(2)(vi). Amounts provided in advance of the real estate closing to consumers by third parties, including family members, not otherwise associated with the transaction, are not required to be disclosed under §1026.38(j)(2)(vi).

6. *Adjustments*. Section 1026.38(j)(2)(vi) requires the disclosure of any additional amounts not already disclosed under §1026.38(f), (g), (h), and (j)(2), that are owed to the consumer but payable to the seller before the real estate closing. The disclosures made under §1026.38(j)(2)(vi) must also include a description for each disclosed amount. For example, rent paid to the seller from a tenant before the real estate closing for a period extending beyond the real estate closing is disclosed by identifying the amount as rent from a tenant under the heading ''Adjustments.'' See also §1026.38(k)(2)(viii), which requires disclosure of a description and amount of any and all other obligations required to be paid by the seller at the real estate closing.

Paragraph 38(j)(2)(xi).

1. *Examples*. Section 1026.38(j)(2)(xi) requires the disclosure of any amounts the consumer is expected to pay after the real estate closing that are attributable in part to a period of time prior to the real estate closing. Examples of items that would be disclosed under §1026.38(j)(2)(xi) include:

i. Utilities used but not paid for by the seller; and

ii. Interest on loan assumptions.

38(j)(3) Calculation of borrower's transaction.

Paragraph 38(j)(3)(iii).

1. *Stating if amount is due to or from consumer*. To comply with §1026.38(j)(3)(iii), the creditor must state either the cash required from the consumer at closing, or cash payable to the consumer at closing.

2. *Methodology*. To calculate the cash to close, total the amounts disclosed under §1026.38(j)(3)(i) and (ii). If that calculation results in a positive amount, the amount is due from the consumer. If the calculation results in a negative amount, the amount is due to the consumer.

38(j)(4) Items paid outside of closing funds.

Paragraph 38(j)(4)(i).

1. *Charges not paid with closing funds*. Section 1026.38(j)(4)(i) requires that any charges not paid from closing funds but that otherwise are disclosed under §1026.38(j) be marked as ''paid outside of closing'' or ''P.O.C.'' The disclosure must identify the party making the payment, such as the consumer, seller, loan originator, real estate agent, or any other person. For an example of a disclosure of a charge not made from closing funds, see form H–25(D) of appendix H to this part. For an explanation of what constitutes closing funds, see §1026.38(j)(4)(ii). See also comment 38–4 for an explanation of how to disclose a principal reduction that is not paid from closing funds.

2. *Items paid without closing funds not included in sums*. Charges that are paid outside of closing funds under §1026.38(j)(4)(i) should not be included in computing totals under §1026.38(j)(1) and (j)(2).

38(k) Summary of seller's transaction.

1. *Transactions with no seller or simultaneous subordinate financing transactions*. Section 1026.38(k) does not apply in a transaction where there is no seller, such as a refinance transaction or a transaction with a construction purpose as defined in §1026.37(a)(9)(iii), or in a simultaneous subordinate financing purchase transaction as defined in §1026.37(a)(9)(i) if the first-lien Closing Disclosure records the entirety of the seller's transaction.

2. *Extra line items.* For guidance regarding the use of addenda for items disclosed on the Closing Disclosure under §1026.38(k), see comment 38(j)–2.

3. *Identical amounts.* The amounts disclosed under certain provisions of §1026.38(k) are the same as the amounts disclosed under certain provisions of §1026.38(j). *See* comment 38(j)–3 for a listing of the specific provisions.

38(k)(1) Itemization of amounts due to seller.

1. *Simultaneous subordinate financing.* Section 1026.38(k) does not apply in a simultaneous subordinate financing purchase transaction as defined in §1026.37(a)(9)(i) if the first-lien Closing Disclosure records the entirety of the seller's transaction. If §1026.38(k) applies to a simultaneous subordinate financing transaction, §1026.38(k) is completed based only on the terms and conditions of the simultaneous subordinate financing transaction and no contract sales price is disclosed under §1026.38(k)(1)(ii) on the Closing Disclosure for the simultaneous subordinate financing.

38(k)(2) Itemization of amounts due from seller.

Paragraph 38(k)(2)(ii).

1. *Distributions of deposit to seller prior to closing.* If the deposit or any portion thereof has been disbursed to the seller prior to closing, the amount of the deposit that has been distributed to the seller must be disclosed under §1026.38(k)(2)(ii).

Paragraph 38(k)(2)(iv).

1. *Assumption of existing loan obligation of seller by consumer.* If the consumer is assuming or taking title subject to existing liens and the amounts of the outstanding balance of the liens are to be deducted from the sales price, the amounts of the outstanding balance of the liens must be disclosed under §1026.38(k)(2)(iv).

2. *Other seller credits.* Any other obligations of the seller to be paid directly to the consumer, such as credits for issues identified at a walk-through of the property prior to the real estate closing, are disclosed under §1026.38(k)(2)(vii).

Paragraph 38(k)(2)(vii).

1. *Simultaneous subordinate financing—seller contribution.* If a simultaneous subordinate financing transaction is disclosed with the alternative tables pursuant to §1026.38(d)(2) and (e), the first-lien Closing Disclosure must include any contributions from the seller toward the simultaneous subordinate financing that are disclosed in the payoffs and payments table under §1026.38(t)(5)(vii)(B) on the simultaneous subordinate financing Closing Disclosure. For example, assume the simultaneous subordinate financing transaction is disclosed using the alternative tables pursuant to §1026.38(d)(2) and (e) and the seller contributes $200.00 toward the closing costs of the simultaneous subordinate financing. The simultaneous subordinate financing Closing Disclosure must include the $200.00 contribution in the payoffs and payments table pursuant to §1026.38(t)(5)(vii)(B) and comments 38(t)(5)(vii)(B)–1 and –2. The first-lien Closing Disclosure must include the $200.00 contribution in the summaries of transactions table for the seller's transaction under §1026.38(k)(2)(vii).

Paragraph 38(k)(2)(viii).

1. *Satisfaction of other seller obligations.* Seller obligations, other than second liens, that must be paid off to clear title to the property must be disclosed pursuant to §1026.38(k)(2)(viii). Examples of disclosures pursuant to §1026.38(k)(2)(viii) include the satisfaction of outstanding liens imposed due to Federal, State, or local income taxes, real estate property tax liens, judgments against the seller reduced to a lien upon the property, or any other obligations the seller wishes the closing agent to pay from their proceeds at the real estate closing.

2. *Consumer satisfaction of outstanding subordinate loans.* If the consumer is satisfying existing liens which will not be deducted from the sales price, the amount of the outstanding balance of the loan must be disclosed under §1026.38(k)(2)(viii). For example, the amount of any second lien which will be paid as part of the real estate closing that is not deducted from the seller's proceeds under §1026.38(k)(2)(iv), is disclosed under §1026.38(k)(2)(viii). For payments to the subordinate lien holder, any amounts paid must be disclosed, and other amounts paid by or on behalf of the seller must be disclosed as paid outside of closing funds under §1026.38(j)(2)(vi). For additional discussion, see comment 38(j)(2)(vi)–2.

3. *Escrows held by closing agent for payment of invoices received after consummation.* Funds to be held by the closing agent for the payment of either repairs, or water, fuel, or other utility bills that cannot be prorated between the parties at closing because the amounts used by the seller prior to closing are not yet known must be disclosed under §1026.38(k)(2)(viii). Subsequent disclosure of the actual amount of these post-closing items to be paid from closing funds is optional.

38(k)(3) Calculation of seller's transaction.

1. *Stating if amount is due to or from seller.* To comply with §1026.38(k)(3)(iii), the creditor must state either the cash required from the seller at closing, or cash payable to the seller at closing.

2. *Methodology.* To calculate the cash due to or from the consumer, total the amounts disclosed under §1026.38(k)(3)(i) and (ii). If that calculation results in a positive amount, the amount is due to the seller. If the calculation results in a negative amount, the amount is due from the seller.

38(k)(4) Items paid outside of closing funds.

1. *Guidance.* For guidance regarding the disclosure of items paid with funds other

than closing funds, see comments 38(j)(4)(i)–1 and –2.

38(l) Loan disclosures.

38(l)(2) Demand feature.

1. *Covered features.* See comment 18(i)–2 for a description of demand features triggering the disclosure requirements of §1026.38(l)(2).

38(l)(3) Late payment.

1. *Guidance.* See the commentary to §1026.37(m)(4) for guidance on disclosing late payment fees, as required under §1026.38(l)(3).

38(l)(6) Security interest.

1. *Alternate property address.* Section 1026.38(l)(6) requires disclosure of the address for the property that secures the credit, including the zip code. If the address is unavailable, §1026.38(l)(6) requires disclosure of other location information for the property, such as a lot number; however, disclosure of a zip code is required in all instances. For transactions secured by a consumer's interest in a timeshare plan, the creditor may disclose as other location information a lot, square, or other such number or other legal description of the property assigned by the local governing authority, or if no such number or description is available, disclose the name of the timeshare property or properties with a designation indicating that the property is an interest in a timeshare plan.

2. *Personal property.* Where personal property also secures the credit transaction, a description of that property may be disclosed, at the creditor's option, pursuant to §1026.38(l)(6). If the form does not provide enough space to disclose a description of personal property to be disclosed under §1026.38(l)(6), an additional page may be used and appended to the end of the form provided that the creditor complies with the requirements of §1026.38(t)(3). The creditor may use one addendum to disclose the personal property under §1026.38(a)(3)(vi) and (l)(6). *See* comment 38(a)(3)(vi)–1.

38(l)(7) Escrow account.

1. *Definition of escrow account.* For a description of an escrow account for purposes of the escrow account disclosure under §1026.38(l)(7), see the definition of ''escrow account'' in 12 CFR 1024.17(b).

2. *Addenda.* Additional pages may be attached to the Closing Disclosure to add lines, as necessary, to accommodate the complete listing of all items required to be shown on the Closing Disclosure under §1026.38(l)(7). *See* §1026.38(t)(5)(ix). A reference such as ''See attached page for additional information'' must be placed in the applicable section of the Closing Disclosure, if an additional page is used to list all items required to be shown.

Paragraph 38(l)(7)(i)(A)(2).

1. *Estimated costs not paid by escrow account funds.* Section 1026.38(l)(7)(i)(A)(*2*) requires the creditor to estimate the amount the consumer is likely to pay during the first year after consummation for the mortgage-related obligations described in §1026.43(b)(8) that are known to the creditor and that will not be paid using escrow account funds. The creditor discloses this amount only if an escrow account will be established.

2. *During the first year.* Section 1026.38(l)(7)(i)(A)(*2*) requires disclosure based on payments during the first year after consummation. Alternatively, if the creditor elects to make the disclosures required by §1026.38(l)(7)(i)(A)(*1*) and (l)(7)(i)(A)(*4*) based on amounts derived from the escrow account analysis required under Regulation X, 12 CFR 1024.17, then the creditor may make the disclosures required by §1026.38(l)(7)(i)(A)(*2*) based on a 12-month period beginning with the borrower's initial payment date (rather than beginning with consummation). *See* comment 38(l)(7)(i)(A)(*5*)–1.

Paragraph 38(l)(7)(i)(A)(4).

1. *Estimated costs paid using escrow account funds.* The amount the consumer will be required to pay into an escrow account with each periodic payment during the first year after consummation disclosed under §1026.38(l)(7)(i)(A)(*4*) is equal to the sum of the amount of estimated escrow payments disclosed under §1026.38(c)(1) (as described in §1026.37(c)(2)(iii)) and the amount the consumer will be required to pay into an escrow account to pay some or all of the mortgage insurance premiums disclosed under §1026.38(c)(1) (as described in §1026.37(c)(2)(ii)).

Paragraph 38(l)(7)(i)(A)(5).

1. *During the first year.* Section 1026.38(l)(7)(i)(A)(*4*) requires disclosure of the amount the consumer will be required to pay into the escrow account with each periodic payment during the first year after consummation. Section 1026.38(l)(7)(i)(A)(*1*) requires a disclosure, labeled ''Escrowed Property Costs over Year 1,'' calculated as the amount disclosed under §1026.38(l)(7)(i)(A)(*4*) multiplied by the number of periodic payments scheduled to be made to the escrow account during the first year after consummation. For example, creditors may base such disclosures on less than 12 payments if, based on the payment schedule dictated by the legal obligation, fewer than 12 periodic payments will be made to the escrow account during the first year after consummation. Alternatively, §1026.38(l)(7)(i)(A)(*5*) permits the creditor to base the disclosures required by §1026.38(l)(7)(i)(A)(*1*) and (*4*) on amounts derived from the escrow account analysis required under Regulation X, 12 CFR 1024.17, even if those disclosures differ from what would otherwise be disclosed under §1026.38(l)(7)(i)(A)(*1*) and (*4*)—as, for example, when there are fewer than 12 periodic payments scheduled to be made to the escrow account during the first year after consummation.

Paragraph 38(l)(7)(i)(B)(1).

1. *Estimated costs paid directly by the consumer.* The creditor discloses an amount

under §1026.38(l)(7)(i)(B)(*1*) only if no escrow account will be established.

2. *During the first year*. Section 1026.38(l)(7)(i)(B)(*1*) requires disclosure based on payments during the first year after consummation. A creditor may comply with this requirement by basing the disclosure on a 12-month period beginning with the borrower's initial payment date or on a 12-month period beginning with consummation.

38(m) Adjustable payment table.

1. *Guidance*. See the commentary to §1026.37(i) for guidance regarding the disclosure required by §1026.38(m).

2. *Master heading*. The disclosure required by §1026.38(m) is required to be provided under a different master heading than the disclosure required by §1026.37(i), but all other requirements applicable to the disclosure required by §1026.37(i) apply to the disclosure required by §1026.38(m).

3. *When table is not permitted to be disclosed*. Like the disclosure required by §1026.37(i), the disclosure required by §1026.38(m) is required only if the periodic principal and interest payment may change after consummation based on a loan term other than on an adjustment to the interest rate or if the transaction is a seasonal payment product as described under §1026.37(a)(10)(ii)(E). If the transaction does not contain these terms, this table is not permitted on the Closing Disclosure. *See* comments 37–1 and 37(i)–1.

4. *Final loan terms*. The disclosures required by §1026.38(m) must include the information required by §1026.37(i), as applicable, but the creditor must make the disclosure using the information that is required by §1026.19(f). *See* comments 19(f)(1)(i)–1 and –2.

38(n) Adjustable interest rate table.

1. *Guidance*. See the commentary to §1026.37(j) for guidance regarding the disclosures required by §1026.38(n).

2. *Master heading*. The disclosure required by §1026.38(n) is required to be provided under a different master heading than the disclosure required by §1026.37(j), but all other requirements applicable to the disclosure required by §1026.37(j) apply to the disclosure required by §1026.38(n).

3. *When table is not permitted to be disclosed*. Like the disclosure required by §1026.37(j), the disclosure required by §1026.38(n) is required only if the interest rate may change after consummation based on the terms of the legal obligation. If the interest rate will not change after consummation, this table is not permitted on the Closing Disclosure. *See* comments 37–1 and 37(j)–1.

4. *Final loan terms*. The disclosures required by §1026.38(n) must include the information required by §1026.37(j), as applicable, but the creditor must make the disclosure using the information that is known at the time the disclosure is required to be provided by §1026.19(f).

38(o) Loan calculations.

1. *Examples*. Section 1026.38(o)(1) and (2) sets forth the accuracy requirements for the total of payments and the finance charge, respectively. The following examples illustrate the interaction of these provisions:

i. Assume that loan costs that are designated borrower-paid at or before closing and that are part of the finance charge (see §1026.4 for calculation of the finance charge) are understated by more than $100. For example, assume that borrower-paid loan origination fees (see §1026.4(a)) are cumulatively understated by $150, resulting in the amounts disclosed as the total of payments and the finance charge both being understated by more than $100. Both the disclosed total of payments and the disclosed finance charge would not be accurate for purposes of §1026.38(o)(1) and (2), respectively.

ii. Assume that loan costs that are designated borrower-paid at or before closing and that are not part of the finance charge are understated by more than $100. For example, assume that borrower-paid property appraisal and inspection fees that are excluded from the finance charge under §1026.4(c)(7)(iv) are cumulatively understated by $150, resulting in the amount disclosed as the total of payments being understated by more than $100. The disclosed total of payments would not be accurate for purposes of §1026.38(o)(1), but the disclosed finance charge would be accurate for purposes of §1026.38(o)(2).

38(o)(1) Total of payments.

1. *Calculation of total of payments*. The total of payments is the total, expressed as a dollar amount, the consumer will have paid after making all payments of principal, interest, mortgage insurance, and loan costs, as scheduled, through the end of the loan term. The total of payments excludes charges that would otherwise be included as components of the total of payments if such charges are designated on the Closing Disclosure as paid by seller or paid by others. A seller or other party, such as the creditor, may agree to offset payments of principal, interest, mortgage insurance, or loan costs, whether in whole or in part, through a specific credit, for example through a specific seller or lender credit. Because these amounts are not paid by the consumer, they are excluded from the total of payments calculation. Non-specific credits, however, are generalized payments to the consumer that do not pay for a particular fee and therefore do not offset amounts for purposes of the total of payments calculation. For guidance on the amounts included in the total of payments calculation, see the ''In 5 Years'' disclosure under §1026.37(l)(1)(i) and comment 37(l)(1)(i)–1. For a discussion of lender credits, see comment 19(e)(3)(i)–5. For a discussion of seller credits, see comment 38(j)(2)(v)–1.

38(o)(2) Finance charge.

1. *Calculation of finance charge.* The finance charge is calculated in accordance with the requirements of §1026.4 and its commentary and is expressed as a dollar amount.

2. *Disclosure.* The finance charge is disclosed as a total amount; the components of the finance charge are not itemized.

38(o)(3) Amount financed.

1. *Calculation of amount financed.* The amount financed is calculated in accordance with the requirements of §1026.18(b) and its commentary.

38(o)(5) Total interest percentage.

1. *In general.* For guidance on calculation and disclosure of the total interest percentage, see §1026.37(l)(3) and its commentary.

38(p) Other disclosures.

38(p)(1) Appraisal.

1. *Applicability.* The disclosure required by §1026.38(p)(1) is only applicable to closed-end transactions subject to §1026.19(f) that are also subject either to 15 U.S.C. 1639h or 1691(e), as implemented by this part or Regulation B, 12 CFR part 1002, respectively. Accordingly, if a transaction is not subject to either of those provisions, the disclosure required by §1026.38(p)(1) may be left blank on form H–25 of appendix H to this part.

38(p)(3) Liability after foreclosure.

1. *State law requirements.* If the creditor forecloses on the property and the proceeds of the foreclosure sale are less than the unpaid balance on the loan, whether the consumer has continued or additional responsibility for the loan balance after foreclosure, and the conditions under which liability occurs, will vary by State. If the applicable State law affords any type of protection, other than a statute of limitations that only limits the timeframe in which a creditor may seek redress, §1026.38(p)(3) requires a statement that State law may protect the consumer from liability for the unpaid balance.

38(q) Questions notice.

Paragraph 38(q)(3).

1. *Prominent question mark.* The notice required under §1026.38(q) includes a prominent question mark. This prominent question mark is an aspect of form H–25 of appendix H to this part, the standard form or model form, as applicable, pursuant to §1026.38(t). If the creditor deviates from the depiction of the question mark as shown on form H–25, the creditor complies with §1026.38(q) if (1) the size and location of the question mark on the Closing Disclosure are substantially similar in size and location to the question mark shown on form H–25, and (2) the creditor otherwise complies with §1026.38(t)(5) regarding permissible changes to the form of the Closing Disclosure.

38(r) Contact information.

1. *Each person to be identified.* Form H–25 of appendix H to this part includes the contact information required to be disclosed under §1026.38(r) generally in a five-column tabular format (*i.e.*, there are columns from left to right that disclose the contact information for the creditor, mortgage broker, consumer's real estate broker, seller's real estate broker, and settlement agent). Columns are left blank where no such person is participating in the transaction. For example, if there is no mortgage broker involved in the transaction, the column for the mortgage broker is left blank. Conversely, in the event the transaction involves more than one of each such person (*e.g.*, two sellers' real estate brokers splitting a commission), the space in the contact information table provided on form H–25 of appendix H to this part may be altered to accommodate the information for such persons, provided that the information required by §1026.38(o),(p),(q),(r) and (s) is disclosed on the same page as illustrated by form H–25. If the space provided on form H–25 does not accommodate the addition of such information, an additional table to accommodate the information may be provided on a separate page, with an appropriate reference to the additional table. A creditor or settlement agent may also omit a column on the table that is inapplicable or, if necessary, replace an inapplicable column with the contact information for the additional person.

2. *Name of person.* Where §1026.38(r)(1) calls for disclosure of the name of the person participating in the transaction, the person's legal name (*e.g.*, the name used for registration, incorporation, or chartering purposes), the person's trade name, if any, or an abbreviation of the person's legal name or the trade name is disclosed, so long as the disclosure is clear and conspicuous as required by §1026.38(t)(1)(i). For example, if the creditor's legal name is "Alpha Beta Chi Bank and Trust Company, N.A." and its trade name is "ABC Bank," then under §1026.38(r)(1) the full legal name, the trade name, or an abbreviation such as "ABC Bank & Trust Co." may be disclosed. However, the abbreviation "Bank & Trust Co." is not sufficiently distinct to enable a consumer to identify the person, and therefore would not be clear and conspicuous. If the creditor, mortgage broker, seller's real estate broker, consumer's real estate broker, or settlement agent participating in the transaction is a natural person, the natural person's name is listed in the §1026.38(r)(1) and (r)(4) disclosures (assuming that such natural person is the primary contact for the consumer or seller, as applicable).

3. *Address.* The address disclosed under §1026.38(r)(2) is the identified person's place of business where the primary contact for the transaction is located (usually the local office), rather than a general corporate headquarters address. If a natural person's name is to be disclosed under §1026.38(r)(1), *see* comment 38(r)–2, the business address of such natural person is listed (assuming that such

natural person is the primary contact for the consumer or seller, as applicable).

4. *NMLSR ID*. Section 1026.38(r)(3) and (5) requires the disclosure of an NMLSR identification (ID) number for each person identified in the table. The NMLSR ID is a unique number or other identifier that is generally assigned by the Nationwide Mortgage Licensing System & Registry (NMLSR) to individuals registered or licensed through NMLSR to provide loan originating services (for more information, see the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act) sections 1503(3) and (12) and 1504, 12 U.S.C. 5102(3) and (12) and 5103, and its implementing regulations (*i.e.*, 12 CFR 1007.103(a) and 1008.103(a)(2)). An entity may also have an NMLSR ID. Thus, any NMLSR ID that is obtained by a creditor or mortgage broker entity disclosed under §1026.38(r)(1), as applicable, or a natural person disclosed under §1026.38(r)(4), either as required under the SAFE Act or otherwise, is disclosed. If the creditor, mortgage broker, or natural person has an NMLSR ID and a separate license number or unique identifier issued by the applicable State, locality, or other regulatory body with responsibility for licensing and/or registering such entity or person's business activities, both the NMLSR ID and the separate license number or unique identifier may be disclosed. The space in the table is left blank for the disclosures in the columns corresponding to persons that have no NMLSR ID to be disclosed under §1026.38(r)(3) and (5); provided that, the creditor may omit the column from the table or, if necessary, replace the column with the contact information for an additional person. *See* comment 38(r)–1.

5. *License number or unique identifier*. Section 1026.38(r)(3) and (5) requires the disclosure of a license number or unique identifier for each person (including natural persons) identified in the table who does not have a NMLSR ID if the applicable State, locality, or other regulatory body with responsibility for licensing and/or registering such person's business activities has issued a license number or other unique identifier to such person under §1026.38(r)(3) and (5). The space in the table is left blank for the disclosures in the columns corresponding to persons who are not subject to the issuance of such a license number or unique identifier to be disclosed under §1026.38(r)(3) and (5); provided that, the creditor or settlement agent may omit the column from the table or, if necessary, replace the column with the contact information for an additional person. *See* comment 38(r)–1. In addition, under §1026.38(r)(3) and (5), the abbreviation of the State or the jurisdiction or regulatory body that issued such license or registration is required to be included before the word "License" in the label required by §1026.37(r)(3) and (5). If no such license or registration is required to be disclosed, such as if an NMLSR number is disclosed, the space provided for such an abbreviation in form H–25 of appendix H to this part may be left blank. A creditor complies with the requirements of §1026.38(r)(3) and (5) to disclose the abbreviation of the State by disclosing a U.S. Postal Service State abbreviation, if applicable.

6. *Contact*. Section 1026.38(r)(4) requires the disclosure of the primary contact for the consumer. The primary contact is the natural person employed by the person disclosed under §1026.38(r)(1) who interacts most frequently with the consumer and who has an NMLSR ID or, if none, a license number or other unique identifier to be disclosed under §1026.38(r)(5), as applicable. For example, if the senior loan officer employed by the creditor or mortgage broker disclosed under §1026.38(r)(1) has an NMLSR ID, but the consumer meets with a different loan officer to complete the application and answer questions, the senior loan officer's name is disclosed under §1026.38(r)(4) unless the other loan officer also has an NMLSR ID, in which case the other loan officer's name is disclosed. Further, if the sales agent employed by the consumer's real estate broker disclosed under §1026.38(r)(1) has a State-issued brokers' license number, but the consumer meets with an associate sales agent to tour the property being purchased and complete the sales contract, the sales agent's name is disclosed under §1026.38(r)(4) unless the associate sales agent also has a State-issued license number, in which case the associate sales agent's name is disclosed. Moreover, if the closing attorney employed by the settlement agent disclosed under §1026.38(r)(1) has a State-issued settlement agent license number, but the consumer meets with the attorney's assistant to fill out any necessary documentation prior to the closing and to answer questions, the closing attorney's name is disclosed under §1026.38(r)(4) because the assistant is only performing clerical functions.

7. *Email address and phone number*. Section 1026.38(r)(6) and (7) requires disclosure of the email address and phone number, respectively, for the persons listed in §1026.37(r)(4). Disclosure of a general number or email address for the lender, mortgage broker, real estate broker, or settlement agent, as applicable, satisfies this requirement if no such information is generally available for such person.

38(s) Signature statement.

1. *General requirements*. See the commentary to §1026.37(n) for guidance regarding the optional signature requirements and signature lines for multiple consumers.

38(t) Form of disclosures.

38(t)(1) General requirements.

1. *Clear and conspicuous; segregation*. The clear and conspicuous standard requires that the disclosures required by §1026.38 be legible

and in a readily understandable form. The disclosures also must be grouped together and segregated from everything else. As required by §1026.38(t)(3), the disclosures for any transaction that is a federally related mortgage loan under Regulation X, 12 CFR 1024.2, must be made using the standard form H–25 of appendix H to this part. Accordingly, use of that form constitutes compliance with the clear and conspicuous and segregation requirements of §1026.38(t)(1).

2. *Balloon payment financing with leasing characteristics.* In certain credit sale or loan transactions, a consumer may reduce the dollar amount of the payments to be made during the course of the transaction by agreeing to make, at the end of the loan term, a large final payment based on the expected residual value of the property. The consumer may have a number of options with respect to the final payment, including, among other things, retaining the property and making the final payment, refinancing the final payment, or transferring the property to the creditor in lieu of the final payment. Such transactions may have some of the characteristics of lease transactions subject to Regulation M (12 CFR part 1013), but are considered credit transactions where the consumer assumes the indicia of ownership, including the risks, burdens and benefits of ownership, upon consummation. These transactions are governed by the disclosure requirements of this part instead of Regulation M. Under §1026.38(t)(1)(ii), creditors may not include any additional information in the disclosures required by §1026.38. Thus, the disclosures must show the large final payment as a balloon payment in the projected payments table required by §1026.38(c) and should not, for example, reflect the other options available to the consumer at maturity.

38(t)(2) Headings and labels.

1. *Estimated amounts.* Certain amounts are estimated when provided on the disclosure required by §1026.37. When disclosed as required by §1026.38, however, many of the corresponding disclosures must be actual amounts rather than estimates in accordance with the requirements of §1026.19(f), even though the provision of §1026.38 cross-references a counterpart in §1026.37. Section 1026.38(t)(2) provides that, if a master heading, heading, subheading, label, or similar designation contains the word "estimated" in form H–25 of appendix H to this part, that heading, label, or similar designation shall contain the word "estimated." Thus, §1026.38(t)(2) incorporates the "estimated" designations reflected on form H–25 into the requirements of §1026.38. *See* comment 37(o)(2)–1.

38(t)(3) Form.

1. *Non-federally related mortgage loans.* For a transaction that is not a federally related mortgage loan, the creditor is not required to use form H–25 of appendix H to this part, although its use as a model form for such transactions, if properly completed with accurate content, constitutes compliance with the clear and conspicuous and segregation requirements of §1026.38(t)(1)(i). Even when the creditor elects not to use the model form, §1026.38(t)(1)(ii) requires that the disclosures contain only the information required by §1026.38(a) through (s), and that the creditor make the disclosures in the same order as they occur in form H–25, use the same headings, labels, and similar designations as used in the form (many of which also are expressly required by §1026.38(a) through (s)), and position the disclosures relative to those designations in the same manner as shown in the form. In order to be in a format substantially similar to form H–25, the disclosures required by §1026.38 must be provided on letter size (8.5″ x 11″) paper.

38(t)(4) Rounding.

1. *Generally.* Consistent with §1026.2(b)(4), any amount required to be disclosed by §1026.38 and not required to be rounded by §1026.38(t)(4) must be disclosed as an exact numerical amount using decimal places where applicable, unless otherwise provided. For example, under §1026.38(t)(4), the principal and interest payment disclosed under §1026.37(b)(3) and §1026.38(b) must be disclosed using decimal places even if the amount of cents is zero, in contrast to the loan amount disclosed under §1026.37(b)(1) and §1026.38(b).

2. *Guidance.* For guidance regarding the requirements of §1026.38(t)(4), see the commentary to §1026.37(o)(4).

38(t)(5) Exceptions.

1. *Permissible changes.* The changes required and permitted by §1026.38(t)(5) are permitted for federally related mortgage loans for which the use of form H–25 is required under §1026.38(t)(3). For non-federally related mortgage loans, the changes required or permitted by §1026.38(t)(5), do not affect the substance, clarity, or meaningful sequence of the disclosure and therefore, are permissible. Any changes to the disclosure not specified in §1026.38(t)(5) or not permitted by other provisions of §1026.38 are not permissible for federally related mortgage loans. Creditors in non-federally related mortgage loans making any changes that affect the substance, clarity, or meaningful sequence of the disclosure will lose their protection from civil liability under TILA section 130.

2. *Manual completion.* The creditor, or settlement agent preparing the form, under §1026.19(f)(1)(v) is not required to use a computer, typewriter, or other word processor to complete the disclosure required by §1026.38. The creditor or settlement agent may fill in information and amounts required to be disclosed by §1026.38 on form H–25 of appendix H to this part by hand printing or using any other method, provided the person produces

clear and legible text and uses the formatting required by §1026.38, including replicating bold font where required.

3. *Unit-period.* Section 1026.38(t)(5)(i) provides that wherever form H–25 or §1026.38 uses ''monthly'' to describe the frequency of any payments or uses ''month'' to describe the applicable unit-period, the creditor is required to substitute the appropriate term to reflect the fact that the transaction's terms provide for other than monthly periodic payments, such as bi-weekly or quarterly payments. For purposes of §1026.38, the term ''unit-period'' has the same meaning as in appendix J to Regulation Z.

4. *Signature lines.* Section 1026.38(t) does not restrict the addition of signature lines to the disclosure required by §1026.38, provided any signature lines for confirmations of receipt of the disclosure appear only under the ''Confirm Receipt'' heading required by §1026.38(s) as illustrated by form H–25 of appendix H to this part. If the number of signatures requested by the creditor for confirming receipt of the disclosure requires space for signature lines in excess of that provided on form H–25, an additional page may be added to accommodate the additional signature lines with an appropriate reference to the additional page. Such additional page should also contain the heading and statement required by §1026.38(s) in the format provided on form H–25. Signatures for a purpose other than confirming receipt of the form may be obtained on a separate page, and consistent with §1026.38(t)(1)(i), not on the same page as the information required by §1026.38.

5. *Additional page.* Information required or permitted to be disclosed by §1026.38 on a separate page should be formatted similarly to form H–25 of appendix H to this part, so as not to affect the substance, clarity, or meaningful sequence of the disclosure. In addition, information provided on additional pages should be consolidated on as few pages as necessary so as not to affect the substance, clarity, or meaningful sequence of the disclosure.

6. *Page numbers.* References required by provisions of §1026.38 to information disclosed pursuant to other provisions of the section, as illustrated on form H–25 of appendix H, may be altered to refer to the appropriate page number of the form containing such information.

7. *Translation.* Section 1026.38(t)(5)(viii) permits the translation of form H–25 into languages other than English, similar to §1026.37(o)(5)(ii). Pursuant §1026.38(t)(5)(viii) creditors may modify form H–25 to the extent that translation prevents the headings, labels, designations, and required disclosure items under §1026.38 from fitting in the space provided on form H–25. For example, if the translation of a required label does not fit within the line provided for such label in form H–25, the label may be disclosed over two lines. See form H–28 of appendix H to this part for Spanish translations of form H–25.

38(t)(5)(iv) Closing Cost Details.

1. *Line numbers; closing cost details.* Section 1026.38(t)(5)(iv)(A) permits the deletion of unused lines from the disclosures required by §1026.38(f)(1) through (3) and (g)(1) through (4), if necessary to allow the addition of lines to other sections that require them for the required disclosures. This provision permits creditors and settlement agents to use the space gained from deleting unused lines for additional lines to accommodate all of the costs that are required to be itemized. For example, if the only origination charge required by §1026.38(f)(1) is points, the remaining seven lines illustrated on form H–25 of appendix H to this part may be deleted and added to the disclosure required by §1026.38(g)(4), if seven lines in addition to those provided on form H–25 are necessary to accommodate such disclosure.

2. *Two pages; closing cost details.* Section 1026.38(t)(5)(iv)(B) permits the disclosure of the information required by §1026.38(f) through (h) over two pages, but only if form H–25 of appendix H to this part, as modified pursuant to §1026.38(t)(5)(iv)(A), does not accommodate all of the costs required to be disclosed on one page. If the deletion of unused lines and the addition of such lines to other sections permits the disclosures required by §1026.38(f) through (h) to fit on one page, modification pursuant to §1026.38(t)(5)(iv)(B) is not permissible.

3. *Separate pages for Loan Costs and Other Costs.* The modification permitted by §1026.38(t)(5)(iv)(B) allows the information required by §1026.38(f) through (h) to be disclosed over two pages, numbered as ''2a'' and ''2b.'' For an example of such a modification, see form H–25(H) of appendix H to this part. Under this modification, the information required by §1026.38(h) must remain on the same page as the information required by §1026.38(g). Accordingly, the Loan Costs section of form H–25 may appear on its own page ''2a,'' but the Other Costs section must appear on the same page as the Total Closing Costs section on page ''2b.'' The modifications permitted by §1026.38(t)(5)(iv)(A) and (B) may be used in conjunction to ensure disclosure of §1026.38(f) on one page and §1026.38(g) and (h) on a separate page.

38(t)(5)(v) Separation of consumer and seller information.

1. *Permissible form modifications to separate consumer and seller information.* The modifications to the form permitted by §1026.38(t)(5)(v) may be made by the creditor in any one of the following ways:

i. Leave the applicable disclosure blank concerning the seller or consumer on the form provided to the other party;

ii. Omit the table or label, as applicable, for the disclosure concerning the seller or consumer on the form provided to the other party; or

iii. Provide to the seller, or assist the settlement agent in providing to the seller, a modified version of the form under §1026.38(t)(5)(vi), as illustrated by form H–25(I) of appendix H to this part.

2. *Provision of separate disclosure to consumer*. If applicable State law prohibits sharing with the consumer the information disclosed under §1026.38(k), a creditor may provide a separate form to the consumer. A creditor may also provide a separate form to the consumer in any other situation where the creditor in its discretion chooses to do so, such as based on the seller's request. For the permissible form modifications to separate consumer and seller information, see comment 38(t)(5)(v)–1.

3. *Provision of separate disclosure to seller*. To separate the information of the consumer and seller under §1026.38(t)(5)(v), a creditor may assist the settlement agent in providing (or provide when acting as a settlement agent) a separate form to the seller where applicable State law prohibits sharing with the seller the information disclosed under §1026.38(a)(2), (a)(4)(iii), (a)(5), (b) through (d), (f), or (g), with respect to closing costs paid by the consumer, or §1026.38(i), (j), (l) through (p), or (r), with respect to closing costs paid by the creditor and mortgage broker. A creditor may also assist the settlement agent in providing (or provide when acting as a settlement agent) a separate form to the seller in any other situation where the creditor in its discretion chooses to do so, such as based on the consumer's request. For the permissible form modifications to separate consumer and seller information, see comment 38(t)(5)(v)–1.

38(t)(5)(vi) Modified version of the form for a seller or third-party.

1. For permissible form modifications to separate consumer and seller information, see comment 38(t)(5)(v)–1.

38(t)(5)(vii) Transaction without a seller or simultaneous subordinate financing transaction.

1. *Alternative tables*. The alternative tables pursuant to §1026.38(d)(2) and (e) are required to be disclosed to use the modification permitted under §1026.38(t)(5)(vii).

2. *Appraised property value*. The modifications permitted by §1026.38(t)(5)(vii) do not specifically refer to the label required by §1026.38(a)(3)(vii)(B) for transactions that do not involve a seller, because the label is required by that section and therefore is not a modification. As required by §1026.38(a)(3)(vii)(B), a form used for a transaction that does not involve a seller and is modified under §1026.38(t)(5)(vii) must contain the label ''Appraised Prop. Value'' or ''Estimated Prop. Value'' where there is no appraisal.

Paragraph 38(t)(5)(vii)(B).

1. *Amounts paid by third parties*. Under §1026.38(t)(5)(vii)(B), the payoffs and payments table itemizes the amounts of payments made at closing to other parties from the credit extended to the consumer or funds provided by the consumer, including designees of the consumer. Designees of the consumer for purposes of §1026.38(t)(5)(vii)(B) include third parties who provide funds on behalf of the consumer. Such amounts may be disclosed as credits in the payoffs and payments table. Some examples of amounts paid by third parties that may be disclosed as credits on the payoffs and payments table under §1026.38(t)(5)(vii)(B) include gift funds, grants, proceeds from loans that satisfy the partial exemption criteria in §1026.3(h), and, on the Closing Disclosure for a simultaneous subordinate financing transaction, contributions from a seller for costs associated with the subordinate financing.

2. *Disclosure of subordinate financing*. i. *First-lien Closing Disclosure*. On the Closing Disclosure for a first-lien transaction disclosed with the alternative tables pursuant to §1026.38(d)(2) and (e), such as a refinance transaction, that also has simultaneous subordinate financing, the proceeds of the subordinate financing are included in the payoffs and payments table under §1026.38(t)(5)(vii)(B) by disclosing, as a credit, the principal amount of the subordinate financing, and, if the net proceeds of the subordinate financing are less than the principal amount of the subordinate financing, the net proceeds. The creditor may list the principal amount and net proceeds of the subordinate financing on the same line. For example, the creditor may disclose the principal amount of the subordinate financing under the subheading ''To'' with a description of the payment, and the net proceeds of the subordinate financing under the subheading ''Amount.''

ii. *Simultaneous subordinate financing Closing Disclosure*. On the Closing Disclosure for a simultaneous subordinate financing transaction disclosed with the alternative tables pursuant to §1026.38(d)(2) and (e), the proceeds of the subordinate financing applied to the first-lien transaction may be included in the payoffs and payments table under §1026.38(t)(5)(vii)(B).

iii. *Simultaneous subordinate financing—seller contribution*. If a creditor discloses the alternative tables pursuant to §1026.38(d)(2) and (e) on the simultaneous subordinate financing Closing Disclosure, the creditor must also disclose as a credit in the payoffs and payments table on the simultaneous subordinate financing Closing Disclosure, any contributions from the seller toward the simultaneous subordinate financing. For example, assume the subordinate-lien creditor provides the alternative tables pursuant to §1026.38(d)(2) and (e) on the simultaneous subordinate financing Closing Disclosure and the seller contributes $200.00 toward the closing costs of the simultaneous subordinate financing. The subordinate-lien creditor must disclose the $200.00 contribution as a credit on the simultaneous subordinate financing Closing Disclosure in the payoffs and payments table under §1026.38(t)(5)(vii)(B). See also comments 38(j)–3 and 38(k)(2)(vii)–1 for disclosure requirements applicable to the first-lien transaction when the alternative disclosures are used for a simultaneous subordinate financing transaction and a seller contributes to the costs of the subordinate financing.

3. *Other examples.* For additional examples of items disclosed under §1026.38(t)(5)(vii)(B), see comment 37(h)(2)(iii)–1. See also comment 38–4 for an explanation of how to disclose a principal reduction under §1026.38(t)(5)(vii)(B).

38(t)(5)(ix) Customary recitals and information.

1. *Customary recitals and information.* Section 1026.38(t)(5)(ix) permits an additional page to be added to the disclosure for customary recitals and information used locally in real estate settlements. Examples of such information include a breakdown of payoff figures, a breakdown of the consumer's total monthly mortgage payments, check disbursements, a statement indicating receipt of funds, applicable special stipulations between buyer and seller, and the date funds are transferred.

Section 1026.39—Mortgage Transfer Disclosures

39(a) Scope

Paragraph 39(a)(1)

1. *Covered persons.* The disclosure requirements of this section apply to any "covered person" that becomes the legal owner of an existing mortgage loan, whether through a purchase, or other transfer or assignment, regardless of whether the person also meets the definition of a "creditor" in Regulation Z. The fact that a person purchases or acquires mortgage loans and provides the disclosures under this section does not by itself make that person a "creditor" as defined in the regulation.

2. *Acquisition of legal title.* To become a "covered person" subject to this section, a person must become the owner of an existing mortgage loan by acquiring legal title to the debt obligation.

i. *Partial interest.* A person may become a covered person by acquiring a partial interest in the mortgage loan. If the original creditor transfers a partial interest in the loan to one or more persons, all such transferees are covered persons under this section.

ii. *Joint acquisitions.* All persons that jointly acquire legal title to the loan are covered persons under this section, and under §1026.39(b)(5), a single disclosure must be provided on behalf of all such covered persons. Multiple persons are deemed to jointly acquire legal title to the loan if each acquires a partial interest in the loan pursuant to the same agreement or by otherwise acting in concert. *See* comments 39(b)(5)–1 and 39(d)(1)(ii)–1 regarding the disclosure requirements for multiple persons that jointly acquire a loan.

iii. *Affiliates.* An acquiring party that is a separate legal entity from the transferor must provide the disclosures required by this section even if the parties are affiliated entities.

3. *Exclusions.* i. *Beneficial interest.* Section 1026.39 does not apply to a party that acquires only a beneficial interest or a security interest in the loan, or to a party that assumes the credit risk without acquiring legal title to the loan. For example, an investor that acquires mortgage-backed securities, pass-through certificates, or participation interests and does not acquire legal title in the underlying mortgage loans is not covered by this section.

ii. *Loan servicers.* Pursuant to TILA Section 131(f)(2), the servicer of a mortgage loan is not the owner of the obligation for purposes of this section if the servicer holds title to the loan as a result of the assignment of the obligation to the servicer solely for the administrative convenience of the servicer in servicing the obligation.

4. *Mergers, corporate acquisitions, or reorganizations.* Disclosures are required under this section when, as a result of a merger, corporate acquisition, or reorganization, the ownership of a mortgage loan is transferred to a different legal entity.

Paragraph 39(a)(2)

1. *Mortgage transactions covered.* Section 1026.39 applies to closed-end or open-end consumer credit transactions secured by the principal dwelling of a consumer.

39(b) Disclosure Required

1. *Generally.* A covered person must mail or deliver the disclosures required by this section on or before the 30th calendar day following the date of transfer, unless an exception in §1026.39(c) applies. For example, if a covered person acquires a mortgage loan on March 15, the disclosure must be mailed or delivered on or before April 14.

39(b)(1) Form of Disclosures

1. *Combining disclosures.* The disclosures under this section can be combined with other materials or disclosures, including the transfer of servicing notices required by the Real Estate Settlement Procedure Act (12 U.S.C. 2601 *et seq.*) so long as the combined disclosure satisfies the timing and other requirements of this section.

39(b)(4) Multiple Transfers

1. *Single disclosure for multiple transfers.* A mortgage loan might be acquired by a covered person and subsequently transferred to another entity that is also a covered person required to provide the disclosures under this section. In such cases, a single disclosure may be provided on behalf of both covered persons instead of providing two separate disclosures if the disclosure satisfies the timing and content requirements applicable to each covered person. For example, if a covered person acquires a loan on March 15 with the intent to assign the loan to another entity on April 30, the covered person could mail the disclosure on or before April 14 to provide the required information for both entities and indicate when the subsequent transfer is expected to occur.

2. *Estimating the date.* When a covered person provides the disclosure required by this section that also describes a subsequent transfer, the date of the subsequent transfer may be estimated when the exact date is unknown at the time the disclosure is made. Information is unknown if it is not reasonably available to the covered person at the time the disclosure is made. The ''reasonably available'' standard requires that the covered person, acting in good faith, exercise due diligence in obtaining information. The covered person normally may rely on the representations of other parties in obtaining information. The covered person might make the disclosure using an estimated date even though the covered person knows that more precise information will be available in the future. For example, a covered person may provide a disclosure on March 31 stating that it acquired the loan on March 15 and that a transfer to another entity is expected to occur ''on or around'' April 30, even if more precise information will be available by April 14.

3. *Duty to comply.* Even though one covered person provides the disclosures for another covered person, each has a duty to ensure that disclosures related to its acquisition are accurate and provided in a timely manner unless an exception in §1026.39(c) applies.

39(b)(5) Multiple Covered Person

1. *Single disclosure required.* If multiple covered persons jointly acquire the loan, a single disclosure must be provided on behalf of all covered persons instead of providing separate disclosures. *See* comment 39(a)(1)–2.ii regarding a joint acquisition of legal title, and comment 39(d)(1)(ii)–1 regarding the disclosure requirements for multiple persons that jointly acquire a loan. If multiple covered persons jointly acquire the loan and complete the acquisition on separate dates, a single disclosure must be provided on behalf of all persons on or before the 30th day following the earliest acquisition date. For examples, if covered persons A and B enter into an agreement with the original creditor to jointly acquire the loan, and complete the acquisition on March 15 and March 25, respectively, a single disclosure must be provided on behalf of both persons on or before April 14. If the two acquisition dates are more than 30 days apart, a single disclosure must be provided on behalf of both persons on or before the 30th day following the earlier acquisition date, even though one person has not completed its acquisition. *See* comment 39(b)(4)–2 regarding use of an estimated date of transfer.

2. *Single disclosure not required.* If multiple covered persons each acquire a partial interest in the loan pursuant to separate and unrelated agreements and not jointly, each covered person has a duty to ensure that disclosures related to its acquisition are accurate and provided in a timely manner unless an exception in §1026.39(c) applies. The parties may, but are not required to, provide a single disclosure that satisfies the timing and content requirements applicable to each covered person.

3. *Timing requirements.* A single disclosure provided on behalf of multiple covered persons must satisfy the timing and content requirements applicable to each covered person unless an exception in §1026.39(c) applies.

4. *Duty to comply.* Even though one covered person provides the disclosures for another covered person, each has a duty to ensure that disclosures related to its acquisition are accurate and provided in a timely manner unless an exception in §1026.39(c) applies. *See* comments 39(c)(1)–2, 39(c)(3)–1 and 39(c)(3)–2 regarding transfers of a partial interest in the mortgage loan.

39(c) Exceptions

Paragraph 39(c)(1)

1. *Transfer of all interest.* A covered person is not required to provide the disclosures required by this section if it sells, assigns or otherwise transfers all of its interest in the mortgage loan on or before the 30th calendar day following the date that it acquired the loan. For example, if covered person A acquires the loan on March 15 and subsequently transfers all of its interest in the loan to covered person B on April 1, person A is not required to provide the disclosures required by this section. Person B, however, must provide the disclosures required by this section unless an exception in §1026.39(c) applies.

2. *Transfer of partial interests.* A covered person that subsequently transfers a partial interest in the loan is required to provide the disclosures required by this section if the covered person retains a partial interest in the loan on the 30th calendar day after it acquired the loan, unless an exception in §1026.39(c) applies. For example, if covered

person A acquires the loan on March 15 and subsequently transfers fifty percent of its interest in the loan to covered person B on April 1, person A is required to provide the disclosures under this section if it retains a partial interest in the loan on April 14. Person B in this example must also provide the disclosures required under this section unless an exception in §1026.39(c) applies. Either person A or person B could provide the disclosure on behalf of both of them if the disclosure satisfies the timing and content requirements applicable to each of them. In this example, a single disclosure for both covered persons would have to be provided on or before April 14 to satisfy the timing requirements for person A's acquisition of the loan on March 15. *See* comment 39(b)(4)–1 regarding a single disclosure for multiple transfers.

Paragraph 39(c)(2)

1. *Repurchase agreements.* The original creditor or owner of the mortgage loan might sell, assign or otherwise transfer legal title to the loan to secure temporary business financing under an agreement that obligates the original creditor or owner to repurchase the loan. The covered person that acquires the loan in connection with such a repurchase agreement is not required to provide disclosures under this section. However, if the transferor does not repurchase the mortgage loan, the acquiring party must provide the disclosures required by this section within 30 days after the date that the transaction is recognized as an acquisition on its books and records.

2. *Intermediary parties.* The exception in §1026.39(c)(2) applies regardless of whether the repurchase arrangement involves an intermediary party. For example, legal title to the loan may transfer from the original creditor to party A through party B as an intermediary. If the original creditor is obligated to repurchase the loan, neither party A nor party B is required to provide the disclosures under this section. However, if the original creditor does not repurchase the loan, party A must provide the disclosures required by this section within 30 days after the date that the transaction is recognized as an acquisition on its books and records unless another exception in §1026.39(c) applies.

Paragraph 39(c)(3)

1. *Acquisition of partial interests.* This exception applies if the covered person acquires only a partial interest in the loan, and there is no change in the agent or person authorized to receive notice of the right to rescind and resolve issues concerning the consumer's payments. If, as a result of the transfer of a partial interest in the loan, a different agent or party is authorized to receive notice of the right to rescind and resolve issues concerning the consumer's payments, the disclosures under this section must be provided.

2. *Examples.* i. A covered person is not required to provide the disclosures under this section if it acquires a partial interest in the loan from the original creditor who remains authorized to receive the notice of the right to rescind and resolve issues concerning the consumer's payments after the transfer.

ii. The original creditor transfers fifty percent of its interest in the loan to covered person A. Person A does not provide the disclosures under this section because the exception in §1026.39(c)(3) applies. The creditor then transfers the remaining fifty percent of its interest in the loan to covered person B and does not retain any interest in the loan. Person B must provide the disclosures under this section.

iii. The original creditor transfers fifty percent of its interest in the loan to covered person A and also authorizes party X as its agent to receive notice of the right to rescind and resolve issues concerning the consumer's payments on the loan. Since there is a change in an agent or party authorized to receive notice of the right to rescind and resolve issues concerning the consumer's payments, person A is required to provide the disclosures under this section. Person A then transfers all of its interest in the loan to covered person B. Person B is not required to provide the disclosures under this section if the original creditor retains a partial interest in the loan and party X retains the same authority.

iv. The original creditor transfers all of its interest in the loan to covered person A. Person A provides the disclosures under this section and notifies the consumer that party X is authorized to receive notice of the right to rescind and resolve issues concerning the consumer's payments on the loan. Person A then transfers fifty percent of its interest in the loan to covered person B. Person B is not required to provide the disclosures under this section if person A retains a partial interest in the loan and party X retains the same authority.

39(d) Content of Required Disclosures

1. *Identifying the loan.* The disclosures required by this section must identify the loan that was acquired or transferred. The covered person has flexibility in determining what information to provide for this purpose and may use any information that would reasonably inform a consumer which loan was acquired or transferred. For example, the covered person may identify the loan by stating:

i. The address of the mortgaged property along with the account number or loan number previously disclosed to the consumer, which may appear in a truncated format;

ii. The account number alone, or other identifying number, if that number has been previously provided to the consumer, such as on a statement that the consumer receives monthly; or

iii. The date on which the credit was extended and the original amount of the loan or credit line.

2. *Partial payment policy*. The disclosures required by §1026.39(d)(5) must identify whether the covered person accepts periodic payments from the consumer that are less than the full amount due and whether the covered person applies the payments to a consumer's loan or holds the payments in a separate account until the consumer pays the remainder of the full amount due. The disclosures required by §1026.39(d)(5) apply only to a mortgage loan that is a closed-end consumer credit transaction secured by a dwelling or real property and that is not a reverse mortgage transaction subject to §1026.33. In an open-end consumer credit transaction secured by the consumer's principal dwelling, §1026.39(d) requires a covered person to provide the disclosures required by §1026.39(d)(1) through (4), but not the partial payment policy disclosure required by §1026.39(d)(5). If, however, the dwelling in the open-end consumer credit transaction is not the consumer's principal dwelling (*e.g.*, it is used solely for vacation purposes), none of the disclosures required by §1026.39(d) is required because the transaction is not a mortgage loan for purposes of §1026.39. *See* §1026.39(a)(2). In contrast, a closed-end consumer credit transaction secured by the consumer's dwelling that is not the consumer's principal dwelling is considered a mortgage loan for purposes of §1026.39. Assuming that the transaction is not a reverse mortgage transaction subject to §1026.33, §1026.39(d) requires a covered person to provide the disclosures under §1026.39(d)(1) through (5). But if the transaction is a reverse mortgage transaction subject to §1026.33, §1026.39(d) requires a covered person to provide only the disclosures under §1026.39(d)(1) through (4).

Paragraph 39(d)(1)

1. *Identification of covered person*. Section 1026.39(d)(1) requires a covered person to provide its name, address, and telephone number. The party identified must be the covered person who owns the mortgage loan, regardless of whether another party services the loan or is the covered person's agent. In addition to providing its name, address and telephone number, the covered person may, at its option, provide an address for receiving electronic mail or an Internet Web site address, but is not required to do so.

Paragraph 39(d)(1)(i)

1. *Multiple transfers, single disclosure*. If a mortgage loan is acquired by a covered person and subsequently transferred to another covered person, a single disclosure may be provided on behalf of both covered persons instead of providing two separate disclosures as long as the disclosure satisfies the timing and content requirements applicable to each covered person. *See* comment 39(b)(4)–1 regarding multiple transfers. A single disclosure for multiple transfers must state the name, address, and telephone number of each covered person unless §1026.39(d)(1)(ii) applies.

Paragraph 39(d)(1)(ii)

1. *Multiple covered persons, single disclosure*. If multiple covered persons jointly acquire the loan, a single disclosure must be provided on behalf of all covered persons instead of providing separate disclosures. The single disclosure must provide the name, address, and telephone number of each covered person unless §1026.39(d)(1)(ii) applies and one of the covered persons has been authorized in accordance with §1026.39(d)(3) of this section to receive the consumer's notice of the right to rescind and resolve issues concerning the consumer's payments on the loan. In such cases, the information required by §1026.39(d)(1) may be provided only for that covered person.

2. *Multiple covered persons, multiple disclosures*. If multiple covered persons each acquire a partial interest in the loan in separate transactions and not jointly, each covered person must comply with the disclosure requirements of this section unless an exception in §1026.39(c) applies. *See* comment 39(a)(1)–2.ii regarding a joint acquisition of legal title, and comment 39(b)(5)–2 regarding the disclosure requirements for multiple covered persons.

Paragraph 39(d)(3)

1. *Identifying agents*. Under §1026.39(d)(3), the covered person must provide the name, address and telephone number for the agent or other party having authority to receive the notice of the right to rescind and resolve issues concerning the consumer's payments on the loan. If multiple persons are identified under this paragraph, the disclosure shall provide the name, address and telephone number for each and indicate the extent to which the authority of each person differs. Section 1026.39(d)(3) does not require that a covered person designate an agent or other party, but if the consumer cannot contact the covered person for these purposes, the disclosure must provide the name, address and telephone number for an agent or other party that can address these matters. If an agent or other party is authorized to receive the notice of the right to rescind and resolve issues concerning the consumer's payments on the loan, the disclosure can state that the consumer may contact that

agent regarding any questions concerning the consumer's account without specifically mentioning rescission or payment issues. However, if multiple agents are listed on the disclosure, the disclosure shall state the extent to which the authority of each agent differs by indicating if only one of the agents is authorized to receive notice of the right to rescind, or only one of the agents is authorized to resolve issues concerning payments.

2. *Other contact information.* The covered person may also provide an agent's electronic mail address or Internet Web site address, but is not required to do so.

Paragraph 39(d)(4)

1. *Where recorded.* Section 1026.39(d)(4) requires the covered person to disclose where transfer of ownership of the debt to the covered person is recorded if it has been recorded in public records. Alternatively, the disclosure can state that the transfer of ownership of the debt has not been recorded in public records at the time the disclosure is provided, if that is the case, or the disclosure can state where the transfer may later be recorded. An exact address is not required and it would be sufficient, for example, to state that the transfer of ownership is recorded in the office of public land records or the recorder of deeds office for the county or local jurisdiction where the property is located.

39(d)(5) Partial payment policy.

1. *Format of disclosure.* Section 1026.39(d)(5) requires disclosure of the partial payment policy of covered persons for closed-end consumer credit transactions secured by a dwelling or real property, other than a reverse mortgage transaction subject to §1026.33. A covered person may utilize the format of the disclosure illustrated by form H–25 of appendix H to this part for the information required to be disclosed by §1026.38(l)(5). For example, the statement required §1026.39(d)(5)(iii) that a new covered person may have a different partial payment policy may be disclosed using the language illustrated by form H–25, which states "If this loan is sold, your new lender may have a different policy." The text illustrated by form H–25 may be modified to suit the format of the covered person's disclosure under §1026.39. For example, the format illustrated by form H–25 begins with the text, "Your lender may" or "Your lender does not," which may not be suitable to the format of the covered person's other disclosures under §1026.39. This text may be modified to suit the format of the covered person's integrated disclosure, using a phrase such as "We will" or "We are your new lender and have a different Partial Payment Policy than your previous lender. Under our policy we will." Any modifications must be appropriate and not affect the substance, clarity, or meaningful sequence of the disclosure.

39(e) Optional Disclosures

1. *Generally.* Section 1026.39(e) provides that covered persons may, at their option, include additional information about the mortgage transaction that they consider relevant or helpful to consumers. For example, the covered person may choose to inform consumers that the location where they should send mortgage payments has not changed. *See* comment 39(b)(1)–1 regarding combined disclosures.

Section 1026.40—Requirements for Home-Equity Plans

1. *Coverage.* This section applies to all open-end credit plans secured by the consumer's *dwelling,* as defined in §1026.2(a)(19), and is not limited to plans secured by the consumer's principal dwelling. (See the commentary to §1026.3(a), which discusses whether transactions are consumer or business-purpose credit, for guidance on whether a home equity plan is subject to Regulation Z.)

2. *Changes to home equity plans entered into on or after November 7, 1989.* Section 1026.9(c) applies if, by written agreement under §1026.40(f)(3)(iii), a creditor changes the terms of a home equity plan—entered into on or after November 7, 1989—at or before its scheduled expiration, for example, by renewing a plan on different terms. A new plan results, however, if the plan is renewed (with or without changes to the terms) after the scheduled expiration. The new plan is subject to all open-end credit rules, including §§1026.6, 1026.15, and 1026.40.

3. *Transition rules and renewals of preexisting plans.* The requirements of this section do not apply to home equity plans entered into before November 7, 1989. The requirements of this section also do not apply if the original consumer, on or after November 7, 1989, renews a plan entered into prior to that date (with or without changes to the terms). If, on or after November 7, 1989, a security interest in the consumer's dwelling is added to a line of credit entered into before that date, the substantive restrictions of this section apply for the remainder of the plan, but no new disclosures are required under this section.

4. *Disclosure of repayment phase—applicability of requirements.* Some plans provide in the initial agreement for a period during which no further draws may be taken and repayment of the amount borrowed is made. All of the applicable disclosures in this section must be given for the repayment phase. Thus, for example, a creditor must provide payment information about the repayment phase as well as about the draw period, as required by §1026.40(d)(5). If the rate that will apply during the repayment phase is fixed at

a known amount, the creditor must provide an annual percentage rate under §1026.40(d)(6) for that phase. If, however, a creditor uses an index to determine the rate that will apply at the time of conversion to the repayment phase—even if the rate will thereafter be fixed—the creditor must provide the information in §1026.40(d)(12), as applicable.

5. *Payment terms—applicability of closed-end provisions and substantive rules.* All payment terms that are provided for in the initial agreement are subject to the requirements of subpart B and not subpart C of the regulation. Payment terms that are subsequently added to the agreement may be subject to subpart B or to subpart C, depending on the circumstances. The following examples apply these general rules to different situations:

i. If the initial agreement provides for a repayment phase or for other payment terms such as options permitting conversion of part or all of the balance to a fixed rate during the draw period, these terms must be disclosed pursuant to §§1026.6 and 1026.40, and not under subpart C. Furthermore, the creditor must continue to provide periodic statements under §1026.7 and comply with other provisions of subpart B (such as the substantive requirements of §1026.40(f)) throughout the plan, including the repayment phase.

ii. If the consumer and the creditor enter into an agreement during the draw period to repay all or part of the principal balance on different terms (for example, with a fixed rate of interest) and the amount of available credit will be replenished as the principal balance is repaid, the creditor must continue to comply with subpart B. For example, the creditor must continue to provide periodic statements and comply with the substantive requirements of §1026.40(f) throughout the plan.

iii. If the consumer and creditor enter into an agreement during the draw period to repay all or part of the principal balance and the amount of available credit will not be replenished as the principal balance is repaid, the creditor must give closed-end credit disclosures pursuant to subpart C for that new agreement. In such cases, subpart B, including the substantive rules, does not apply to the closed-end credit transaction, although it will continue to apply to any remaining open-end credit available under the plan.

6. *Spreader clause.* When a creditor holds a mortgage or deed of trust on the consumer's dwelling and that mortgage or deed of trust contains a *spreader clause* (also known as a *dragnet* or cross-collateralization clause), subsequent occurrences such as the opening of an open-end plan are subject to the rules applicable to home equity plans to the same degree as if a security interest were taken directly to secure the plan, unless the creditor effectively waives its security interest under the spreader clause with respect to the subsequent open-end credit extensions.

7. *Appraisals and other valuations.* For consumer credit transactions subject to §1026.40 and secured by the consumer's principal dwelling, creditors and other persons must comply with the requirements for appraisals and other valuations under §1026.42.

40(a) Form of Disclosures

40(a)(1) General

1. *Written disclosures.* The disclosures required under this section must be clear and conspicuous and in writing, but need not be in a form the consumer can keep. (*See* the commentary to §1026.6(a)(3) for special rules when disclosures required under §1026.40(d) are given in a retainable form.)

2. *Disclosure of annual percentage rate—more conspicuous requirement.* As provided in §1026.5(a)(2), when the term *annual percentage rate* is required to be disclosed with a number, it must be more conspicuous than other required disclosures.

3. *Segregation of disclosures.* i. While most of the disclosures must be grouped together and segregated from all unrelated information, the creditor is permitted to include information that explains or expands on the required disclosures, including, for example:

A. Any prepayment penalty.

B. How a substitute index may be chosen.

C. Actions the creditor may take short of terminating and accelerating an outstanding balance.

D. Renewal terms.

E. Rebate of fees.

ii. An example of information that does not explain or expand on the required disclosures and thus cannot be included is the creditor's underwriting criteria, although the creditor could provide such information separately from the required disclosures.

4. *Method of providing disclosures.* A creditor may provide a single disclosure form for all of its home equity plans, as long as the disclosure describes all aspects of the plans. For example, if the creditor offers several payment options, all such options must be disclosed. (See, however, the commentary to §1026.40(d)(5)(iii) and (d)(12) (x) and (xi) for disclosure requirements relating to these provisions.) If any aspects of a plan are linked together, the creditor must disclose clearly the relationship of the terms to each other. For example, if the consumer can only obtain a particular payment option in conjunction with a certain variable-rate feature, this fact must be disclosed. A creditor has the option of providing separate disclosure forms for multiple options or variations in features. For example, a creditor that offers different payment options for the draw period may prepare separate disclosure forms for the two payment options. A creditor

using this alternative, however, must include a statement on each disclosure form that the consumer should ask about the creditor's other home equity programs. (This disclosure is required only for those programs available generally to the public. Thus, if the only other programs available are employee preferred-rate plans, for example, the creditor would not have to provide this statement.) A creditor that receives a request for information about other available programs must provide the additional disclosures as soon as reasonably possible.

5. *Form of electronic disclosures provided on or with electronic applications.* Creditors must provide the disclosures required by this section (including the brochure) on or with a blank application that is made available to the consumer in electronic form, such as on a creditor's Internet Web site. Creditors have flexibility in satisfying this requirement. Methods creditors could use to satisfy the requirement include, but are not limited to, the following examples (whatever method is used, a creditor need not confirm that the consumer has read the disclosures):

i. The disclosures could automatically appear on the screen when the application appears;

ii. The disclosures could be located on the same Web page as the application (whether or not they appear on the initial screen), if the application 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;

iii. Creditors could provide a link to the electronic disclosures on or with the application as long as consumers cannot bypass the disclosures before submitting the application. The link would take the consumer to the disclosures, but the consumer need not be required to scroll completely through the disclosures; or

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

40(a)(2) Precedence of Certain Disclosures

1. *Precedence rule.* The list of conditions provided at the creditor's option under §1026.40(d)(4)(iii) need not precede the other disclosures.

Paragraph 40(a)(3)

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

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

ii. In contrast, if a consumer is physically present in the creditor's office, and accesses a home equity credit line application 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 creditor to provide applications to consumers), the creditor may provide disclosures in either electronic or paper form, provided the creditor complies with the timing, delivery, and retainability requirements of the regulation.

40(b) Time of Disclosures

1. *Mail and telephone applications.* If the creditor sends applications through the mail, the disclosures and a brochure must accompany the application. If an application is taken over the telephone, the disclosures and brochure may be delivered or mailed within three business days of taking the application. If an application is mailed to the consumer following a telephone request, however, the creditor also must send the disclosures and a brochure along with the application.

2. *General purpose applications.* The disclosures and a brochure need not be provided when a general purpose application is given to a consumer unless (1) the application or materials accompanying it indicate that it can be used to apply for a home equity plan or (2) the application is provided in response to a consumer's specific inquiry about a home equity plan. On the other hand, if a general purpose application is provided in response to a consumer's specific inquiry only about credit other than a home equity plan, the disclosures and brochure need not be provided even if the application indicates it can be used for a home equity plan, unless it is accompanied by promotional information about home equity plans.

3. *Publicly-available applications.* Some creditors make applications for home equity plans, such as *take-ones,* available without the need for a consumer to request them. These applications must be accompanied by the disclosures and a brochure, such as by attaching the disclosures and brochure to the application form.

4. *Response cards.* A creditor may solicit consumers for its home equity plan by mailing a *response card* which the consumer returns to the creditor to indicate interest in the plan. If the only action taken by the creditor upon receipt of the response card is to send the consumer an application form or

to telephone the consumer to discuss the plan, the creditor need not send the disclosures and brochure with the response card.

5. *Denial or withdrawal of application.* In situations where §1026.40(b) permits the creditor a three-day delay in providing disclosures and the brochure, if the creditor determines within that period that an application will not be approved, the creditor need not provide the consumer with the disclosures or brochure. Similarly, if the consumer withdraws the application within this three-day period, the creditor need not provide the disclosures or brochure.

6. *Intermediary agent or broker.* In determining whether or not an application involves an *intermediary agent or broker* as discussed in §1026.40(b), creditors should consult the provisions in comment 19(b)–3.

40(c) Duties of Third Parties

1. *Disclosure requirements.* Although third parties who give applications to consumers for home equity plans must provide the brochure required under §1026.40(e) in all cases, such persons need provide the disclosures required under §1026.40(d) only in certain instances. A third party has no duty to obtain disclosures about a creditor's home equity plan or to create a set of disclosures based on what it knows about a creditor's plan. If, however, a creditor provides the third party with disclosures along with its application form, the third party must give the disclosures to the consumer with the application form. The duties under this section are those of the third party; the creditor is not responsible for ensuring that a third party complies with those obligations. If an intermediary agent or broker takes an application over the telephone or receives an application contained in a magazine or other publication, §1026.40(c) permits that person to mail the disclosures and brochure within three business days of receipt of the application. (See the commentary to §1026.40(h) about imposition of nonrefundable fees.)

40(d) Content of Disclosures

1. *Disclosures given as applicable.* The disclosures required under this section need be made only as applicable. Thus, for example, if negative amortization cannot occur in a home equity plan, a reference to it need not be made.

2. *Duty to respond to requests for information.* If the consumer, prior to the opening of a plan, requests information as suggested in the disclosures (such as the current index value or margin), the creditor must provide this information as soon as reasonably possible after the request.

40(d)(1) Retention of Information

1. *When disclosure not required.* The creditor need not disclose that the consumer should make or otherwise retain a copy of the disclosures if they are retainable—for example, if the disclosures are not part of an application that must be returned to the creditor to apply for the plan.

40(d)(2) Conditions for Disclosed Terms

Paragraph 40(d)(2)(i)

1. *Guaranteed terms.* The requirement that the creditor disclose the time by which an application must be submitted to obtain the disclosed terms does not require the creditor to guarantee any terms. If a creditor chooses not to guarantee any terms, it must disclose that all of the terms are subject to change prior to opening the plan. The creditor also is permitted to guarantee some terms and not others, but must indicate which terms are subject to change.

2. *Date for obtaining disclosed terms.* The creditor may disclose either a specific date or a time period for obtaining the disclosed terms. If the creditor discloses a time period, the consumer must be able to determine from the disclosure the specific date by which an application must be submitted to obtain any guaranteed terms. For example, the disclosure might read, ''To obtain the following terms, you must submit your application within 60 days after the date appearing on this disclosure,'' provided the disclosure form also shows the date.

Paragraph 40(d)(2)(ii)

1. *Relation to other provisions.* Creditors should consult the rules in §1026.40(g) regarding refund of fees.

40(d)(4) Possible Actions by Creditor

Paragraph 40(d)(4)(i)

1. *Fees imposed upon termination.* This disclosure applies only to fees (such as penalty or prepayment fees) that the creditor imposes if it terminates the plan prior to normal expiration. The disclosure does not apply to fees that are imposed either when the plan expires in accordance with the agreement or if the consumer terminates the plan prior to its scheduled maturity. In addition, the disclosure does not apply to fees associated with collection of the debt, such as attorneys fees and court costs, or to increases in the annual percentage rate linked to the consumer's failure to make payments. The actual amount of the fee need not be disclosed.

2. *Changes specified in the initial agreement.* If changes may occur pursuant to §1026.40(f)(3)(i), a creditor must state that certain changes will be implemented as specified in the initial agreement.

Paragraph 40(d)(4)(iii)

1. *Disclosure of conditions.* In making this disclosure, the creditor may provide a highlighted copy of the document that contains such information, such as the contract or security agreement. The relevant items must be distinguished from the other information contained in the document. For example, the creditor may provide a cover sheet that specifically points out which contract provisions contain the information, or may mark the relevant items on the document itself. As an alternative to disclosing the conditions in this manner, the creditor may simply describe the conditions using the language in §§1026.40(f)(2)(i)–(iii), 1026.40(f)(3)(i) (regarding freezing the line when the maximum annual percentage rate is reached), and 1026.40(f)(3)(vi) or language that is substantially similar. The condition contained in §1026.40(f)(2)(iv) need not be stated. In describing specified changes that may be implemented during the plan, the creditor may provide a disclosure such as ''Our agreement permits us to make certain changes to the terms of the line at specified times or upon the occurrence of specified events.''

2. *Form of disclosure.* The list of conditions under §1026.40(d)(4)(iii) may appear with the segregated disclosures or apart from them. If the creditor elects to provide the list of conditions with the segregated disclosures, the list need not comply with the precedence rule in §1026.40(a)(2).

40(d)(5) Payment Terms

Paragraph 40(d)(5)(i)

1. *Length of the plan.* The combined length of the draw period and any repayment period need not be stated. If the length of the repayment phase cannot be determined because, for example, it depends on the balance outstanding at the beginning of the repayment period, the creditor must state that the length is determined by the size of the balance. If the length of the plan is indefinite (for example, because there is no time limit on the period during which the consumer can take advances), the creditor must state that fact.

2. *Renewal provisions.* If, under the credit agreement, a creditor retains the right to review a line at the end of the specified draw period and determine whether to renew or extend the draw period of the plan, the possibility of renewal or extension—regardless of its likelihood—should be ignored for purposes of the disclosures. For example, if an agreement provides that the draw period is five years and that the creditor may renew the draw period for an additional five years, the possibility of renewal should be ignored and the draw period should be considered five years. (See the commentary accompanying §1026.9(c)(1) dealing with change in terms requirements.)

Paragraph 40(d)(5)(ii)

1. *Determination of the minimum periodic payment.* This disclosure must reflect how the minimum periodic payment is determined, but need only describe the principal and interest components of the payment. Other charges that may be part of the payment (as well as the balance computation method) may, but need not, be described under this provision.

2. *Fixed rate and term payment options during draw period.* If the home equity plan permits the consumer to repay all or part of the balance during the draw period at a fixed rate (rather than a variable rate) and over a specified time period, this feature must be disclosed. To illustrate, a variable-rate plan may permit a consumer to elect during a ten-year draw period to repay all or a portion of the balance over a three-year period at a fixed rate. The creditor must disclose the rules relating to this feature including the period during which the option can be selected, the length of time over which repayment can occur, any fees imposed for such a feature, and the specific rate or a description of the index and margin that will apply upon exercise of this choice. For example, the index and margin disclosure might state: ''If you choose to convert any portion of your balance to a fixed rate, the rate will be the highest prime rate published in the 'Wall Street Journal' that is in effect at the date of conversion plus a margin.'' If the fixed rate is to be determined according to an index, it must be one that is outside the creditor's control and is publicly available in accordance with §1026.40(f)(1). The effect of exercising the option should not be reflected elsewhere in the disclosures, such as in the historical example required in §1026.40(d)(12)(xi).

3. *Balloon payments.* In programs where the occurrence of a balloon payment is possible, the creditor must disclose the possibility of a balloon payment even if such a payment is uncertain or unlikely. In such cases, the disclosure might read, ''Your minimum payments may not be sufficient to fully repay the principal that is outstanding on your line. If they are not, you will be required to pay the entire outstanding balance in a single payment.'' In programs where a balloon payment will occur, such as programs with interest-only payments during the draw period and no repayment period, the disclosures must state that fact. For example, the disclosure might read, ''Your minimum payments will not repay the principal that is outstanding on your line. You will be required to pay the entire outstanding balance in a single payment.'' In making this disclosure, the creditor is not required to use the

term ''balloon payment.'' The creditor also is not required to disclose the amount of the balloon payment. (See, however, the requirement under §1026.40(d)(5)(iii).) The balloon payment disclosure does not apply in cases where repayment of the entire outstanding balance would occur only as a result of termination and acceleration. The creditor also need not make a disclosure about balloon payments if the final payment could not be more than twice the amount of other minimum payments under the plan.

Paragraph 40(d)(5)(iii)

1. *Minimum periodic payment example.* In disclosing the payment example, the creditor may assume that the credit limit as well as the outstanding balance is $10,000 if such an assumption is relevant to calculating payments. (If the creditor only offers lines of credit for less than $10,000, the creditor may assume an outstanding balance of $5,000 instead of $10,000 in making this disclosure.) The example should reflect the payment comprised only of principal and interest. Creditors may provide an additional example reflecting other charges that may be included in the payment, such as credit insurance premiums. Creditors may assume that all months have an equal number of days, that payments are collected in whole cents, and that payments will fall on a business day even though they may be due on a non-business day. For variable-rate plans, the example must be based on the last rate in the historical example required in §1026.40(d)(12)(xi), or a more recent rate. In cases where the last rate shown in the historical example is different from the index value and margin (for example, due to a rate cap), creditors should calculate the rate by using the index value and margin. A discounted rate may not be considered a more recent rate in calculating this payment example for either variable- or fixed-rate plans.

2. *Representative examples.* i. In plans with multiple payment options within the draw period or within any repayment period, the creditor may provide representative examples as an alternative to providing examples for each payment option. The creditor may elect to provide representative payment examples based on three categories of payment options. The first category consists of plans that permit minimum payment of only accrued finance charges (*interest only* plans). The second category includes plans in which a fixed percentage or a fixed fraction of the outstanding balance or credit limit (for example, 2% of the balance or 1/180th of the balance) is used to determine the minimum payment. The third category includes all other types of minimum payment options, such as a specified dollar amount plus any accrued finance charges. Creditors may classify their minimum payment arrangements within one of these three categories even if other features exist, such as varying lengths of a draw or repayment period, required payment of past due amounts, late charges, and minimum dollar amounts. The creditor may use a single example within each category to represent the payment options in that category. For example, if a creditor permits minimum payments of 1%, 2%, 3% or 4% of the outstanding balance, it may pick one of these four options and provide the example required under §1026.40(d)(5)(iii) for that option alone.

ii. The example used to represent a category must be an option commonly chosen by consumers, or a typical or representative example. (See the commentary to §1026.40(d)(12)(x) and (xi) for a discussion of the use of representative examples for making those disclosures. Creditors using a representative example within each category must use the same example for purposes of the disclosures under §1026.40(d)(5)(iii) and (d)(12)(x) and (xi).) Creditors may use representative examples under §1026.40(d)(5) only with respect to the payment example required under paragraph (d)(5)(iii). Creditors must provide a full narrative description of all payment options under §1026.40(d)(5)(i) and (ii).

3. *Examples for draw and repayment periods.* Separate examples must be given for the draw and repayment periods unless the payments are determined the same way during both periods. In setting forth payment examples for any repayment period under this section (and the historical example under §1026.40(d)(12)(xi)), creditors should assume a $10,000 advance is taken at the beginning of the draw period and is reduced according to the terms of the plan. Creditors should not assume an additional advance is taken at any time, including at the beginning of any repayment period.

4. *Reverse mortgages.* Reverse mortgages, also known as reverse annuity or home equity conversion mortgages, in addition to permitting the consumer to obtain advances, may involve the disbursement of monthly advances to the consumer for a fixed period or until the occurrence of an event such as the consumer's death. Repayment of the reverse mortgage (generally a single payment of principal and accrued interest) may be required to be made at the end of the disbursements or, for example, upon the death of the consumer. In disclosing these plans, creditors must apply the following rules, as applicable:

i. If the reverse mortgage has a specified period for advances and disbursements but repayment is due only upon occurrence of a future event such as the death of the consumer, the creditor must assume that disbursements will be made until they are scheduled to end. The creditor must assume repayment will occur when disbursements end (or within a period following the final disbursement which is not longer than the regular interval between disbursements). This assumption should be used even though repayment may occur before or after the disbursements are scheduled to end. In such cases, the creditor may include a statement such as ''The disclosures assume that you will repay the line at the time the draw period and our payments to you end. As provided in your agreement, your repayment may be required at a different time.'' The single payment should be considered the ''minimum periodic payment'' and consequently would not be treated as a balloon payment. The example of the minimum payment under §1026.40(d)(5)(iii) should assume a single $10,000 draw.

ii. If the reverse mortgage has neither a specified period for advances or disbursements nor a specified repayment date and these terms will be determined solely by reference to future events, including the consumer's death, the creditor may assume that the draws and disbursements will end upon the consumer's death (estimated by using actuarial tables, for example) and that repayment will be required at the same time (or within a period following the date of the final disbursement which is not longer than the regular interval for disbursements). Alternatively, the creditor may base the disclosures upon another future event it estimates will be most likely to occur first. (If terms will be determined by reference to future events which do not include the consumer's death, the creditor must base the disclosures upon the occurrence of the event estimated to be most likely to occur first.)

iii. In making the disclosures, the creditor must assume that all draws and disbursements and accrued interest will be paid by the consumer. For example, if the note has a non-recourse provision providing that the consumer is not obligated for an amount greater than the value of the house, the creditor must nonetheless assume that the full amount to be drawn or disbursed will be repaid. In this case, however, the creditor may include a statement such as ''The disclosures assume full repayment of the amount advanced plus accrued interest, although the amount you may be required to pay is limited by your agreement.''

iv. Some reverse mortgages provide that some or all of the appreciation in the value of the property will be shared between the consumer and the creditor. The creditor must disclose the appreciation feature, including describing how the creditor's share will be determined, any limitations, and when the feature may be exercised.

40(d)(6) Annual Percentage Rate

1. *Preferred-rate plans.* If a creditor offers a preferential fixed-rate plan in which the rate will increase a specified amount upon the occurrence of a specified event, the creditor must disclose the specific amount the rate will increase.

40(d)(7) Fees Imposed by Creditor

1. *Applicability.* The fees referred to in §1026.40(d)(7) include items such as application fees, points, annual fees, transaction fees, fees to obtain checks to access the plan, and fees imposed for converting to a repayment phase that is provided for in the original agreement. This disclosure includes any fees that are imposed by the creditor to use or maintain the plan, whether the fees are kept by the creditor or a third party. For example, if a creditor requires an annual credit report on the consumer and requires the consumer to pay this fee to the creditor or directly to the third party, the fee must be specifically stated. Third party fees to open the plan that are initially paid by the consumer to the creditor may be included in this disclosure or in the disclosure under §1026.40(d)(8).

2. *Manner of describing fees.* Charges may be stated as an estimated dollar amount for each fee, or as a percentage of a typical or representative amount of credit. The creditor may provide a stepped fee schedule in which a fee will increase a specified amount at a specified date. (See the discussion contained in the commentary to §1026.40(f)(3)(i).)

3. *Fees not required to be disclosed.* Fees that are not imposed to open, use, or maintain a plan, such as fees for researching an account, photocopying, paying late, stopping payment, having a check returned, exceeding the credit limit, or closing out an account do not have to be disclosed under this section. Credit report and appraisal fees imposed to investigate whether a condition permitting a freeze continues to exist—as discussed in the commentary to §1026.40(f)(3)(vi)—are not required to be disclosed under this section or §1026.40(d)(8).

4. *Rebates of closing costs.* If closing costs are imposed they must be disclosed, regardless of whether such costs may be rebated later (for example, rebated to the extent of any interest paid during the first year of the plan).

5. *Terms used in disclosure.* Creditors need not use the terms *finance charge* or *other charge* in describing the fees imposed by the creditor under this section or those imposed by third parties under §1026.40(d)(8).

40(d)(8) Fees Imposed by Third Parties to Open a Plan

1. *Applicability.* Section 1026.40(d)(8) applies only to fees imposed by third parties to open the plan. Thus, for example, this section does not require disclosure of a fee imposed by a government agency at the end of a plan to

release a security interest. Fees to be disclosed include appraisal, credit report, government agency, and attorneys fees. In cases where property insurance is required by the creditor, the creditor either may disclose the amount of the premium or may state that property insurance is required. For example, the disclosure might state, ''You must carry insurance on the property that secures this plan.''

2. *Itemization of third-party fees.* In all cases creditors must state the total of third-party fees as a single dollar amount or a range except that the total need not include costs for property insurance if the creditor discloses that such insurance is required. A creditor has two options with regard to providing the more detailed information about third party fees. Creditors may provide a statement that the consumer may request more specific cost information about third party fees from the creditor. As an alternative to including this statement, creditors may provide an itemization of such fees (by type and amount) with the early disclosures. Any itemization provided upon the consumer's request need not include a disclosure about property insurance.

3. *Manner of describing fees.* A good faith estimate of the amount of fees must be provided. Creditors may provide, based on a typical or representative amount of credit, a range for such fees or state the dollar amount of such fees. Fees may be expressed on a unit cost basis, for example, $5 per $1,000 of credit.

4. *Rebates of third party fees.* Even if fees imposed by third parties may be rebated, they must be disclosed. (See the commentary to §1026.40(d)(7).)

40(d)(9) Negative Amortization

1. *Disclosure required.* In transactions where the minimum payment will not or may not be sufficient to cover the interest that accrues on the outstanding balance, the creditor must disclose that negative amortization will or may occur. This disclosure is required whether or not the unpaid interest is added to the outstanding balance upon which interest is computed. A disclosure is not required merely because a loan calls for non-amortizing or partially amortizing payments.

40(d)(10) Transaction Requirements

1. *Applicability.* A limitation on automated teller machine usage need not be disclosed under this paragraph unless that is the only means by which the consumer can obtain funds.

40(d)(12) Disclosures for Variable-Rate Plans

1. *Variable-rate provisions.* Sample forms in appendix G–14 provide illustrative guidance on the variable-rate rules.

Paragraph 40(d)(12)(iv)

1. *Determination of annual percentage rate.* If the creditor adjusts its index through the addition of a margin, the disclosure might read, ''Your annual percentage rate is based on the index plus a margin.'' The creditor is not required to disclose a specific value for the margin.

Paragraph 40(d)(12)(viii)

1. *Preferred-rate provisions.* This paragraph requires disclosure of preferred-rate provisions, where the rate will increase upon the occurrence of some event, such as the borrower-employee leaving the creditor's employ or the consumer closing an existing deposit account with the creditor.

2. *Provisions on conversion to fixed rates.* The commentary to §1026.40(d)(5)(ii) discusses the disclosure requirements for options permitting the consumer to convert from a variable rate to a fixed rate.

Paragraph 40(d)(12)(ix)

1. *Periodic limitations on increases in rates.* The creditor must disclose any annual limitations on increases in the annual percentage rate. If the creditor bases its rate limitation on 12 monthly billing cycles, such a limitation should be treated as an annual cap. Rate limitations imposed on less than an annual basis must be stated in terms of a specific amount of time. For example, if the creditor imposes rate limitations on only a semiannual basis, this must be expressed as a rate limitation for a six-month time period. If the creditor does not impose periodic limitations (annual or shorter) on rate increases, the fact that there are no annual rate limitations must be stated.

2. *Maximum limitations on increases in rates.* The maximum annual percentage rate that may be imposed under each payment option over the term of the plan (including the draw period and any repayment period provided for in the initial agreement) must be provided. The creditor may disclose this rate as a specific number (for example, 18%) or as a specific amount above the initial rate. For example, this disclosure might read, ''The maximum annual percentage rate that can apply to your line will be 5 percentage points above your initial rate.'' If the creditor states the maximum rate as a specific amount above the initial rate, the creditor must include a statement that the consumer should inquire about the rate limitations that are currently available. If an initial discount is not taken into account in applying maximum rate limitations, that fact must be disclosed. If separate overall limitations apply to rate increases resulting from events such as the exercise of a fixed-rate conversion option or leaving the creditor's employ,

those limitations also must be stated. Limitations do not include legal limits in the nature of usury or rate ceilings under state or Federal statutes or regulations.

3. *Form of disclosures.* The creditor need not disclose each periodic or maximum rate limitation that is currently available. Instead, the creditor may disclose the range of the lowest and highest periodic and maximum rate limitations that may be applicable to the creditor's home equity plans. Creditors using this alternative must include a statement that the consumer should inquire about the rate limitations that are currently available.

Paragraph 40(d)(12)(x)

1. *Maximum rate payment example.* In calculating the payment creditors should assume the maximum rate is in effect. Any discounted or premium initial rates or periodic rate limitations should be ignored for purposes of this disclosure. If a range is used to disclose the maximum cap under §1026.40(d)(12)(ix), the highest rate in the range must be used for the disclosure under this paragraph. As an alternative to making disclosures based on each payment option, the creditor may choose a representative example within the three categories of payment options upon which to base this disclosure. (See the commentary to §1026.40(d)(5).) However, separate examples must be provided for the draw period and for any repayment period unless the payment is determined the same way in both periods. Creditors should calculate the example for the repayment period based on an assumed $10,000 balance. (See the commentary to §1026.40(d)(5) for a discussion of the circumstances in which a creditor may use a lower outstanding balance.)

2. *Time the maximum rate could be reached.* In stating the date or time when the maximum rate could be reached, creditors should assume the rate increases as rapidly as possible under the plan. In calculating the date or time, creditors should factor in any discounted or premium initial rates and periodic rate limitations. This disclosure must be provided for the draw phase and any repayment phase. Creditors should assume the index and margin shown in the last year of the historical example (or a more recent rate) is in effect at the beginning of each phase.

Paragraph 40(d)(12)(xi)

1. *Index movement.* Index values and annual percentage rates must be shown for the entire 15 years of the historical example and must be based on the most recent 15 years. The example must be updated annually to reflect the most recent 15 years of index values as soon as reasonably possible after the new index value becomes available. If the values for an index have not been available for 15 years, a creditor need only go back as far as the values have been available and may start the historical example at the year for which values are first available.

2. *Selection of index values.* The historical example must reflect the method of choosing index values for the plan. For example, if an average of index values is used in the plan, averages must be used in the example, but if an index value as of a particular date is used, a single index value must be shown. The creditor is required to assume one date (or one period, if an average is used) within a year on which to base the history of index values. The creditor may choose to use index values as of any date or period as long as the index value as of this date or period is used for each year in the example. Only one index value per year need be shown, even if the plan provides for adjustments to the annual percentage rate or payment more than once in a year. In such cases, the creditor can assume that the index rate remained constant for the full year for the purpose of calculating the annual percentage rate and payment.

3. *Selection of margin.* A value for the margin must be assumed in order to prepare the example. A creditor may select a representative margin that it has used with the index during the six months preceding preparation of the disclosures and state that the margin is one that it has used recently. The margin selected may be used until the creditor annually updates the disclosure form to reflect the most recent 15 years of index values.

4. *Amount of discount or premium.* In reflecting any discounted or premium initial rate, the creditor may select a discount or premium that it has used during the six months preceding preparation of the disclosures, and should disclose that the discount or premium is one that the creditor has used recently. The discount or premium should be reflected in the example for as long as it is in effect. The creditor may assume that a discount or premium that would have been in effect for any part of a year was in effect for the full year for purposes of reflecting it in the historical example.

5. *Rate limitations.* Limitations on both periodic and maximum rates must be reflected in the historical example. If ranges of rate limitations are provided under §1026.40(d)(12)(ix), the highest rates provided in those ranges must be used in the example. Rate limitations that may apply more often than annually should be treated as if they were annual limitations. For example, if a creditor imposes a 1% cap every six months, this should be reflected in the example as if it were a 2% annual cap.

6. *Assumed advances.* The creditor should assume that the $10,000 balance is an advance taken at the beginning of the first billing cycle and is reduced according to the terms

of the plan, and that the consumer takes no subsequent draws. As discussed in the commentary to §1026.40(d)(5), creditors should not assume an additional advance is taken at the beginning of any repayment period. If applicable, the creditor may assume the $10,000 is both the advance and the credit limit. (See the commentary to §1026.40(d)(5) for a discussion of the circumstances in which a creditor may use a lower outstanding balance.)

7. *Representative payment options.* The creditor need not provide an historical example for all of its various payment options, but may select a representative payment option within each of the three categories of payments upon which to base its disclosure. (See the commentary to §1026.40(d)(5).)

8. *Payment information.* i. The payment figures in the historical example must reflect all significant program terms. For example, features such as rate and payment caps, a discounted initial rate, negative amortization, and rate carryover must be taken into account in calculating the payment figures if these would have applied to the plan. The historical example should include payments for as much of the length of the plan as would occur during a 15-year period. For example:

A. If the draw period is 10 years and the repayment period is 15 years, the example should illustrate the entire 10-year draw period and the first 5 years of the repayment period.

B. If the length of the draw period is 15 years and there is a 15-year repayment phase, the historical example must reflect the payments for the 15-year draw period and would not show any of the repayment period. No additional historical example would be required to reflect payments for the repayment period.

C. If the length of the plan is less than 15 years, payments in the historical example need only be shown for the number of years in the term. In such cases, however, the creditor must show the index values, margin and annual percentage rates and continue to reflect all significant plan terms such as rate limitations for the entire 15 years.

ii. A creditor need show only a single payment per year in the example, even though payments may vary during a year. The calculations should be based on the actual payment computation formula, although the creditor may assume that all months have an equal number of days. The creditor may assume that payments are made on the last day of the billing cycle, the billing date or the payment due date, but must be consistent in the manner in which the period used to illustrate payment information is selected. Information about balloon payments and remaining balance may, but need not, be reflected in the example.

9. *Disclosures for repayment period.* The historical example must reflect all features of the repayment period, including the appropriate index values, margin, rate limitations, length of the repayment period, and payments. For example, if different indices are used during the draw and repayment periods, the index values for that portion of the 15 years that reflect the repayment period must be the values for the appropriate index.

10. *Reverse mortgages.* The historical example for reverse mortgages should reflect 15 years of index values and annual percentage rates, but the payment column should be blank until the year that the single payment will be made, assuming that payment is estimated to occur within 15 years. (See the commentary to §1026.40(d)(5) for a discussion of reverse mortgages.)

40(e) Brochure

1. *Substitutes.* A brochure is a suitable substitute for the home equity brochure, ''What You Should Know About Home Equity Lines of Credit,'' (available on the Bureau's Web site) if it is, at a minimum, comparable to that brochure in substance and comprehensiveness. Creditors are permitted to provide more detailed information than is contained in that brochure.

2. *Effect of third party delivery of brochure.* If a creditor determines that a third party has provided a consumer with the required brochure pursuant to §1026.40(c), the creditor need not give the consumer a second brochure.

40(f) Limitations on Home Equity Plans

1. *Coverage.* Section 1026.40(f) limits both actions that may be taken and language that may be included in contracts, and applies to any assignee or holder as well as to the original creditor. The limitations apply to the draw period and any repayment period, and to any renewal or modification of the original agreement.

Paragraph 40(f)(1)

1. *External index.* A creditor may change the annual percentage rate for a plan only if the change is based on an index outside the creditor's control. Thus, a creditor may not make rate changes based on its own prime rate or cost of funds and may not reserve a contractual right to change rates at its discretion. A creditor is permitted, however, to use a published prime rate, such as that in the Wall Street Journal, even if the bank's own prime rate is one of several rates used to establish the published rate.

2. *Publicly available.* The index must be available to the public. A publicly available index need not be published in a newspaper, but it must be one the consumer can independently obtain (by telephone, for example) and use to verify rates imposed under the plan.

3. *Provisions not prohibited.* This paragraph does not prohibit rate changes that are specifically set forth in the agreement. For example, stepped-rate plans, in which specified rates are imposed for specified periods, are permissible. In addition, preferred-rate provisions, in which the rate increases by a specified amount upon the occurrence of a specified event, also are permissible.

Paragraph 40(f)(2)

1. *Limitations on termination and acceleration.* In general, creditors are prohibited from terminating and accelerating payment of the outstanding balance before the scheduled expiration of a plan. However, creditors may take these actions in the four circumstances specified in §1026.40(f)(2). Creditors are not permitted to specify in their contracts any other events that allow termination and acceleration beyond those permitted by the regulation. Thus, for example, an agreement may not provide that the balance is payable on demand nor may it provide that the account will be terminated and the balance accelerated if the rate cap is reached.

2. *Other actions permitted.* If an event permitting termination and acceleration occurs, a creditor may instead take actions short of terminating and accelerating. For example, a creditor could temporarily or permanently suspend further advances, reduce the credit limit, change the payment terms, or require the consumer to pay a fee. A creditor also may provide in its agreement that a higher rate or higher fees will apply in circumstances under which it would otherwise be permitted to terminate the plan and accelerate the balance. A creditor that does not immediately terminate an account and accelerate payment or take another permitted action may take such action at a later time, provided one of the conditions permitting termination and acceleration exists at that time.

Paragraph 40(f)(2)(i)

1. *Fraud or material misrepresentation.* A creditor may terminate a plan and accelerate the balance if there has been fraud or material misrepresentation by the consumer in connection with the plan. This exception includes fraud or misrepresentation at any time, either during the application process or during the draw period and any repayment period. What constitutes fraud or misrepresentation is determined by applicable state law and may include acts of omission as well as overt acts, as long as any necessary intent on the part of the consumer exists.

Paragraph 40(f)(2)(ii)

1. *Failure to meet repayment terms.* A creditor may terminate a plan and accelerate the balance when the consumer fails to meet the repayment terms provided for in the agreement. However, a creditor may terminate and accelerate under this provision only if the consumer actually fails to make payments. For example, a creditor may not terminate and accelerate if the consumer, in error, sends a payment to the wrong location, such as a branch rather than the main office of the creditor. If a consumer files for or is placed in bankruptcy, the creditor may terminate and accelerate under this provision if the consumer fails to meet the repayment terms of the agreement. This section does not override any state or other law that requires a right-to-cure notice, or otherwise places a duty on the creditor before it can terminate a plan and accelerate the balance.

Paragraph 40(f)(2)(iii)

1. *Impairment of security.* A creditor may terminate a plan and accelerate the balance if the consumer's action or inaction adversely affects the creditor's security for the plan, or any right of the creditor in that security. Action or inaction by third parties does not, in itself, permit the creditor to terminate and accelerate.

2. *Examples.* i. A creditor may terminate and accelerate, for example, if:

A. The consumer transfers title to the property or sells the property without the permission of the creditor.

B. The consumer fails to maintain required insurance on the dwelling.

C. The consumer fails to pay taxes on the property.

D. The consumer permits the filing of a lien senior to that held by the creditor.

E. The sole consumer obligated on the plan dies.

F. The property is taken through eminent domain.

G. A prior lienholder forecloses.

ii. By contrast, the filing of a judgment against the consumer would permit termination and acceleration only if the amount of the judgment and collateral subject to the judgment is such that the creditor's security is adversely affected. If the consumer commits waste or otherwise destructively uses or fails to maintain the property such that the action adversely affects the security, the plan may be terminated and the balance accelerated. Illegal use of the property by the consumer would permit termination and acceleration if it subjects the property to seizure. If one of two consumers obligated on a plan dies the creditor may terminate the plan and accelerate the balance if the security is adversely affected. If the consumer moves out of the dwelling that secures the plan and that action adversely affects the security, the creditor may terminate a plan and accelerate the balance.

Paragraph 40(f)(3)

1. *Scope of provision.* In general, a creditor may not change the terms of a plan after it is opened. For example, a creditor may not increase any fee or impose a new fee once the plan has been opened, even if the fee is charged by a third party, such as a credit reporting agency, for a service. The change of terms prohibition applies to all features of a plan, not only those required to be disclosed under this section. For example, this provision applies to charges imposed for late payment, although this fee is not required to be disclosed under §1026.40(d)(7).

2. *Charges not covered.* There are three charges not covered by this provision. A creditor may pass on increases in taxes since such charges are imposed by a governmental body and are beyond the control of the creditor. In addition, a creditor may pass on increases in premiums for property insurance that are excluded from the finance charge under §1026.4(d)(2), since such insurance provides a benefit to the consumer independent of the use of the line and is often maintained notwithstanding the line. A creditor also may pass on increases in premiums for credit insurance that are excluded from the finance charge under §1026.4(d)(1), since the insurance is voluntary and provides a benefit to the consumer.

Paragraph 40(f)(3)(i)

1. *Changes provided for in agreement.* A creditor may provide in the initial agreement that further advances will be prohibited or the credit line reduced during any period in which the maximum annual percentage rate is reached. A creditor also may provide for other specific changes to take place upon the occurrence of specific events. Both the triggering event and the resulting modification must be stated with specificity. For example, in home equity plans for employees, the agreement could provide that a specified higher rate or margin will apply if the borrower's employment with the creditor ends. A contract could contain a stepped-rate or stepped-fee schedule providing for specified changes in the rate or the fees on certain dates or after a specified period of time. A creditor also may provide in the initial agreement that it will be entitled to a share of the appreciation in the value of the property as long as the specific appreciation share and the specific circumstances which require the payment of it are set forth. A contract may permit a consumer to switch among minimum payment options during the plan.

2. *Prohibited provisions.* A creditor may not include a general provision in its agreement permitting changes to any or all of the terms of the plan. For example, creditors may not include "boilerplate" language in the agreement stating that they reserve the right to change the fees imposed under the plan. In addition, a creditor may not include any "triggering events" or responses that the regulation expressly addresses in a manner different from that provided in the regulation. For example, an agreement may not provide that the margin in a variable-rate plan will increase if there is a material change in the consumer's financial circumstances, because the regulation specifies that temporarily freezing the line or lowering the credit limit is the permissible response to a material change in the consumer's financial circumstances. Similarly a contract cannot contain a provision allowing the creditor to freeze a line due to an insignificant decline in property value since the regulation allows that response only for a significant decline.

Paragraph 40(f)(3)(ii)

1. Replacing LIBOR. A creditor may use either the provision in §1026.40(f)(3)(ii)(A) or (f)(3)(ii)(B) to replace a LIBOR index used under a plan so long as the applicable conditions are met for the provision used. Neither provision, however, excuses the creditor from noncompliance with contractual provisions. The following examples illustrate when a creditor may use the provisions in §1026.40(f)(3)(ii)(A) or (B) to replace the LIBOR index used under a plan.

i. Assume that LIBOR becomes unavailable after June 30, 2023, and assume a contract provides that a creditor may not replace an index unilaterally under a plan unless the original index becomes unavailable and provides that the replacement index and replacement margin will result in an annual percentage rate substantially similar to a rate that is in effect when the original index becomes unavailable. In this case, the creditor may use §1026.40(f)(3)(ii)(A) to replace the LIBOR index used under the plan so long as the conditions of that provision are met. Section 1026.40(f)(3)(ii)(B) provides that a creditor may replace the LIBOR index if, among other conditions, the replacement index value in effect on October 18, 2021, and replacement margin will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If the replacement index is not published on October 18, 2021, the creditor generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index. The one exception is that if the replacement index is the Board-selected benchmark replacement for consumer loans to replace the 1-month, 3-month, 6-month, or 12-month U.S. Dollar LIBOR index, the creditor must use the index value on June 30, 2023, for the LIBOR index and, for the Board-selected benchmark replacement for consumer loans, must use the index value on the first date that index is published, in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index. *See* §1026.2(a)(28) for the definition of *the Board-selected benchmark replacement for consumer loans*. In this example, however, the creditor would be contractually prohibited from replacing the LIBOR index used under the plan unless the replacement index and replacement margin also will produce an annual percentage rate substantially similar to a rate that is in effect when the LIBOR index becomes unavailable.

ii. Assume that LIBOR becomes unavailable after June 30, 2023, and assume a contract provides that a creditor may not replace an index unilaterally under a plan unless the original index becomes unavailable but does not require that the replacement index and replacement margin will result in an annual percentage rate substantially similar to a rate that is in effect when the original index becomes unavailable. In this case, the creditor would be contractually prohibited from unilaterally replacing a LIBOR index used under the plan until it becomes unavailable. At that time, the creditor has the option of using §1026.40(f)(3)(ii)(A) or (B) to replace the LIBOR index if the conditions of the applicable provision are met.

iii. Assume that LIBOR becomes unavailable after June 30, 2023, and assume a contract provides that a creditor may change the terms of the contract (including the index) as permitted by law. In this case, if the creditor replaces a LIBOR index under a plan on or after April 1, 2022, but does not wait until the LIBOR index becomes unavailable to do so, the creditor may only use §1026.40(f)(3)(ii)(B) to replace the LIBOR index if the conditions of that provision are met. In this case, the creditor may not use §1026.40(f)(3)(ii)(A). If the creditor waits until the LIBOR index used under the plan becomes unavailable to replace the LIBOR index, the creditor has the option of using §1026.40(f)(3)(ii)(A) or (B) to replace the LIBOR index if the conditions of the applicable provision are met.

Paragraph 40(f)(3)(ii)(A)

1. *Substitution of index*. A creditor may change the index and margin used under the plan if the original index becomes unavailable, as long as historical fluctuations in the original and replacement indices were substantially similar, and as long as the replacement index and replacement margin will produce a rate substantially similar to the rate that was in effect at the time the original index became unavailable. If the replacement index is newly established and therefore does not have any rate history, it may be used if it and the replacement margin will produce a rate substantially similar to the rate in effect when the original index became unavailable.

2. *Replacing LIBOR*. For purposes of replacing a LIBOR index used under a plan, a replacement index that is not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index used under the plan. Except for the Board-selected benchmark replacement for consumer loans defined in §1026.2(a)(28), the historical fluctuations considered are the historical fluctuations up through when the LIBOR index becomes unavailable or up through the date indicated in a Bureau determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, whichever is earlier.

i. The Bureau has determined that effective April 1, 2022, the prime rate published in the Wall Street Journal has historical fluctuations that are substantially similar to those of the 1-month and 3-month U.S. Dollar LIBOR indices, and no further determination is required. In order to use this prime rate as the replacement index for the 1-month or 3-month U.S. Dollar LIBOR index, the creditor also must comply with the condition in §1026.40(f)(3)(ii)(A) that the prime rate and replacement margin would have resulted in an annual percentage rate substantially similar to the rate in effect at the time the LIBOR index became unavailable. *See also* comment 40(f)(3)(ii)(A)–3.

ii. By operation of the Adjustable Interest Rate (LIBOR) Act, Public Law 117–103, division U, and the Board's implementing regulation, 12 CFR part 253, the Board-selected benchmark replacement for consumer loans to replace the 1-month, 3-month, 6-month, or 12-month U.S. Dollar LIBOR index has historical fluctuations substantially similar to those of the LIBOR index being replaced. *See* §1026.2(a)(28) for the definition of *the Board-selected benchmark replacement for consumer loans*. As a result, the Board-selected benchmark replacement for consumer loans meets the ''historical fluctuations are substantially similar'' standard for the LIBOR index tenor it replaces, and no further determination is required. In order to use the Board-selected benchmark replacement for consumer loans as the replacement index for the applicable LIBOR index, the creditor also must comply with the condition in §1026.40(f)(3)(ii)(A) that the Board-selected benchmark replacement for consumer loans and replacement margin would have resulted in an annual percentage rate substantially similar to the rate in effect at the time the LIBOR index became unavailable. *See also* comment 40(f)(3)(ii)(A)–3.

iii. Except for the Board-selected benchmark replacement for consumer loans as defined in §1026.2(a)(28), the relevant factors to be considered in determining whether a replacement index has historical fluctuations substantially similar to those of a particular LIBOR index depend on the replacement index being considered and the LIBOR index being replaced. For example, these determinations may need to consider certain aspects of the historical data itself for a particular replacement index, such as whether the replacement index is a backward-looking rate (e.g., historical average of rates) such that timing aspects of the data may need to be adjusted to match up with the particular forward-looking LIBOR term-rate being replaced. The types of relevant factors to establish if a replacement index would meet the ''historical fluctuations are substantially similar'' standard with respect to a particular LIBOR index using historical data, include but are not limited to, whether: (1) the movements over time are substantially similar; and (2) the consumers' payments using the replacement index compared to payments using the LIBOR index are substantially similar if there is sufficient historical data for this analysis. The Board-selected benchmark replacement for consumer loans is considered to meet the ''historical fluctuations are substantially similar'' standard with respect to the LIBOR tenor being replaced, and therefore, these factors need not be considered.

3. *Substantially similar rate when LIBOR becomes unavailable.* Under §1026.40(f)(3)(ii)(A), the replacement index and replacement margin must produce an annual percentage rate substantially similar to the rate that was in effect based on the LIBOR index used under the plan when the LIBOR index became unavailable. For this comparison of the rates, a creditor generally must use the value of the replacement index and the LIBOR index on the day that LIBOR becomes unavailable. If the replacement index is not published on the day that the LIBOR index becomes unavailable, the creditor generally must use the previous calendar day that both indices are published as the date for selecting indices values in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index. The one exception is that if the replacement index is the Board-selected benchmark replacement for consumer loans to replace the 1-month, 3-month, 6-month, or 12-month U.S. Dollar LIBOR index, the creditor must use the index value on June 30, 2023, for the LIBOR index and, for the Board-selected benchmark replacement for consumer loans, must use the index value on the first date that index is published, in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index. The replacement index and replacement margin are not required to produce an annual percentage rate that is substantially similar on the day that the replacement index and replacement margin become effective on the plan. For purposes of §1026.40(f)(3)(ii)(A), if a creditor uses the Board-selected benchmark replacement for consumer loans to replace the 1-month, 3-month, 6-month, or 12-month U.S. Dollar LIBOR index as the replacement index and uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan, the creditor will be deemed to be in compliance with the condition in §1026.40(f)(3)(ii)(A) that the replacement index and replacement margin would have resulted in an annual percentage rate substantially similar to the rate in effect at the time the LIBOR index became unavailable. The following example illustrates this comment.

i. Assume that the 1-month U.S. Dollar LIBOR index used under a plan becomes unavailable on June 30, 2023, and on that day the LIBOR index value is 2%, the margin is 10%, and the annual percentage rate is 12%. Also, assume that a creditor has selected the prime index published in the Wall Street Journal as the replacement index, and the value of the prime index is 5% on June 30, 2023. The creditor would satisfy the requirement to use a replacement index and replacement margin that will produce an annual percentage rate substantially similar to the rate that was in effect when the LIBOR index used under the plan became unavailable by selecting a 7% replacement margin. (The prime index value of 5% and the replacement margin of 7% would produce a rate of 12% on June 30, 2023.) Thus, if the creditor provides a change-in-terms notice under §1026.9(c)(1) on July 1, 2023, disclosing the prime index as the replacement index and a replacement margin of 7%, where these changes will become effective on July 17, 2023, the creditor satisfies the requirement to use a replacement index and replacement margin that will produce an annual percentage rate substantially similar to the rate that was in effect when the LIBOR index used under the plan became unavailable. This is true even if the prime index value changes after June 30, 2023, and the annual percentage rate calculated using the prime index value and 7% margin on July 17, 2022, is not substantially similar to the rate calculated using the LIBOR index value on June 30, 2023.

Paragraph 40(f)(3)(ii)(B)

1. *Replacing LIBOR.* For purposes of replacing a LIBOR index used under a plan, a replacement index that is not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index used under the plan. Except for the Board-selected benchmark replacement for consumer loans as defined in §1026.2(a)(28), the historical fluctuations considered are the historical fluctuations up through the relevant date. If the Bureau has made a determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, the relevant date is the date indicated in that determination. If the Bureau has not made a determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, the relevant date is the later of April 1, 2022, or the date no more than 30 days before the creditor makes a determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar.

i. The Bureau has determined that effective April 1, 2022, the prime rate published in the Wall Street Journal has historical fluctuations that are substantially similar to those of the 1-month and 3-month U.S. Dollar LIBOR indices, and no further determination is required. In order to use this prime rate as the replacement index for the 1-month or 3-month U.S. Dollar LIBOR index, the creditor also must comply with the condition in §1026.40(f)(3)(ii)(B) that the prime rate index value in effect on October 18, 2021, and replacement margin will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. *See also* comments 40(f)(3)(ii)(B)–2 and –3.

ii. By operation of the Adjustable Interest Rate (LIBOR) Act, Public Law 117–103, division U, and the Board's implementing regulation, 12 CFR part 253, the Board-selected benchmark replacement for consumer loans to replace the 1-month, 3-month, 6-month, or 12-month U.S. Dollar LIBOR index has historical fluctuations substantially similar to those of the LIBOR index being replaced. *See* §1026.2(a)(28) for the definition of *the Board-selected benchmark replacement for consumer loans*. As a result, the Board-selected benchmark replacement for consumer loans meets the ''historical fluctuations are substantially similar'' standard for the LIBOR index it replaces, and no further determination is required. In order to use the Board-selected benchmark replacement for consumer loans as the replacement index for the applicable LIBOR index, the creditor also must comply with the condition in §1026.40(f)(3)(ii)(B) that the Board-selected benchmark replacement for consumer loans and replacement margin will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. Because of the exception in §1026.40(f)(3)(ii)(B), the creditor must use the index value on June 30, 2023, for the LIBOR index and, for the Board-selected benchmark replacement for consumer loans, must use the index value on the first date that index is published, in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index. *See also* comments 40(f)(3)(ii)(B)–2 and –3.

iii. Except for the Board-selected benchmark replacement for consumer loans as defined in §1026.2(a)(28), the relevant factors to be considered in determining whether a replacement index has historical fluctuations substantially similar to those of a particular LIBOR index depend on the replacement index being considered and the LIBOR index being replaced. For example, these determinations may need to consider certain aspects of the historical data itself for a particular replacement index, such as whether the replacement index is a backward-looking rate (e.g., historical average of rates) such that timing aspects of the data may need to be adjusted to match up with the particular forward-looking LIBOR term-rate being replaced. The types of relevant factors to establish if a replacement index would meet the ''historical fluctuations are substantially similar'' standard with respect to a particular LIBOR index using historical data, include but are not limited to, whether: (1) the movements over time are substantially similar; and (2) the consumers' payments using the replacement index compared to payments using the LIBOR index are substantially similar if there is sufficient historical data for this analysis. The Board-selected benchmark replacement for consumer loans is considered to meet the ''historical fluctuations are substantially similar'' standard with respect to the LIBOR tenor being replaced, and therefore, these factors need not be considered.

2. *Using index values on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan.* Under §1026.40(f)(3)(ii)(B), if the replacement index was published on October 18, 2021, the replacement index value in effect on October 18, 2021, and replacement margin must produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the

variable rate immediately prior to the replacement of the LIBOR index used under the plan. The margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan is the margin that applied to the variable rate immediately prior to when the creditor provides the change-in-terms notice disclosing the replacement index for the variable rate. The following example illustrates this comment.

i. Assume a variable rate used under the plan that is based on the 1-month U.S. Dollar LIBOR index and assume that LIBOR becomes unavailable after June 30, 2023. On October 18, 2021, the LIBOR index value is 2%, the margin on that day is 10% and the annual percentage rate using that index value and margin is 12%. Assume on January 1, 2022, a creditor provides a change-in-terms notice under §1026.9(c)(1) disclosing a new margin of 12% for the variable rate pursuant to a written agreement under §1026.40(f)(3)(iii), and this change in the margin becomes effective on January 1, 2022, pursuant to §1026.9(c)(1). Assume that there are no more changes in the margin that is used in calculating the variable rate prior to April 1, 2022, the date on which the creditor provides a change-in-terms notice under §1026.9(c)(1), disclosing the replacement index and replacement margin for the variable rate that will be effective on April 17, 2022. In this case, the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan is 12%. Assume that the creditor has selected the prime index published in the Wall Street Journal as the replacement index, and the value of the prime index is 5% on October 18, 2021. A replacement margin of 9% is permissible under §1026.40(f)(3)(ii)(B) because that replacement margin combined with the prime index value of 5% on October 18, 2021, will produce an annual percentage rate of 14%, which is substantially similar to the 14% annual percentage rate calculated using the LIBOR index value in effect on October 18, 2021, (which is 2%) and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan (which is 12%).

3. *Substantially similar rates using index values on October 18, 2021.* Under §1026.40(f)(3)(ii)(B), if the replacement index was published on October 18, 2021, the replacement index value in effect on October 18, 2021, and replacement margin must produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. The replacement index and replacement margin are not required to produce an annual percentage rate that is substantially similar on the day that the replacement index and replacement margin become effective on the plan. For purposes of §1026.40(f)(3)(ii)(B), if a creditor uses the Board-selected benchmark replacement for consumer loans to replace the 1-month, 3-month, 6-month, or 12-month U.S. Dollar LIBOR index as the replacement index and uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan, the creditor will be deemed to be in compliance with the condition in §1026.40(f)(3)(ii)(B) that the replacement index and replacement margin would have resulted in an annual percentage rate substantially similar to the rate calculated using the LIBOR index. The following example illustrates this comment.

i. Assume that the 1-month U.S. Dollar LIBOR index used under the plan has a value of 2% on October 18, 2021, the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan is 10%, and the annual percentage rate based on that LIBOR index value and that margin is 12%. Also, assume that the creditor has selected the prime index published in the Wall Street Journal as the replacement index, and the value of the prime index is 5% on October 18, 2021. A creditor would satisfy the requirement to use a replacement index value in effect on October 18, 2021, and replacement margin that will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan, by selecting a 7% replacement margin. (The prime index value of 5% and the replacement margin of 7% would produce a rate of 12%.) Thus, if the creditor provides a change-in-terms notice under §1026.9(c)(1) on April 1, 2022, disclosing the prime index as the replacement index and a replacement margin of 7%, where these changes will become effective on April 17, 2022, the creditor satisfies the requirement to use a replacement index value in effect on October 18, 2021, and replacement margin that will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. This is true even if the prime index value or the LIBOR index value changes after October 18, 2021, and the annual percentage rate calculated using the prime index value and 7% margin on April 17, 2022, is not substantially similar to the rate calculated using the LIBOR index value on October 18, 2021, or substantially similar to the rate calculated using the LIBOR index value on April 17, 2022.

Paragraph 40(f)(3)(iii)

1. *Changes by written agreement.* A creditor may change the terms of a plan if the consumer expressly agrees in writing to the change at the time it is made. For example, a consumer and a creditor could agree in writing to change the repayment terms from interest-only payments to payments that reduce the principal balance. The provisions of any such agreement are governed by the limitations in §1026.40(f). For example, a mutual agreement could not provide for future annual percentage rate changes based on the movement of an index controlled by the creditor or for termination and acceleration under circumstances other than those specified in the regulation. By contrast, a consumer could agree to a new credit limit for the plan, although the agreement could not permit the creditor to later change the credit limit except by a subsequent written agreement or in the circumstances described in §1026.40(f)(3)(vi).

2. *Written agreement.* The change must be agreed to in writing by the consumer. Creditors are not permitted to assume consent because the consumer uses an account, even if use of an account would otherwise constitute acceptance of a proposed change under state law.

Paragraph 40(f)(3)(iv)

1. *Beneficial changes.* After a plan is opened, a creditor may make changes that unequivocally benefit the consumer. Under this provision, a creditor may offer more options to consumers, as long as existing options remain. For example, a creditor may offer the consumer the option of making lower monthly payments or could increase the credit limit. Similarly, a creditor wishing to extend the length of the plan on the same terms may do so. Creditors are permitted to temporarily reduce the rate or fees charged during the plan (though a change in terms notice may be required under §1026.9(c) when the rate or fees are returned to their original level). Creditors also may offer an additional means of access to the line, even if fees are associated with using the device, provided the consumer retains the ability to use prior access devices on the original terms.

Paragraph 40(f)(3)(v)

1. *Insignificant changes.* A creditor is permitted to make insignificant changes after a plan is opened. This rule accommodates operational and similar problems, such as changing the address of the creditor for purposes of sending payments. It does not permit a creditor to change a term such as a fee charged for late payments.

2. *Examples of insignificant changes.* Creditors may make minor changes to features such as the billing cycle date, the payment due date (as long as the consumer does not have a diminished grace period if one is provided), and the day of the month on which index values are measured to determine changes to the rate for variable-rate plans. A creditor also may change its rounding practice in accordance with the tolerance rules set forth in §1026.14 (for example, stating an exact APR of 14.3333 percent as 14.3 percent, even if it had previously been stated as 14.33 percent). A creditor may change the balance computation method it uses only if the change produces an insignificant difference in the finance charge paid by the consumer. For example, a creditor may switch from using the average daily balance method (including new transactions) to the daily balance method (including new transactions).

Paragraph 40(f)(3)(vi)

1. *Suspension of credit privileges or reduction of credit limit.* A creditor may prohibit additional extensions of credit or reduce the credit limit in the circumstances specified in this section of the regulation. In addition, as discussed under §1026.40(f)(3)(i), a creditor may contractually reserve the right to take such actions when the maximum annual percentage rate is reached. A creditor may not take these actions under other circumstances, unless the creditor would be permitted to terminate the line and accelerate the balance as described in §1026.40(f)(2). The creditor's right to reduce the credit limit does not permit reducing the limit below the amount of the outstanding balance if this would require the consumer to make a higher payment.

2. *Temporary nature of suspension or reduction.* Creditors are permitted to prohibit additional extensions of credit or reduce the credit limit only while one of the designated circumstances exists. When the circumstance justifying the creditor's action ceases to exist, credit privileges must be reinstated, assuming that no other circumstance permitting such action exists at that time.

3. *Imposition of fees.* If not prohibited by state law, a creditor may collect only bona fide and reasonable appraisal and credit report fees if such fees are actually incurred in investigating whether the condition permitting the freeze continues to exist. A creditor may not, in any circumstances, impose a fee to reinstate a credit line once the condition has been determined not to exist.

4. *Reinstatement of credit privileges.* Creditors are responsible for ensuring that credit privileges are restored as soon as reasonably possible after the condition that permitted the creditor's action ceases to exist. One way a creditor can meet this responsibility is to

monitor the line on an ongoing basis to determine when the condition ceases to exist. The creditor must investigate the condition frequently enough to assure itself that the condition permitting the freeze continues to exist. The frequency with which the creditor must investigate to determine whether a condition continues to exist depends upon the specific condition permitting the freeze. As an alternative to such monitoring, the creditor may shift the duty to the consumer to request reinstatement of credit privileges by providing a notice in accordance with §1026.9(c)(1)(iii). A creditor may require a reinstatement request to be in writing if it notifies the consumer of this requirement on the notice provided under §1026.9(c)(1)(iii). Once the consumer requests reinstatement, the creditor must promptly investigate to determine whether the condition allowing the freeze continues to exist. Under this alternative, the creditor has a duty to investigate only upon the consumer's request.

5. *Suspension of credit privileges following request by consumer.* A creditor may honor a specific request by a consumer to suspend credit privileges. If the consumer later requests that the creditor reinstate credit privileges, the creditor must do so provided no other circumstance justifying a suspension exists at that time. If two or more consumers are obligated under a plan and each has the ability to take advances, the agreement may permit any of the consumers to direct the creditor not to make further advances. A creditor may require that all persons obligated under a plan request reinstatement.

6. *Significant decline defined.* What constitutes a significant decline for purposes of §1026.40(f)(3)(vi)(A) will vary according to individual circumstances. In any event, if the value of the dwelling declines such that the initial difference between the credit limit and the available equity (based on the property's appraised value for purposes of the plan) is reduced by fifty percent, this constitutes a significant decline in the value of the dwelling for purposes of §1026.40(f)(3)(vi)(A). For example, assume that a house with a first mortgage of $50,000 is appraised at $100,000 and the credit limit is $30,000. The difference between the credit limit and the available equity is $20,000, half of which is $10,000. The creditor could prohibit further advances or reduce the credit limit if the value of the property declines from $100,000 to $90,000. This provision does not require a creditor to obtain an appraisal before suspending credit privileges although a significant decline must occur before suspension can occur.

7. *Material change in financial circumstances.* Two conditions must be met for §1026.40(f)(3)(vi)(B) to apply. First, there must be a ''material change'' in the consumer's financial circumstances, such as a significant decrease in the consumer's income. Second, as a result of this change, the creditor must have a reasonable belief that the consumer will be unable to fulfill the payment obligations of the plan. A creditor may, but does not have to, rely on specific evidence (such as the failure to pay other debts) in concluding that the second part of the test has been met. A creditor may prohibit further advances or reduce the credit limit under this section if a consumer files for or is placed in bankruptcy.

8. *Default of a material obligation.* Creditors may specify events that would qualify as a default of a material obligation under §1026.40(f)(3)(vi)(C). For example, a creditor may provide that default of a material obligation will exist if the consumer moves out of the dwelling or permits an intervening lien to be filed that would take priority over future advances made by the creditor.

9. *Government limits on the annual percentage rate.* Under §1026.40(f)(3)(vi)(D), a creditor may prohibit further advances or reduce the credit limit if, for example, a state usury law is enacted which prohibits a creditor from imposing the agreed-upon annual percentage rate.

40(g) Refund of Fees

1. *Refund of fees required.* If any disclosed term, including any term provided upon request pursuant to §1026.40(d), changes between the time the early disclosures are provided to the consumer and the time the plan is opened, and the consumer as a result decides to not enter into the plan, a creditor must refund all fees paid by the consumer in connection with the application. All fees, including credit report fees and appraisal fees, must be refunded whether such fees are paid to the creditor or directly to third parties. A consumer is entitled to a refund of fees under these circumstances whether or not terms are guaranteed by the creditor under §1026.40(d)(2)(i).

2. *Variable-rate plans.* The right to a refund of fees does not apply to changes in the annual percentage rate resulting from fluctuations in the index value in a variable-rate plan. Also, if the maximum annual percentage rate is expressed as an amount over the initial rate, the right to refund of fees would not apply to changes in the cap resulting from fluctuations in the index value.

3. *Changes in terms.* If a term, such as the maximum rate, is stated as a range in the early disclosures, and the term ultimately applicable to the plan falls within that range, a change does not occur for purposes of this section. If, however, no range is used and the term is changed (for example, a rate cap of 6 rather than 5 percentage points over the initial rate), the change would permit the consumer to obtain a refund of fees. If a fee imposed by the creditor is stated in the early disclosures as an estimate and the fee

changes, the consumer could elect to not enter into the agreement and would be entitled to a refund of fees. On the other hand, if fees imposed by third parties are disclosed as estimates and those fees change, the consumer is not entitled to a refund of fees paid in connection with the application. Creditors must, however, use the best information reasonably available in providing disclosures about such fees.

4. *Timing of refunds and relation to other provisions.* The refund of fees must be made as soon as reasonably possible after the creditor is notified that the consumer is not entering into the plan because of the changed term, or that the consumer wants a refund of fees. The fact that an application fee may be refunded to some applicants under this provision does not render such fees finance charges under §1026.4(c)(1) of the regulation.

40(h) Imposition of Nonrefundable Fees

1. *Collection of fees after consumer receives disclosures.* A fee may be collected after the consumer receives the disclosures and brochure and before the expiration of three days, although the fee must be refunded if, within three days of receiving the required information, the consumer decides to not enter into the agreement. In such a case, the consumer must be notified that the fee is refundable for three days. The notice must be clear and conspicuous and in writing, and may be included with the disclosures required under §1026.40(d) or as an attachment to them. If disclosures and brochure are mailed to the consumer, §1026.40(h) provides that a nonrefundable fee may not be imposed until six business days after the mailing.

2. *Collection of fees before consumer receives disclosures.* An application fee may be collected before the consumer receives the disclosures and brochure (for example, when an application contained in a magazine is mailed in with an application fee) provided that it remains refundable until three business days after the consumer receives the §1026.40 disclosures. No other fees except a refundable membership fee may be collected until after the consumer receives the disclosures required under §1026.40.

3. *Relation to other provisions.* A fee collected before disclosures are provided may become nonrefundable except that, under §1026.40(g), it must be refunded if the consumer elects to not enter into the plan because of a change in terms. (Of course, all fees must be refunded if the consumer later rescinds under §1026.15.)

Section 1026.41—Periodic Statements for Residential Mortgage Loans

41(a) In general.

1. *Recipient of periodic statement.* When two consumers are joint obligors with primary liability on a closed-end consumer credit transaction secured by a dwelling subject to §1026.41, the periodic statement may be sent to either one of them. For example, if spouses jointly own a home, the servicer need not send statements to both spouses; a single statement may be sent.

2. *Billing cycles shorter than a 31-day period.* If a loan has a billing cycle shorter than a period of 31 days (for example, a bi-weekly billing cycle), a periodic statement covering an entire month may be used. Such statement would separately list the upcoming payment due dates and amounts due, as required by §1026.20(d)(1), and list all transaction activity that occurred during the related time period, as required by paragraph (d)(4). Such statement may aggregate the information for the explanation of amount due, as required by paragraph (d)(2), and past payment breakdown, as required by paragraph (d)(3).

3. *One statement per billing cycle.* The periodic statement requirement in §1026.41 applies to the ''creditor, assignee, or servicer as applicable.'' The creditor, assignee, and servicer are all subject to this requirement (*but see* comment 41(a)–4), but only one statement must be sent to the consumer each billing cycle. When two or more parties are subject to this requirement, they may decide among themselves which of them will send the statement.

4. *Opting out.* A consumer may not opt out of receiving periodic statements altogether. However, consumers who have demonstrated the ability to access statements online may opt out of receiving notifications that statements are available. Such an ability may be demonstrated, for example, by the consumer receiving notification that the statements is available, going to the Web site where the information is available, viewing the information about their account and selecting a link or option there to indicate they no longer would like to receive notifications when new statements are available.

41(b) Timing of the periodic statement.

1. *Reasonably prompt time.* Section 1026.41(b) requires that the periodic statement be delivered or placed in the mail no later than a reasonably prompt time after the payment due date or the end of any courtesy period. Delivering, emailing or placing the periodic statement in the mail within four days of the close of the courtesy period of the previous billing cycle generally would be considered reasonably prompt.

2. *Courtesy period.* The meaning of ''courtesy period'' is explained in comment 7(b)(11)–1.

41(c) Form of the periodic statement.

1. *Clear and conspicuous standard.* The ''clear and conspicuous'' standard generally requires that disclosures be in a reasonably understandable form. Except where otherwise provided, the standard does not prohibit adding to the required disclosures, as long as

the additional information does not overwhelm or obscure the required disclosures. For example, while certain information about the escrow account (such as the account balance) is not required on the periodic statement, this information may be included.

2. *Additional information; disclosures required by other laws.* Nothing in §1026.41 prohibits a servicer from including additional information or combining disclosures required by other laws with the disclosures required by this subpart, unless such prohibition is expressly set forth in this subpart, or other applicable law.

3. *Electronic distribution.* The periodic statement may be provided electronically if the consumer agrees. The consumer must give affirmative consent to receive statements electronically. If statements are provided electronically, the creditor, assignee, or servicer may send a notification that a consumer's statement is available, with a link to where the statement can be accessed, in place of the statement itself.

4. *Presumed consent.* Any consumer who is currently receiving disclosures for any account (for example, a mortgage or checking account) electronically from their servicer shall be deemed to have consented to receiving e-statements in place of paper statements.

5. *Permissible changes.* Servicers may modify the sample forms for periodic statements provided in appendix H–30 of this part to remove language that could suggest liability under the mortgage loan agreement if such language is not applicable. For example, in the case of a confirmed successor in interest who has not assumed the mortgage loan obligation under State law and is not otherwise liable on the mortgage loan obligation, a servicer may modify the forms to:

i. Use ''this mortgage'' or ''the mortgage'' instead of ''your mortgage.''

ii. Use ''The payments on this mortgage are late'' instead of ''You are late on your mortgage payments.''

iii. Use ''This is the amount needed to bring the loan current'' instead of ''You must pay this amount to bring your loan current.''

41(d) Content and layout of the periodic statement.

1. *Close proximity.* Section 1026.41(d) requires several disclosures to be provided in close proximity to one another. To meet this requirement, the items to be provided in close proximity must be grouped together, and set off from other groupings of items. This may be accomplished in a variety of ways, for example, by presenting the information in boxes, or by arranging the items on the document and including spacing between the groupings. Items in close proximity may not have any unrelated text between them. Text is unrelated if it does not explain or expand upon the required disclosures.

2. *Not applicable.* If an item required by paragraph (d) or (e) of this section is not applicable to the loan, it may be omitted from the periodic statement or coupon book. For example, if there is no prepayment penalty associated with a loan, the prepayment penalty disclosures need not be provided on the periodic statement.

3. *Terminology.* A servicer may use terminology other than that found on the sample periodic statements in appendix H–30, so long as the new terminology is commonly understood. For example, servicers may take into consideration regional differences in terminology and refer to the account for the collection of taxes and insurance, referred to in §1026.41(d) as the ''escrow account,'' as an ''impound account.''

4. *Temporary loss mitigation programs.* If the consumer has agreed to a temporary loss mitigation program, the disclosures required by §1026.41(d)(2), (3), and (5) regarding how payments were and will be applied must identify how payments are applied according to the loan contract, regardless of the temporary loss mitigation program.

5. *First statement after exemption terminates.* Section 1026.41(d)(2)(ii), (d)(3)(i), and (d)(4) requires the disclosure of the total sum of any fees or charges imposed since the last statement, the total of all payments received since the last statement, including a breakdown of how payments were applied, and a list of all transaction activity since the last statement. For purposes of the first periodic statement provided to the consumer following termination of an exemption under §1026.41(e), the disclosures required by §1026.41(d)(2)(ii), (d)(3)(i), and (d)(4) may be limited to account activity since the last payment due date that occurred while the exemption was in effect. For example, if mortgage loan payments are due on the first of each month and the servicer's exemption under §1026.41(e) terminated on January 15, the first statement provided to the consumer after January 15 may be limited to the total sum of any fees or charges imposed, the total of all payments received, a breakdown of how the payments were applied, and a list of all transaction activity since January 1.

41(d)(1) Amount due.

1. *Acceleration.* If the balance of a mortgage loan has been accelerated but the servicer will accept a lesser amount to reinstate the loan, the amount due under §1026.41(d)(1) must identify only the lesser amount that will be accepted to reinstate the loan. The periodic statement must be accurate when provided and should indicate, if applicable, that the amount due is accurate only for a specified period of time. For example, the statement may include language such as ''as of [date]'' or ''good through [date]'' and provide an amount due that will reinstate the

loan as of that date or good through that date, respectively.

2. *Temporary loss mitigation programs.* If the consumer has agreed to a temporary loss mitigation program, the amount due under §1026.41(d)(1) may identify either the payment due under the temporary loss mitigation program or the amount due according to the loan contract.

3. *Permanent loan modifications.* If the loan contract has been permanently modified, the amount due under §1026.41(d)(1) must identify only the amount due under the modified loan contract.

41(d)(2) Explanation of amount due.

1. *Acceleration.* If the balance of a mortgage loan has been accelerated but the servicer will accept a lesser amount to reinstate the loan, the explanation of amount due under §1026.41(d)(2) must list both the reinstatement amount that is disclosed as the amount due and the accelerated amount but not the monthly payment amount that would otherwise be required under §1026.41(d)(2)(i). The periodic statement must also include an explanation that the reinstatement amount will be accepted to reinstate the loan through the "as of [date]" or "good through [date]," as applicable, along with any special instructions for submitting the payment. The explanation should be on the front page of the statement or, alternatively, may be included on a separate page enclosed with the periodic statement. The explanation may include related information, such as a statement that the amount disclosed is "not a payoff amount."

2. *Temporary loss mitigation programs.* If the consumer has agreed to a temporary loss mitigation program and the amount due identifies the payment due under the temporary loss mitigation program, the explanation of amount due under §1026.41(d)(2) must include both the amount due according to the loan contract and the payment due under the temporary loss mitigation program. The statement must also include an explanation that the amount due is being disclosed as a different amount because of the temporary loss mitigation program. The explanation should be on the front page of the statement or, alternatively, may be included on a separate page enclosed with the periodic statement or in a separate letter.

41(d)(3) Past payment breakdown.

1. *Partial payments.* The disclosure of any partial payments received since the previous statement that were sent to a suspense or unapplied funds account as required by §1026.41(d)(3)(i) should reflect any funds that were received in the time period covered by the current statement and that were placed in such account. The disclosure of any portion of payments since the beginning of the calendar year that was sent to a partial payment or suspense account as required by §1026.41(d)(3)(ii) should reflect all funds that are currently held in a suspense or unapplied funds account. For example:

i. Suppose a payment of $1,000 is due, but the consumer sends in only $600 on January 1, which is held in a suspense account. Further assume there are no fees charged on this account. Assuming there are no other funds in the suspense account, the January statement should reflect: Unapplied funds since last statement—$600. Unapplied funds YTD—$600.

ii. Assume the same facts as in the preceding paragraph, except that during February the consumer sends in $300 and this too is held in the suspense account. The statement should reflect: Unapplied funds since last statement—$300. Unapplied funds YTD—$900.

iii. Assume the same facts as in the preceding paragraph, except that during March the consumer sends in $400. Of this payment, $100 completes a full periodic payment when added to the $900 in funds already held in the suspense account. This $1,000 is applied to the January payment, and the remaining $300 remains in the suspense account. The statement should reflect: Unapplied funds since last statement—$300. Unapplied Funds YTD—$300.

41(d)(4) Transaction Activity.

1. *Meaning.* Transaction activity includes any transaction that credits or debits the amount currently due. This is the same amount that is required to be disclosed under §1026.41(d)(1)(iii). Examples of such transactions include, without limitation:

i. Payments received and applied;

ii. Payments received and held in a suspense account;

iii. The imposition of any fees (for example late fees); and

iv. The imposition of any charges (for example, private mortgage insurance).

2. *Description of late fees.* The description of any late fee charges includes the date of the late fee, the amount of the late fee, and the fact that a late fee was imposed.

3. *Partial payments.* If a partial payment is sent to a suspense or unapplied funds account, this fact must be in the transaction description along with the date and amount of the payment.

41(d)(8) Delinquency information.

1. *Length of delinquency.* For purposes of §1026.41(d)(8), the length of a consumer's delinquency is measured as of the date of the periodic statement or the date of the written notice provided under §1026.41(e)(3)(iv). A consumer's delinquency begins on the date an amount sufficient to cover a periodic payment of principal, interest, and escrow, if applicable, becomes due and unpaid, even if the consumer is afforded a period after the due date to pay before the servicer assesses a late fee. A consumer is delinquent if one or

more periodic payments of principal, interest, and escrow, if applicable, are due and unpaid.

2. *Application of funds.* For purposes of §1026.41(d)(8), if a servicer applies payments to the oldest outstanding periodic payment, a payment by a delinquent consumer advances the date the consumer's delinquency began. For example, assume a mortgage loan obligation under which a consumer's periodic payment is due on the first of each month. A consumer fails to make a payment on January 1 but makes a periodic payment on February 3. The servicer applies the payment received on February 3 to the outstanding January payment. On February 4, the consumer is three days delinquent, and the next periodic statement should disclose the length of the consumer's delinquency using February 2 as the first day of delinquency.

41(e) Exemptions.

41(e)(3) Coupon book exemption.

1. *Fixed rate.* For guidance on the meaning of "fixed rate" for purposes of §1026.41(e)(3), see §1026.18(s)(7)(iii) and its commentary.

2. *Coupon book.* A coupon book is a booklet provided to the consumer with a page for each billing cycle during a set period of time (often covering one year). These pages are designed to be torn off and returned to the servicer with a payment for each billing cycle. Additional information about the loan is often included on or inside the front or back cover, or on filler pages in the coupon book.

3. *Information location.* The information required by paragraph (e)(3)(ii) need not be provided on each coupon, but should be provided somewhere in the coupon book. Such information could be located, e.g., on or inside the front or back cover, or on filler pages in the coupon book.

4. *Outstanding principal balance.* Paragraph (e)(3)(ii)(A) requires the information listed in paragraph (d)(7) to be included in the coupon book. Paragraph (d)(7)(i) requires the disclosure of the outstanding principal balance. If the servicer makes use of a coupon book and the exemption in §1026.41(e)(3), the servicer need only disclose the principal balance at the beginning of the time period covered by the coupon book.

41(e)(4) Small servicers.

41(e)(4)(ii) Small servicer defined.

1. *Mortgage loans considered.* Pursuant to §1026.41(a)(1), the mortgage loans considered in determining status as a small servicer are closed-end consumer credit transactions secured by a dwelling, subject to the exclusions in §1026.41(e)(4)(iii).

2. *Services, together with affiliates, 5,000 or fewer mortgage loans.* To qualify as a small servicer, under §1026.41(e)(4)(ii)(A), a servicer must service, together with any affiliates, 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee. There are two elements to satisfying §1026.41(e)(4)(ii)(A). First, a servicer, together with any affiliates, must service 5,000 or fewer mortgage loans. Second, a servicer must service only mortgage loans for which the servicer (or an affiliate) is the creditor or assignee. To be the creditor or assignee of a mortgage loan, the servicer (or an affiliate) must either currently own the mortgage loan or must have been the entity to which the mortgage loan obligation was initially payable (that is, the originator of the mortgage loan). A servicer is not a small servicer under §1026.41(e)(4)(ii)(A) if it services any mortgage loans for which the servicer or an affiliate is not the creditor or assignee (that is, for which the servicer or an affiliate is not the owner or was not the originator). The following two examples demonstrate circumstances in which a servicer would not qualify as a small servicer under §1026.41(e)(4)(ii)(A) because it did not meet both requirements under §1026.41(e)(4)(ii)(A) for determining a servicer's status as a small servicer:

i. A servicer services 3,000 mortgage loans, all of which it or an affiliate owns or originated. An affiliate of the servicer services 4,000 other mortgage loans, all of which it or an affiliate owns or originated. Because the number of mortgage loans serviced by a servicer is determined by counting the mortgage loans serviced by a servicer together with any affiliates, both of these servicers are considered to be servicing 7,000 mortgage loans and neither servicer is a small servicer.

ii. A service services 3,100 mortgage loans—3,000 mortgage loans it owns or originated and 100 mortgage loans it neither owns nor originated, but for which it owns the mortgage servicing rights. The servicer is not a small servicer because it services mortgage loans for which the servicer (or an affiliate) is not the creditor or assignee, notwithstanding that the servicer services fewer than 5,000 mortgage loans.

3. *Master servicing and subservicing.* A servicer that qualifies as a small servicer does not lose its small servicer status if it retains a subservicer, as that term is defined in 12 CFR 1024.31, to service any of its mortgage loans. A subservicer can gain the benefit of the small servicer exemption only if (1) the master servicer, as that term is defined in 12 CFR 1024.31, is a small servicer and (2) the subservicer is a small servicer. A subservicer generally will not qualify as a small servicer because it does not own or did not originate the mortgage loans it subservices—unless it is an affiliate of a master servicer that qualifies as a small servicer. The following examples demonstrate the application of the small servicer exemption for different forms of servicing relationships:

i. A credit union services 4,000 mortgage loans, all of which it originated or owns. The credit union retains a credit union service organization, that is not an affiliate, to subservice 1,000 of the mortgage loans. The credit union is a small servicer and, thus, can gain the benefit of the small servicer exemption for the 3,000 mortgage loans the credit union services itself. The credit union service organization is not a small servicer because it services mortgage loans it does not own or did not originate. Accordingly, the credit union service organization does not gain the benefit of the small servicer exemption and, thus, must comply with any applicable mortgage servicing requirements for the 1,000 mortgage loans it subservices.

ii. A bank holding company, through a lender subsidiary, owns or originated 4,000 mortgage loans. All mortgage servicing rights for the 4,000 mortgage loans are owned by a wholly owned master servicer subsidiary. Servicing for the 4,000 mortgage loans is conducted by a wholly owned subservicer subsidiary. The bank holding company controls all of these subsidiaries and, thus, they are affiliates of the bank holding company pursuant 12 CFR 1026.32(b)(2). Because the master servicer and subservicer service 5,000 or fewer mortgage loans, and because all the mortgage loans are owned or originated by an affiliate, the master servicer and the subservicer both qualify for the small servicer exemption for all 4,000 mortgage loans.

iii. A nonbank servicer services 4,000 mortgage loans, all of which it originated or owns. The servicer retains a "component servicer" to assist it with servicing functions. The component servicer is not engaged in "servicing" as defined in 12 CFR 1024.2; that is, the component servicer does not receive any scheduled periodic payments from a borrower pursuant to the terms of any mortgage loan, including amounts for escrow accounts, and does not make the payments to the owner of the loan or other third parties of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the mortgage servicing loan documents or servicing contract. The component servicer is not a subservicer pursuant to 12 CFR 1024.31 because it is not engaged in servicing, as that term is defined in 12 CFR 1024.2. The nonbank servicer is a small servicer and, thus, can gain the benefit of the small servicer exemption with regard to all 4,000 mortgage loans it services.

4. *Nonprofit entity that services 5,000 or fewer mortgage loans*. To qualify as a small servicer under §1026.41(e)(4)(ii)(C), a servicer must be a nonprofit entity that services 5,000 or fewer mortgage loans, including any mortgage loans serviced on behalf of associated nonprofit entities, for all of which the servicer or an associated nonprofit entity is the creditor. There are two elements to satisfying §1026.41(e)(4)(ii)(C). First, a nonprofit entity must service 5,000 or fewer mortgage loans, including any mortgage loans serviced on behalf of associated nonprofit entities. For each associated nonprofit entity, the small servicer determination is made separately, without consideration of the number of loans serviced by another associated nonprofit entity. Second, a nonprofit entity must service only mortgage loans for which the servicer (or an associated nonprofit entity) is the creditor. To be the creditor, the servicer (or an associated nonprofit entity) must have been the entity to which the mortgage loan obligation was initially payable (that is, the originator of the mortgage loan). A nonprofit entity is not a small servicer under §1026.41(e)(4)(ii)(C) if it services any mortgage loans for which the servicer (or an associated nonprofit entity) is not the creditor (that is, for which the servicer or an associated nonprofit entity was not the originator). The first of the following two examples demonstrates circumstances in which a nonprofit entity would qualify as a small servicer under §1026.41(e)(4)(ii)(C) because it meets both requirements for determining a nonprofit entity's status as a small servicer under §1026.41(e)(4)(ii)(C). The second example demonstrates circumstances in which a nonprofit entity would not qualify as a small servicer under §1026.41(e)(4)(ii)(C) because it does not meet both requirements under §1026.41(e)(4)(ii)(C).

i. Nonprofit entity A services 3,000 of its own mortgage loans, and 1,500 mortgage loans on behalf of associated nonprofit entity B. All 4,500 mortgage loans were originated by A or B. Associated nonprofit entity C services 2,500 mortgage loans, all of which it originated. Because the number of mortgage loans serviced by a nonprofit entity is determined by counting the number of mortgage loans serviced by the nonprofit entity (including mortgage loans serviced on behalf of associated nonprofit entities) but not counting any mortgage loans serviced by an associated nonprofit entity, A and C are both small servicers.

ii. A nonprofit entity services 4,500 mortgage loans—3,000 mortgage loans it originated, 1,000 mortgage loans originated by associated nonprofit entities, and 500 mortgage loans neither it nor an associated nonprofit entity originated. The nonprofit entity is not a small servicer because it services mortgage loans for which neither it nor an associated nonprofit entity is the creditor, notwithstanding that it services fewer than 5,000 mortgage loans.

41(e)(4)(iii) Small servicer determination.

1. *Loans obtained by merger or acquisition*. Any mortgage loans obtained by a servicer or an affiliate as part of a merger or acquisition, or as part of the acquisition of all of the assets or liabilities of a branch office of a creditor, should be considered mortgage loans for which the servicer or an affiliate is the creditor to which the mortgage loan is

initially payable. A branch office means either an office of a depository institution that is approved as a branch by a Federal or State supervisory agency or an office of a for-profit mortgage lending institution (other than a depository institution) that takes applications from the public for mortgage loans.

2. *Timing for small servicer exemption*. The following examples demonstrate when a servicer either is considered or is no longer considered a small servicer under §1026.41(e)(4)(ii)(A) and (C):

i. Assume a servicer (that as of January 1 of the current year qualifies as a small servicer) begins servicing more than 5,000 mortgage loans on October 1, and services more than 5,000 mortgage loans as of January 1 of the following year. The servicer would no longer be considered a small servicer on January 1 of the following year and would have to comply with any requirements from which it is no longer exempt as a small servicer on April 1 of the following year.

ii. Assume a servicer (that as of January 1 of the current year qualifies as a small servicer) begins servicing more than 5,000 mortgage loans on February 1, and services more than 5,000 mortgage loans as of January 1 of the following year. The servicer would no longer be considered a small servicer on January 1 of the following year and would have to comply with any requirements from which it is no longer exempt as a small servicer on that same January 1.

iii. Assume a servicer (that as of January 1 of the current year qualifies as a small servicer) begins servicing more than 5,000 mortgage loans on February 1, but services fewer than 5,000 mortgage loans as of January 1 of the following year. The servicer is considered a small servicer for the following year.

3. *Mortgage loans not considered in determining whether a servicer is a small servicer*. Mortgage loans that are not considered pursuant to §1026.41(e)(4)(iii) in applying §1026.41(e)(4)(ii)(A) are not considered either for determining whether a servicer (together with any affiliates) services 5,000 or fewer mortgage loans or whether a servicer is servicing only mortgage loans that it (or an affiliate) owns or originated. For example, assume a servicer services 5,400 mortgage loans. Of these mortgage loans, the servicer owns or originated 4,800 mortgage loans, voluntarily services 300 mortgage loans that neither it (nor an affiliate) owns or originated and for which the servicer does not receive any compensation or fees, and services 300 reverse mortgage transactions. The voluntarily serviced mortgage loans and reverse mortgage loans are not considered in determining whether the servicer qualifies as a small servicer pursuant to §1026.41(e)(4)(iii)(A). Thus, because only the 4,800 mortgage loans owned or originated by the servicer are considered in determining whether the servicer qualifies as a small servicer, the servicer satisfies §1026.41(e)(4)(ii)(A) with regard to all 5,400 mortgage loans it services.

4. *Mortgage loans not considered in determining whether a nonprofit entity is a small servicer*. Mortgage loans that are not considered pursuant to §1026.41(e)(4)(iii) in applying §1026.41(e)(4)(ii)(C) are not considered either for determining whether a nonprofit entity services 5,000 or fewer mortgage loans, including any mortgage loans serviced on behalf of associated nonprofit entities, or whether a nonprofit entity is servicing only mortgage loans that it or an associated nonprofit entity originated. For example, assume a servicer that is a nonprofit entity services 5,400 mortgage loans. Of these mortgage loans, the nonprofit entity originated 2,800 mortgage loans and associated nonprofit entities originated 2,000 mortgage loans. The nonprofit entity receives compensation for servicing the loans originated by associated nonprofits. The nonprofit entity also voluntarily services 600 mortgage loans that were originated by an entity that is not an associated nonprofit entity, and receives no compensation or fees for servicing these loans. The voluntarily serviced mortgage loans are not considered in determining whether the servicer qualifies as a small servicer. Thus, because only the 4,800 mortgage loans originated by the nonprofit entity or associated nonprofit entities are considered in determining whether the servicer qualifies as a small servicer, the servicer satisfies §1026.41(e)(4)(ii)(C) with regard to all 5,400 mortgage loans it services.

5. *Limited role of voluntarily serviced mortgage loans*. Reverse mortgages and mortgage loans secured by consumers' interests in timeshare plans, in addition to not being considered in determining small servicer qualification, are also exempt from the requirements of §1026.41. In contrast, although voluntarily serviced mortgage loans, as defined by §1026.41(e)(4)(iii)(A), are likewise not considered in determining small servicer status, they are not exempt from the requirements of §1026.41. Thus, a servicer that does not qualify as a small servicer would not have to provide periodic statements for reverse mortgages and timeshare plans because they are exempt from the rule, but would have to provide periodic statements for mortgage loans it voluntarily services.

41(e)(5) Certain consumers in bankruptcy.

1. *Consumer's representative*. If an agent of the consumer, such as the consumer's bankruptcy counsel, submits a request under §1026.41(e)(5)(i)(B)(*1*) or (e)(5)(ii), the request is deemed to be submitted by the consumer.

2. *Multiple requests*. A consumer's most recent written request under §1026.41(e)(5)(i)(B)(*1*) or (e)(5)(ii) that the

servicer cease or continue, as applicable, providing a periodic statement or coupon book determines whether the exemption in §1026.41(e)(5)(i) applies.

3. *Effective upon receipt.* A consumer's written request under §1026.41(e)(5)(i)(B)(*1*) or (e)(5)(ii) is effective as of the date of receipt by the servicer.

4. *Bankruptcy case revived.* If a consumer's bankruptcy case is revived, for example, if the court reinstates a previously dismissed case or reopens a case, §1026.41(e)(5) may apply again, including the timing requirements in §1026.41(e)(5)(iv).

41(e)(5)(i) Exemption.

1. *Multiple obligors.* When two or more consumers are joint obligors with primary liability on a mortgage loan subject to §1026.41, §1026.41(e)(5)(i) applies if any one of the consumers meets its criteria. For example, assume that two spouses jointly own a home and are primary obligors on the mortgage loan. One spouse files for chapter 13 bankruptcy and has a bankruptcy plan that provides for surrendering the dwelling that secures the mortgage loan. In part, §1026.41(e)(5)(i) exempts the servicer from providing a periodic statement with regard to that mortgage loan, unless one of the spouses requests in writing that the servicer provide a periodic statement or coupon book pursuant to §1026.41(e)(5)(ii). If either spouse, including the one who is not a debtor in bankruptcy, submits a written request to receive a periodic statement or coupon book, the servicer must provide a periodic statement or coupon book for that mortgage loan account.

Paragraph 41(e)(5)(i)(B)(2).

1. *Bankruptcy plan.* For purposes of §1026.41(e)(5)(i)(B)(*2*), bankruptcy plan refers to the consumer's most recently filed bankruptcy plan under the applicable provisions of title 11 of the United States Code, regardless of whether the court overseeing the consumer's bankruptcy case has confirmed or approved the plan.

Paragraph 41(e)(5)(i)(B)(4).

1. *Statement of intention.* For purposes of §1026.41(e)(5)(i)(B)(*4*), the statement of intention refers to the consumer's most recently filed statement of intention. For example, if a consumer files a statement of intention on June 1 identifying an intent to surrender the dwelling securing the mortgage loan but files an amended statement of intention on June 15 identifying an intent to retain the dwelling, the consumer's June 15 statement of intention is the relevant filing for purposes of §1026.41(e)(5)(i)(B)(*4*).

41(e)(5)(ii) Reaffirmation or consumer request to receive statement or coupon book.

1. *Form of periodic statement or coupon book.* Section 1026.41(e)(5)(ii) generally requires a servicer, notwithstanding §1026.41(e)(5)(i), to resume providing a periodic statement or coupon book if the consumer in bankruptcy reaffirms personal liability for the mortgage loan or any consumer on the mortgage loan requests in writing that the servicer provide a periodic statement or coupon book. Whether a servicer provides a periodic statement or coupon book as modified by §1026.41(f) or an unmodified periodic statement or coupon book depends on whether or not §1026.41(f) applies to that mortgage loan at that time. For example, §1026.41(f) does not apply with respect to a mortgage loan once the consumer has reaffirmed personal liability; therefore, following a consumer's reaffirmation, a servicer generally would provide a periodic statement or coupon book that complies with §1026.41 but without the modifications set forth in §1026.41(f). *See* comment 41(f)–6. Section 1026.41(f) does apply, however, with respect to a mortgage loan following a consumer's written request to receive a periodic statement or coupon book, so long as any consumer on the mortgage loan remains in bankruptcy or has discharged personal liability for the mortgage loan; accordingly, following that written request, a servicer must provide a periodic statement or coupon book that includes the modifications set forth in §1026.41(f).

41(e)(5)(iv) Timing of compliance following transition.

41(e)(5)(iv)(A) Triggering events for transitioning to modified and unmodified periodic statements.

1. *Section 1026.41(f) becomes applicable or ceases to apply.* Section 1026.41(e)(5)(iv) sets forth the time period in which a servicer must provide a periodic statement or coupon book for the first time after a mortgage loan either becomes subject to the requirements of §1026.41(f) or ceases to be subject to the requirements of §1026.41(f). A mortgage loan becomes subject to the requirements of §1026.41(f) when, for example, any consumer on the mortgage loan becomes a debtor in bankruptcy or discharges personal liability for the mortgage loan. A mortgage loan may cease to be subject to the requirements of §1026.41(f) when, for example, the consumer in bankruptcy reaffirms personal liability for a mortgage loan or the consumer's bankruptcy case is closed or dismissed without the consumer having discharged personal liability for the mortgage loan. *See* comment 41(f)–6.

2. *Servicer ceases to qualify for an exemption.* Section 1026.41(e)(5)(iv) sets forth the time period in which a servicer must provide a periodic statement or coupon book for the first time after a servicer ceases to qualify for an exemption pursuant to §1026.41(e)(5)(i) with respect to a mortgage loan. A servicer ceases to qualify for an exemption pursuant to §1026.41(e)(5)(i) with respect to a mortgage loan when, for example:

i. The consumer's bankruptcy case is dismissed or closed without the consumer having discharged personal liability for the mortgage loan;

ii. The consumer files an amended bankruptcy plan or statement of intention that provides, as applicable, for the maintenance of payments due under the mortgage loan and the payment of pre-petition arrearage or that the consumer will retain the dwelling securing the mortgage loan;

iii. A consumer makes a partial or periodic payment on the mortgage loan despite the consumer in bankruptcy having filed a statement of intention identifying an intent to surrender the dwelling securing the mortgage loan, thus making §1026.41(e)(5)(i)(B)(*4*) inapplicable;

iv. The consumer in bankruptcy reaffirms personal liability for the mortgage loan; or

v. The consumer submits a written request pursuant to §1026.41(e)(ii) that the servicer resume providing a periodic statement or coupon book.

41(e)(5)(iv)(B) Single-Statement Exemption.

1. *Timing.* The exemption in §1026.41(e)(5)(iv)(B) applies with respect to a single periodic statement or coupon book following an event listed in §1026.41(e)(5)(iv)(A). For example, assume that a mortgage loan has a monthly billing cycle, each payment due date is on the first day of the month following its respective billing cycle, and each payment due date has a 15-day courtesy period. In this scenario:

i. If an event listed in §1026.41(e)(5)(iv)(A) occurs on October 6, before the end of the 15-day courtesy period provided for the October 1 payment due date, and the servicer has not yet provided a periodic statement or coupon book for the billing cycle with a November 1 payment due date, the servicer is exempt from providing a periodic statement or coupon book for that billing cycle. The servicer is required thereafter to resume providing periodic statements or coupon books that comply with the requirements of §1026.41 by providing a modified or unmodified periodic statement or coupon book for the billing cycle with a December 1 payment due date within a reasonably prompt time after November 1 or the end of the 15-day courtesy period provided for the November 1 payment due date. *See* §1026.41(b).

ii. If an event listed in §1026.41(e)(5)(iv)(A) occurs on October 20, after the end of the 15-day courtesy period provided for the October 1 payment due date, and the servicer timely provided a periodic statement or coupon book for the billing cycle with the November 1 payment due date, the servicer is not required to correct the periodic statement or coupon book already provided and is exempt from providing the next periodic statement or coupon book, which is the one that would otherwise be required for the billing cycle with a December 1 payment due date. The servicer is required thereafter to resume providing periodic statements or coupon books that comply with the requirements of §1026.41 by providing a modified or unmodified periodic statement or coupon book for the billing cycle with a January 1 payment due date within a reasonably prompt time after December 1 or the end of the 15-day courtesy period provided for the December 1 payment due date. *See* §1026.41(b).

2. *Duplicate coupon books not required.* If a servicer provides a coupon book instead of a periodic statement under §1026.41(e)(3), §1026.41 requires the servicer to provide a new coupon book after one of the events listed in §1026.41(e)(5)(iv)(A) occurs only to the extent the servicer has not previously provided the consumer with a coupon book that covers the upcoming billing cycle.

3. *Subsequent triggering events.* The single-statement exemption in §1026.41(e)(5)(iv)(B) might apply more than once over the life of a loan. For example, assume the exemption applies beginning on April 14 because the consumer files for bankruptcy on that date and the bankruptcy plan provides that the consumer will surrender the dwelling, such that the mortgage loan becomes subject to the requirements of §1026.41(f). *See* §1026.41(e)(5)(iv)(A)(*1*). If the consumer later exits bankruptcy on November 2 and has not discharged personal liability for the mortgage loan pursuant to 11 U.S.C. 727, 1141, 1228, or 1328, such that the mortgage loan ceases to be subject to the requirements of §1026.41(f), the single-statement exemption would apply again beginning on November 2. *See* §1026.41(e)(5)(iv)(A)(*2*).

41(e)(6) Charged-off loans.

1. *Change in ownership.* If a charged-off mortgage loan is subsequently purchased, assigned, or transferred, §1026.39(b) requires a covered person, as defined in §1026.39(a)(1), to provide mortgage transfer disclosures. *See* §1026.39.

2. *Change in servicing.* A servicer may take advantage of the exemption in §1026.41(e)(6)(i), subject to the requirements of that paragraph, and may rely on a prior servicer's provision to the consumer of a periodic statement pursuant to §1026.41(e)(6)(i)(B) unless the servicer provided the consumer a periodic statement pursuant to §1026.41(a).

Paragraph 41(e)(6)(i)(B).

1. *Clearly and conspicuously.* Section 1026.41(e)(6)(i)(B) requires that the periodic statement be clearly and conspicuously labeled ''Suspension of Statements & Notice of Charge Off—Retain This Copy for Your Records'' and that it clearly and conspicuously provide certain explanations to the consumer, as applicable, but no minimum type size or other technical requirements are imposed. The clear and conspicuous standard generally requires that disclosures be in a reasonably understandable form and readily

noticeable to the consumer. *See* comment 41(c)–1.

41(f) Modified periodic statements and coupon books for certain consumers in bankruptcy.

1. *Compliance after the bankruptcy case ends.* Except as provided in §1026.41(e)(5), §1026.41(f) applies with regard to a mortgage loan for which any consumer with primary liability is a debtor in a case under title 11 of the United States Code. After the debtor exits bankruptcy, §1026.41(f) continues to apply if the consumer has discharged personal liability for the mortgage loan, but §1026.41(f) does not apply if the consumer has reaffirmed personal liability for the mortgage loan or otherwise has not discharged personal liability for the mortgage loan.

2. *Terminology.* With regard to a periodic statement provided under §1026.41(f), a servicer may use terminology other than that found on the sample periodic statements in appendix H–30, so long as the new terminology is commonly understood. *See* comment 41(d)–3. For example, a servicer may take into account terminology appropriate for consumers in bankruptcy and refer to the ''amount due'' identified in §1026.41(d)(1), as the ''payment amount.'' Similarly, a servicer may refer to an amount past due identified in §1026.41(d)(2)(iii) as ''past unpaid amount.'' Additionally, a servicer may refer to the delinquency information required by §1026.41(d)(8) as an ''account history,'' and to the amount needed to bring the loan current, referred to in §1026.41(d)(8)(vi) as ''the total payment amount needed to bring the account current,'' as ''unpaid amount.''

3. *Other periodic statement requirements continue to apply.* The requirements of §1026.41, including the content and layout requirements of §1026.41(d), apply unless modified expressly by §1026.41(e)(5) or (f). For example, the requirement under §1026.41(d)(3) to disclose a past payment breakdown applies without modification with respect to a periodic statement provided to a consumer in bankruptcy.

4. *Further modifications.* A periodic statement or coupon book provided under §1026.41(f) may be modified as necessary to facilitate compliance with title 11 of the United States Code, the Federal Rules of Bankruptcy Procedure, court orders, and local rules, guidelines, and standing orders. For example, a periodic statement or coupon book may include additional disclosures or disclaimers not required under §1026.41(f) but that are related to the consumer's status as a debtor in bankruptcy or that advise the consumer how to submit a written request under §1026.41(e)(5)(i)(B)(*1*). *See* comment 41(f)(3)–1.ii for a discussion of the treatment of a bankruptcy plan that modifies the terms of the mortgage loan, such as by reducing the outstanding balance of the mortgage loan or altering the applicable interest rate.

5. *Commencing compliance.* A servicer must begin to provide a periodic statement or coupon book that complies with paragraph (f) of this section within the timeframe set forth in §1026.41(e)(5)(iv).

6. *Reaffirmation.* For purposes of §1026.41(f), a consumer who has reaffirmed personal liability for a mortgage loan is not considered to be a debtor in bankruptcy.

41(f)(3) Chapter 12 and chapter 13 consumers.

1. *Pre-petition payments and post-petition payments.* i. For purposes of §1026.41(f)(3), pre-petition payments are payments made to cure the consumer's pre-bankruptcy defaults, and post-petition payments are payments made to satisfy the mortgage loan's periodic payments as they come due after the bankruptcy case is filed. For example, assume a consumer is $3,600 in arrears as of the bankruptcy filing date on a mortgage loan requiring monthly periodic payments of $2,000. The consumer's most recently filed bankruptcy plan requires the consumer to make payments of $100 each month for 36 months to pay the pre-bankruptcy arrearage, and $2,000 each month to satisfy the monthly periodic payments. Assuming the consumer makes the payments according to the plan, the $100 payments are the pre-petition payments and the $2,000 payments are the post-petition payments for purposes of the disclosures required under §1026.41(f)(3).

ii. If a consumer is a debtor in a case under chapter 12 or if a consumer's bankruptcy plan modifies the terms of the mortgage loan, such as by reducing the outstanding balance of the mortgage loan or altering the applicable interest rate, the disclosures under §1026.41(d)(1) and (2) and (f)(3)(ii) and (iii) may disclose either the amount payable under the original terms of the mortgage loan, the amount payable under the remaining secured portion of the adjusted mortgage loan, or a statement that the consumer should contact the trustee or the consumer's attorney with any questions about the amount payable. In such cases, the remaining disclosures under §1026.41(d) or (f)(3), as applicable, may be limited to how payments are applied to the remaining secured portion of the adjusted mortgage loan.

2. *Post-petition fees and charges.* For purposes of §1026.41(f)(3), post-petition fees and charges are those fees and charges imposed after the bankruptcy case is filed. To the extent that the court overseeing the consumer's bankruptcy case requires such fees and charges to be included as an amendment to a servicer's proof of claim, a servicer may include such fees and charges in the balance of the pre-petition arrearage under §1026.41(f)(3)(v)(C) rather than treating them as post-petition fees and charges for purposes of §1026.41(f)(3).

3. *First statement after exemption terminates.* Section §1026.41(f)(3)(iii) through (v) requires, in part, the disclosure of certain information regarding account activity that has occurred since the last statement. For purposes of the first periodic statement provided to the consumer following termination of an exemption under §1026.41(e), those disclosures regarding account activity that has occurred since the last statement may be limited to account activity since the last payment due date that occurred while the exemption was in effect. *See* comment 41(d)–5.

41(f)(3)(ii) Amount due.

1. *Amount due.* The amount due under §1026.41(d)(1) is not required to include any amounts other than post-petition payments the consumer is required to make under the terms of a bankruptcy plan, including any past due post-petition payments, and post-petition fees and charges that a servicer has imposed. The servicer is not required to include in the amount due any pre-petition payments due under a bankruptcy plan or other amounts payable pursuant to a court order. The servicer is not required to include in the amount due any post-petition fees and charges that the servicer has not imposed. A servicer that defers collecting a fee or charge until after complying with the Federal Rule of Bankruptcy Procedure 3002.1 procedures, and thus after a potential court determination on whether the fee or charge is allowed, is not required to disclose the fee or charge until complying with such procedures. However, a servicer may include in the amount due other amounts due to the servicer that are not post-petition payments or fees or charges, such as amounts due under an agreed order, provided those other amounts are also disclosed in the explanation of amount due and transaction activity.

41(f)(3)(iii) Explanation of amount due.

1. *Explanation of amount due.* The explanation of amount due under §1026.41(d)(2) is not required to include any amounts other than the post-petition payments, including the amount of any past due post-petition payments and post-petition fees and charges that a servicer has imposed. Consistent with §1026.41(d)(3)(i), the post-petition payments must be broken down by the amount, if any, that will be applied to principal, interest, and escrow. The servicer is not required to disclose, as part of the explanation of amount due, any pre-petition payments or the amount of the consumer's pre-bankruptcy arrearage. However, a servicer may identify other amounts due to the servicer provided those amounts are also disclosed in the amount due and transaction activity. *See* comment 41(d)–4.

41(f)(3)(v) Pre-petition arrearage.

1. *Pre-petition arrearage.* If the pre-petition arrearage is subject to dispute, or has not yet been determined by the servicer, the periodic statement may include a statement acknowledging the unresolved amount of the pre-petition arrearage. A servicer may omit the information required by §1026.41(f)(3)(v) from the periodic statement until such time as the servicer has had a reasonable opportunity to determine the amount of the pre-petition arrearage. The servicer may not omit the information required by §1026.41(f)(3)(v) from the periodic statement after the date that the bankruptcy court has fixed for filing proofs of claim in the consumer's bankruptcy case.

41(f)(4) Multiple obligors.

1. *Modified statements.* When two or more consumers are joint obligors with primary liability on a mortgage loan subject to §1026.41, a servicer may send the periodic statement to any one of the primary obligors. *See* comment 41(a)–1. Section 1026.41(f)(4) provides that a servicer may provide a modified statement under §1026.41(f), if applicable, to any or all of the primary obligors, even if a primary obligor to whom the servicer provides the modified statement is not a debtor in bankruptcy. The servicer need not provide an unmodified statement to any of the primary obligors. For example, assume that two spouses jointly own a home and are both primarily liable on the mortgage loan. One spouse files for chapter 13 bankruptcy, and that spouse's chapter 13 bankruptcy plan provides that the same spouse will retain the home by making pre-petition and post-petition payments. The servicer complies with §1026.41 by providing the modified periodic statement under §1026.41(f) to either spouse.

2. *Obligors in different chapters of bankruptcy.* If two or more consumers are joint obligors with primary liability on a mortgage loan subject to §1026.41 and are debtors under different chapters of bankruptcy, only one of which is subject to §1026.41(f)(3), a servicer may, but need not, include the modifications set forth in §1026.41(f)(3). For example, assume one joint obligor is a debtor in a case under chapter 7 and another joint obligor is a debtor in a case under chapter 13, and that the servicer is not exempt from the periodic statement requirement under §1026.41(e)(5). The periodic statement or coupon book is subject to the modifications set forth in §1026.41(f)(1) and (2), but the servicer may determine whether it is appropriate to include the modifications set forth in §1026.41(f)(3).

Section 1026.42—Valuation Independence

42(a) Scope

1. *Open- and closed-end credit.* Section 1026.42 applies to both open-end and closed-end transactions secured by the consumer's principal dwelling.

2. *Consumer's principal dwelling.* Section 1026.42 applies only if the dwelling that will

secure a consumer credit transaction is the principal dwelling of the consumer who obtains credit.

42(b) Definitions

Paragraph 42(b)(1)

1. *Examples of covered persons.* ''Covered persons'' include creditors, mortgage brokers, appraisers, appraisal management companies, real estate agents, and other persons that provide ''settlement services'' as defined under the Real Estate Settlement Procedures Act and implementing regulations. *See* 12 U.S.C. 2602(3).

2. *Examples of persons not covered.* The following persons are not ''covered persons'' (unless, of course, they are creditors with respect to a covered transaction or perform ''settlement services'' in connection with a covered transaction):

i. The consumer who obtains credit through a covered transaction.

ii. A person secondarily liable for a covered transaction, such as a guarantor.

iii. A person that resides in or will reside in the consumer's principal dwelling but will not be liable on the covered transaction, such as a non-obligor spouse.

Paragraph 42(b)(2)

1. *Principal dwelling.* The term ''principal dwelling'' has the same meaning under §1026.42(b) as under §§1026.2(a)(24), 1026.15(a), and 1026.23(a). *See* comments 2(a)(24)–3, 15(a)–5, and 23(a)–3.

Paragraph 42(b)(3)

1. *Valuation.* A ''valuation'' is an estimate of value prepared by a natural person, such as an appraisal report prepared by an appraiser or an estimate of market value prepared by a real estate agent. The term includes photographic or other information included with a written estimate of value. A ''valuation'' includes an estimate provided or viewed electronically, such as an estimate transmitted via electronic mail or viewed using a computer.

2. *Automated model or system.* A ''valuation'' does not include an estimate of value produced exclusively using an automated model or system. However, a ''valuation'' includes an estimate of value developed by a natural person based in part on an estimate of value produced using an automated model or system.

3. *Estimate.* An estimate of the value of the consumer's principal dwelling includes an estimate of a range of values for the consumer's principal dwelling.

42(c) Valuation for consumer's principal dwelling

42(c)(1) Coercion

1. *State law.* The terms ''coercion,'' ''extortion,'' ''inducement,'' ''bribery,'' ''intimidation,'' ''compensation,'' ''instruction,'' and ''collusion'' have the meanings given to them by applicable state law or contract. *See* §1026.2(b)(3).

2. *Purpose.* A covered person does not violate §1026.42(c)(1) if the person does not engage in an act or practice set forth in §1026.42(c)(1) for the purpose of causing the value assigned to the consumer's principal dwelling to be based on a factor other than the independent judgment of a person that prepares valuations. For example, requesting that a person that prepares a valuation take certain actions, such as consider additional, appropriate property information, does not violate §1026.42(c), because such request does not supplant the independent judgment of the person that prepares a valuation. *See* §1026.42(c)(3)(i). A covered person also may provide incentives, such as additional compensation, to a person that prepares valuations or performs valuation management functions under §1026.42(c)(1), as long as the covered person does not cause or attempt to cause the value assigned to the consumer's principal dwelling to be based on a factor other than the independent judgment of the person that prepares valuations.

3. *Person that prepares valuations.* For purposes of §1026.42, the term ''valuation'' includes an estimate of value regardless of whether it is an appraisal prepared by a state-certified or -licensed appraiser. See comment 42(b)(3)–1. A person that prepares valuations may or may not be a state-licensed or state-certified appraiser. Thus a person violates §1026.42(c)(1) by engaging in prohibited acts or practices directed towards any person that prepares or may prepare a valuation of the consumer's principal dwelling for a covered transaction. For example, a person violates §1026.42(c)(1) by seeking to coerce a real estate agent to assign a value to the consumer's principal dwelling based on a factor other than the independent judgment of the real estate agent, in connection with a covered transaction.

4. *Indirect acts or practices.* Section 1026.42(c)(1) prohibits both direct and indirect attempts to cause the value assigned to the consumer's principal dwelling to be based on a factor other than the independent judgment of the person that prepares the valuation, through coercion and certain other acts and practices. For example, a creditor violates §1026.42(c)(1) if the creditor attempts to cause the value an appraiser engaged by an appraisal management company assigns to the consumer's principal dwelling

to be based on a factor other than the appraiser's independent judgment, by threatening to withhold future business from a title company affiliated with the appraisal management company unless the appraiser assigns a value to the dwelling that meets or exceeds a minimum threshold.

Paragraph 42(c)(1)(i)

1. *Applicability of examples.* Section 1026.42(c)(1)(i) provides examples of coercion of a person that prepares valuations. However, § 1026.42(c)(1)(i) also applies to coercion of a person that performs valuation management functions or its affiliate. *See* § 1026.42(c)(1); comment 42(c)(1) 4.

2. *Specific value or predetermined threshold.* As used in the examples of actions prohibited under § 1026.42(c)(1), a "specific value" and a "predetermined threshold" include a predetermined minimum, maximum, or range of values. Further, although the examples assume a covered person's prohibited actions are designed to cause the value assigned to the consumer's principal dwelling to equal or exceed a certain amount, the rule applies equally to cases where a covered person's prohibited actions are designed to cause the value assigned to the dwelling to be below a certain amount.

42(c)(2) Mischaracterization of Value

42(c)(2)(i) Misrepresentation

1. *Opinion of value.* Section 1026.42(c)(2)(i) prohibits a person that performs valuations from misrepresenting the value of the consumer's principal dwelling in a valuation. Such person misrepresents the value of the consumer's principal dwelling by assigning a value to such dwelling that does not reflect the person's opinion of the value of such dwelling. For example, an appraiser misrepresents the value of the consumer's principal dwelling if the appraiser estimates that the value of such dwelling is $250,000 applying the standards required by the Uniform Standards of Professional Appraisal Standards but assigns a value of $300,000 to such dwelling in a Uniform Residential Appraisal Report.

42(c)(2)(iii) Inducement of Mischaracterization

1. *Inducement.* A covered person may not induce a person to materially misrepresent the value of the consumer's principal dwelling in a valuation or to falsify or alter a valuation. For example, a loan originator may not coerce a loan underwriter to alter an appraisal report to increase the value assigned to the consumer's principal dwelling.

42(d) Prohibition on Conflicts of Interest

42(d)(1)(i) In General

1. *Prohibited interest in the property.* A person preparing a valuation or performing valuation management functions for a covered transaction has a prohibited interest in the property under paragraph (d)(1)(i) if the person has any ownership or reasonably foreseeable ownership interest in the property. For example, a person who seeks a mortgage to purchase a home has a reasonably foreseeable ownership interest in the property securing the mortgage, and therefore is not permitted to prepare the valuation or perform valuation management functions for that mortgage transaction under paragraph (d)(1)(i).

2. *Prohibited interest in the transaction.* A person preparing a valuation or performing valuation management functions has a prohibited interest in the transaction under paragraph (d)(1)(i) if that person or an affiliate of that person also serves as a loan officer of the creditor, mortgage broker, real estate broker, or other settlement service provider for the transaction and the conditions under paragraph (d)(4) are not satisfied. A person also has a prohibited interest in the transaction if the person is compensated or otherwise receives financial or other benefits based on whether the transaction is consummated. Under these circumstances, the person is not permitted to prepare the valuation or perform valuation management functions for that transaction under paragraph (d)(1)(i).

42(d)(1)(ii) Employees and Affiliates of Creditors; Providers of Multiple Settlement Services

1. *Employees and affiliates of creditors.* In general, a creditor may use employees or affiliates to prepare a valuation or perform valuation management functions without violating paragraph (d)(1)(i). However, whether an employee or affiliate has a direct or indirect interest in the property or transaction that creates a prohibited conflict of interest under paragraph (d)(1)(i) depends on the facts and circumstances of a particular case, including the structure of the employment or affiliate relationship.

2. *Providers of multiple settlement services.* In general, a person who prepares a valuation or perform valuation management functions for a covered transaction may perform another settlement service for the same transaction, or the person's affiliate may perform another settlement service, without violating paragraph (d)(1)(i). However, whether the person has a direct or indirect interest in the property or transaction that creates a prohibited conflict of interest under paragraph (d)(1)(i) depends on the facts and circumstances of a particular case.

42(d)(2) Employees and Affiliates of Creditors with Assets of More than $250 Million for Both of the Past two Calendar Years

1. *Safe harbor.* A person who a prepares valuation or performs valuation management functions for a covered transaction and is an employee or affiliate of the creditor will not be deemed to have an interest prohibited under paragraph (d)(1)(i) on the basis of the employment or affiliate relationship with the creditor if the conditions in paragraph (d)(2) are satisfied. Even if the conditions in paragraph (d)(2) are satisfied, however, the person may have a prohibited conflict of interest on other grounds, such as if the person performs a valuation for a purchase-money mortgage transaction in which the person is the buyer or seller of the subject property. Thus, in general, in any covered transaction in which the creditor had assets of more than $250 million for both of the past two years, the creditor may use its own employee or affiliate to prepare a valuation or perform valuation management functions for a particular transaction, as long as the conditions described in paragraph (d)(2) are satisfied. If the conditions in paragraph (d)(2) are not satisfied, whether a person preparing a valuation or performing valuation management functions has violated paragraph (d)(1)(i) depends on all of the facts and circumstances.

Paragraph 42(d)(2)(ii)

1. *Prohibition on reporting to a person who is part of the creditor's loan production function.* To qualify for the safe harbor under paragraph (d)(2), the person preparing a valuation or performing valuation management functions may not report to a person who is part of the creditor's loan production function (as defined in paragraph (d)(5)(i) and comment 42(d)(5)(i)–1). For example, if a person preparing a valuation is directly supervised or managed by a loan officer or other person in the creditor's loan production function, or by a person who is directly supervised or managed by a loan officer, the condition under paragraph (d)(2)(ii) is not met.

2. *Prohibition on reporting to a person whose compensation is based on the transaction closing.* To qualify for the safe harbor under paragraph (d)(2), the person preparing a valuation or performing valuation management functions may not report to a person whose compensation is based on the closing of the transaction to which the valuation relates. For example, assume an appraisal management company performs valuation management functions for a transaction in which the creditor is an affiliate of the appraisal management company. If the employee of the appraisal management company who is in charge of valuation management functions for that transaction is supervised by a person who earns a commission or bonus based on the percentage of closed transactions for which the appraisal management company provides valuation management functions, the condition under paragraph (d)(2)(ii) is not met.

Paragraph 42(d)(2)(iii)

1. *Direct or indirect involvement in selection of person who prepares a valuation.* In any covered transaction, the safe harbor under paragraph (d)(2) is available if, among other things, no employee, officer or director in the creditor's loan production function (as defined in paragraph (d)(4)(ii) and comment 42(d)(4)(ii)–1) is directly or indirectly involved in selecting, retaining, recommending or influencing the selection of the person to prepare a valuation or perform valuation management functions, or to be included in or excluded from a list or panel of approved persons who prepare valuations or perform valuation management functions. For example, if the person who selects the person to prepare the valuation for a covered transaction is supervised by an employee of the creditor who also supervises loan officers, the condition in paragraph (d)(2)(iii) is not met.

42(d)(3) Employees and Affiliates of Creditors With Assets of $250 Million or Less for Either of the Past Two Calendar Years

1. *Safe harbor.* A person who prepares a valuation or performs valuation management functions for a covered transaction and is an employee or affiliate of the creditor will not be deemed to have interest prohibited under paragraph (d)(1)(i) on the basis of the employment or affiliate relationship with the creditor if the conditions in paragraph (d)(3) are satisfied. Even if the conditions in paragraph (d)(3) are satisfied, however, the person may have a prohibited conflict of interest on other grounds, such as if the person performs a valuation for a purchase-money mortgage transaction in which the person is the buyer or seller of the subject property. Thus, in general, in any covered transaction in which the creditor had assets of $250 million or less for either of the past two calendar years, the creditor may use its own employee or affiliate to prepare a valuation or perform valuation management functions for a particular transaction, as long as the conditions described in paragraph (d)(3) are satisfied. If the conditions in paragraph (d)(3) are not satisfied, whether a person preparing valuations or performing valuation management functions has violated paragraph (d)(1)(i) depends on all of the facts and circumstances.

42(d)(4) Providers of Multiple Settlement Services

Paragraph 42(d)(4)(i)

1. *Safe harbor in transactions in which the creditor had assets of more than $250 million for both of the past two calendar years.* A person preparing a valuation or performing valuation management functions in addition to performing another settlement service for the same transaction, or whose affiliate performs another settlement service for the transaction, will not be deemed to have interest prohibited under paragraph (d)(1)(i) as a result of the person or the person's affiliate performing another settlement service if the conditions in paragraph (d)(4)(i) are satisfied. Even if the conditions in paragraph (d)(4)(i) are satisfied, however, the person may have a prohibited conflict of interest on other grounds, such as if the person performs a valuation for a purchase-money mortgage transaction in which the person is the buyer or seller of the subject property. Thus, in general, in any covered transaction with a creditor that had assets of more than $250 million for the past two years, a person preparing a valuation or performing valuation management functions, or its affiliate, may provide another settlement service for the same transaction, as long as the conditions described in paragraph (d)(4)(i) are satisfied. If the conditions in paragraph (d)(4)(i) are not satisfied, whether a person preparing valuations or performing valuation management functions has violated paragraph (d)(1)(i) depends on all of the facts and circumstances.

2. *Reporting.* The safe harbor under paragraph (d)(4)(i) is available if the condition specified in paragraph (d)(2)(ii), among others, is met. Paragraph (d)(2)(ii) prohibits a person preparing a valuation or performing valuation management functions from reporting to a person whose compensation is based on the closing of the transaction to which the valuation relates. For example, assume an appraisal management company performs both valuation management functions and title services, including providing title insurance, for the same covered transaction. If the appraisal management company employee in charge of valuation management functions for the transaction is supervised by the title insurance agent in the transaction, whose compensation depends in whole or in part on whether title insurance is sold at the loan closing, the condition in paragraph (d)(2)(ii) is not met.

Paragraph 42(d)(4)(ii)

1. *Safe harbor in transactions in which the creditor had assets of $250 million or less for either of the past two calendar years.* A person preparing a valuation or performing valuation management functions in addition to performing another settlement service for the same transaction, or whose affiliate performs another settlement service for the transaction, will not be deemed to have an interest prohibited under paragraph (d)(1)(i) as a result of the person or the person's affiliate performing another settlement service if the conditions in paragraph (d)(4)(ii) are satisfied. Even if the conditions in paragraph (d)(4)(ii) are satisfied, however, the person may have a prohibited conflict of interest on other grounds, such as if the person performs a valuation for a purchase-money mortgage transaction in which the person is the buyer or seller of the subject property. Thus, in general, in any covered transaction in which the creditor had assets of $250 million or less for either of the past two years, a person preparing a valuation or performing valuation management functions, or its affiliate, may provide other settlement services for the same transaction, as long as the conditions described in paragraph (d)(4)(ii) are satisfied. If the conditions in paragraph (d)(4)(ii) are not satisfied, whether a person preparing valuations or performing valuation management functions has violated paragraph (d)(1)(i) depends on all of the facts and circumstances.

42(d)(5) Definitions

42(d)(5)(i) Loan Production Function

1. *Loan production function.* One condition of the safe harbors under paragraphs (d)(2) and (d)(4)(i), involving transactions in which the creditor had assets of more than $250 million for both of the past two calendar years, is that the person who prepares a valuation or performs valuation management functions must report to a person who is not part of the creditor's ''loan production function.'' A creditor's ''loan production function'' includes retail sales staff, loan officers, and any other employee of the creditor with responsibility for taking a loan application, offering or negotiating loan terms or whose compensation is based on loan processing volume. A person is not considered part of a creditor's loan production function solely because part of the person's compensation includes a general bonus not tied to specific transactions or a specific percentage of transactions closing, or a profit sharing plan that benefits all employees. A person solely responsible for credit administration or risk management is also not considered part of a creditor's loan production function. Credit administration and risk management includes, for example, loan underwriting, loan closing functions (e.g., loan documentation), disbursing funds, collecting mortgage payments and otherwise servicing the loan (e.g., escrow management and payment of taxes), monitoring loan performance, and foreclosure processing.

42(e) When Extension of Credit Prohibited

1. *Reasonable diligence*. A creditor will be deemed to have acted with reasonable diligence under §1026.42(e) if the creditor extends credit based on a valuation other than the valuation subject to the restriction in §1026.42(e). A creditor need not obtain a second valuation to document that the creditor has acted with reasonable diligence to determine that the valuation does not materially misstate or misrepresent the value of the consumer's principal dwelling, however. For example, assume an appraiser notifies a creditor before consummation that a loan originator attempted to cause the value assigned to the consumer's principal dwelling to be based on a factor other than the appraiser's independent judgment, through coercion. If the creditor reasonably determines and documents that the appraisal does not materially misstate or misrepresent the value of the consumer's principal dwelling, for purposes of §1026.42(e), the creditor may extend credit based on the appraisal.

42(f) Customary and Reasonable Compensation

42(f)(1) Requirement to Provide Customary and Reasonable Compensation to Fee Appraisers

1. *Agents of the creditor*. Whether a person is an agent of the creditor is determined by applicable law; however, a "fee appraiser" as defined in paragraph (f)(4)(i) is not an agent of the creditor for purposes of paragraph (f), and therefore is not required to pay other fee appraisers customary and reasonable compensation under paragraph (f).

2. *Geographic market*. For purposes of paragraph (f), the "geographic market of the property being appraised" means the geographic market relevant to compensation levels for appraisal services. Depending on the facts and circumstances, the relevant geographic market may be a state, metropolitan statistical area (MSA), metropolitan division, area outside of an MSA, county, or other geographic area. For example, assume that fee appraisers who normally work only in County A generally accept $400 to appraise an attached single-family property in County A. Assume also that *very few or no* fee appraisers who work only in contiguous County B will accept a rate comparable to $400 to appraise an attached single-family property in County A. The relevant geographic market for an attached single-family property in County A may reasonably be defined as County A. On the other hand, assume that fee appraisers who normally work only in County A generally accept $400 to appraise an attached single-family property in County A. Assume also that *many* fee appraisers who normally work only in contiguous County B will accept a rate comparable to $400 to appraise an attached single-family property in County A. The relevant geographic market for an attached single-family property in County A may reasonably be defined to include both County A and County B.

3. *Failure to perform contractual obligations*. Paragraph (f)(1) does not prohibit a creditor or its agent from withholding compensation from a fee appraiser for failing to meet contractual obligations, such as failing to provide the appraisal report or violating state or Federal appraisal laws in performing the appraisal.

4. *Agreement that fee is "customary and reasonable."* A document signed by a fee appraiser indicating that the appraiser agrees that the fee paid to the appraiser is "customary and reasonable" does not by itself create a presumption of compliance with §1026.42(f) or otherwise satisfy the requirement to pay a fee appraiser at a customary and reasonable rate.

5. *Volume-based discounts*. Section 1026.42(f)(1) does not prohibit a fee appraiser and a creditor (or its agent) from agreeing to compensation based on transaction volume, so long as the compensation is customary and reasonable. For example, assume that a fee appraiser typically receives $300 for appraisals from creditors with whom it does business; the fee appraiser, however, agrees to reduce the fee to $280 for a particular creditor, in exchange for a minimum number of assignments from the creditor.

42(f)(2) Presumption of Compliance

1. *In general*. A creditor and its agent are presumed to comply with paragraph (f)(1) if the creditor or its agent meets the conditions specified in paragraph (f)(2) in determining the compensation paid to a fee appraiser. These conditions are not requirements for compliance but, if met, create a presumption that the creditor or its agent has complied with §1026.42(f)(1). A person may rebut this presumption with evidence that the amount of compensation paid to a fee appraiser was not customary and reasonable for reasons unrelated to the conditions in paragraph (f)(2)(i) or (f)(2)(ii). If a creditor or its agent does not meet one of the non-required conditions set forth in paragraph (f)(2), the creditor's and its agent's compliance with paragraph (f)(1) is determined based on all of the facts and circumstances without a presumption of either compliance or violation.

Paragraph 42(f)(2)(i)

1. *Two-step process for determining customary and reasonable rates*. Paragraph (f)(2)(i) sets forth a two-step process for a creditor or its agent to determine the amount of compensation that is customary and reasonable in a given transaction. First, the creditor or its agent must identify recent rates paid for

comparable appraisal services in the relevant geographic market. Second, once recent rates have been identified, the creditor or its agent must review the factors listed in paragraph (f)(2)(i)(A)-(F) and make any appropriate adjustments to the rates to ensure that the amount of compensation is reasonable.

2. *Identifying recent rates.* Whether rates may reasonably be considered ''recent'' depends on the facts and circumstances. Generally, ''recent'' rates would include rates charged within one year of the creditor's or its agent's reliance on this information to qualify for the presumption of compliance under paragraph (f)(2). For purposes of the presumption of compliance under paragraph (f)(2), a creditor or its agent may gather information about recent rates by using a reasonable method that provides information about rates for appraisal services in the geographic market of the relevant property; a creditor or its agent may, but is not required to, use or perform a fee survey.

3. *Accounting for factors.* Once recent rates in the relevant geographic market have been identified, the creditor or its agent must review the factors listed in paragraph (f)(2)(i)(A)-(F) to determine the appropriate rate for the current transaction. For example, if the recent rates identified by the creditor or its agent were solely for appraisal assignments in which the scope of work required consideration of two comparable properties, but the current transaction required an appraisal that considered three comparable properties, the creditor or its agent might reasonably adjust the rate by an amount that accounts for the increased scope of work, in addition to making any other appropriate adjustments based on the remaining factors.

Paragraph 42(f)(2)(i)(A)

1. *Type of property.* The type of property may include, for example, detached or attached single-family property, condominium or cooperative unit, or manufactured home.

Paragraph 42(f)(2)(i)(B)

1. *Scope of work.* The scope of work may include, for example, the type of inspection (such as exterior only or both interior and exterior) or number of comparables required for the appraisal.

Paragraph 42(f)(2)(i)(D)

1. *Fee appraiser qualifications.* The fee appraiser qualifications may include, for example, a state license or certification in accordance with the minimum criteria issued by the Appraisal Qualifications Board of the Appraisal Foundation, or completion of continuing education courses on effective appraisal methods and related topics.

2. *Membership in professional appraisal organization.* Paragraph 42(f)(2)(i)(D) does not override state or Federal laws prohibiting the exclusion of an appraiser from consideration for an assignment solely by virtue of membership or lack of membership in any particular appraisal organization. *See, e.g.,* 12 CFR 225.66(a).

Paragraph 42(f)(2)(i)(E)

1. *Fee appraiser experience and professional record.* The fee appraiser's level of experience may include, for example, the fee appraiser's years of service as a state-licensed or state-certified appraiser, or years of service appraising properties in a particular geographical area or of a particular type. The fee appraiser's professional record may include, for example, whether the fee appraiser has a past record of suspensions, disqualifications, debarments, or judgments for waste, fraud, abuse or breach of legal or professional standards.

Paragraph 42(f)(2)(i)(F)

1. *Fee appraiser work quality.* The fee appraiser's work quality may include, for example, the past quality of appraisals performed by the appraiser based on the written performance and review criteria of the creditor or agent of the creditor.

Paragraph 42(f)(2)(ii)

1. *Restraining trade.* Under §1026.42(f)(2)(ii)(A), creditor or its agent would not qualify for the presumption of compliance under paragraph (f)(2) if it engaged in any acts to restrain trade such as entering into a price fixing or market allocation agreement that affect the compensation of fee appraisers. For example, if appraisal management company A and appraisal management company B agreed to compensate fee appraisers at no more than a specific rate or range of rates, neither appraisal management company would qualify for the presumption of compliance. Likewise, if appraisal management company A and appraisal management company B agreed that appraisal management company A would limit its business to a certain portion of the relevant geographic market and appraisal management company B would limit its business to a different portion of the relevant geographic market, and as a result each appraisal management company unilaterally set the fees paid to fee appraisers in their respective portions of the market, neither appraisal management company would qualify for the presumption of compliance under paragraph (f)(2).

2. *Acts of monopolization.* Under §1026.42(f)(2)(ii)(B), a creditor or its agent would not qualify for the presumption of compliance under paragraph (f)(2) if it engaged in any act of monopolization such as

restricting entry into the relevant geographic market or causing any person to leave the relevant geographic market, resulting in anticompetitive effects that affect the compensation paid to fee appraisers. For example, if only one appraisal management company exists or is predominant in a particular market area, that appraisal management company might not qualify for the presumption of compliance if it entered into exclusivity agreements with all creditors in the market or all fee appraisers in the market, such that other appraisal management companies had to leave or could not enter the market. Whether this behavior would be considered an anticompetitive act that affects the compensation paid to fee appraisers depends on all of the facts and circumstances, including applicable law.

42(f)(3) Alternative Presumption of Compliance

1. *In general.* A creditor and its agent are presumed to comply with paragraph (f)(1) if the creditor or its agent determine the compensation paid to a fee appraiser based on information about customary and reasonable rates that satisfies the conditions in paragraph (f)(3) for that information. Reliance on information satisfying the conditions in paragraph (f)(3) is not a requirement for compliance with paragraph (f)(1), but creates a presumption that the creditor or its agent has complied. A person may rebut this presumption with evidence that the rate of compensation paid to a fee appraiser by the creditor or its agent is not customary and reasonable based on facts or information other than third-party information satisfying the conditions of this paragraph (f)(3). If a creditor or its agent does not rely on information that meets the conditions in paragraph (f)(3), the creditor's and its agent's compliance with paragraph (f)(1) is determined based on all of the facts and circumstances without a presumption of either compliance or violation.

2. *Geographic market.* The meaning of ''geographic market'' for purposes of paragraph (f) is explained in comment (f)(1)–1.

3. *Recent rates.* Whether rates may reasonably be considered ''recent'' depends on the facts and circumstances. Generally, ''recent'' rates would include rates charged within one year of the creditor's or its agent's reliance on this information to qualify for the presumption of compliance under paragraph (f)(3).

42(f)(4) Definitions

42(f)(4)(i) Fee Appraiser

1. *Organization.* The term ''organization'' in paragraph 42(f)(4)(i)(B) includes a corporation, partnership, proprietorship, association, cooperative, or other business entity and does not include a natural person.

42(g) Mandatory Reporting

42(g)(1) Reporting Required

1. *Reasonable basis.* A person reasonably believes that an appraiser has materially failed to comply with the Uniform Standards of Professional Appraisal Practice (USPAP) established by the Appraisal Standards Board of the Appraisal Foundation (as defined in 12 U.S.C. 3350(9)) or ethical or professional requirements for appraisers under applicable state or Federal statutes or regulations if the person possesses knowledge or information that would lead a reasonable person in the same circumstances to conclude that the appraiser has materially failed to comply with USPAP or such statutory or regulatory requirements.

2. *Material failure to comply.* For purposes of §1026.42(g)(1), a material failure to comply is one that is likely to affect the value assigned to the consumer's principal dwelling. The following are examples of a material failure to comply with USPAP or ethical or professional requirements:

i. Mischaracterizing the value of the consumer's principal dwelling in violation of §1026.42(c)(2)(i).

ii. Performing an assignment in a grossly negligent manner, in violation of a rule under USPAP.

iii. Accepting an appraisal assignment on the condition that the appraiser will report a value equal to or greater than the purchase price for the consumer's principal dwelling, in violation of a rule under USPAP.

3. *Other matters.* Section 1026.42(g)(1) does not require reporting of a matter that is not material under §1026.42(g)(1), for example:

i. An appraiser's disclosure of confidential information in violation of applicable state law.

ii. An appraiser's failure to maintain errors and omissions insurance in violation of applicable state law.

4. *Examples of covered persons.* ''Covered persons'' include creditors, mortgage brokers, appraisers, appraisal management companies, real estate agents, and other persons that provide ''settlement services'' as defined in section 3(3) of the Real Estate Settlement Procedures Act (12 U.S.C. 2602(3)) and the implementing regulation at 12 CFR 1024.2. *See* §1026.42(b)(1).

5. *Examples of persons not covered.* The following persons are not ''covered persons'' (unless, of course, they are creditors with respect to a covered transaction or perform ''settlement services'' in connection with a covered transaction):

i. The consumer who obtains credit through a covered transaction.

ii. A person secondarily liable for a covered transaction, such as a guarantor.

iii. A person that resides in or will reside in the consumer's principal dwelling but will not be liable on the covered transaction, such as a non-obligor spouse.

6. *Appraiser*. For purposes of §1026.42(g)(1), an ''appraiser'' is a natural person who provides opinions of the value of dwellings and is required to be licensed or certified under the laws of the state in which the consumer's principal dwelling is located or otherwise is subject to the jurisdiction of the appraiser certifying and licensing agency for that state. *See* 12 U.S.C. 3350(1).

Section 1026.43—Minimum Standards for Transactions Secured by a Dwelling

1. *Record retention*. See §1026.25(c)(3) and comments 25(c)(3)–1 and –2 for guidance on the required retention of records as evidence of compliance with §1026.43.

2. *General QM Amendments Effective on March 1, 2021*. The Bureau's revisions to Regulation Z contained in Qualified Mortgage Definition Under the Truth in Lending Act (Regulation Z): General QM Loan Definition published on December 29, 2020 (2021 General QM Amendments) apply with respect to transactions for which a creditor received an application on or after March 1, 2021 (effective date). Compliance with the 2021 General QM Amendments is mandatory with respect to transactions for which a creditor received an application on or after October 1, 2022 (mandatory compliance date). For a given transaction for which a creditor received an application on or after March 1, 2021 but prior to October 1, 2022, a person has the option of complying either: With 12 CFR part 1026 as it is in effect; or with 12 CFR part 1026 as it was in effect on February 26, 2021, together with any amendments to 12 CFR part 1026 that become effective after February 26, 2021, other than the 2021 General QM Amendments. For transactions subject to §1026.19(e), (f), or (g), creditors determine the date the creditor received the consumer's application, for purposes of this comment, in accordance with §1026.2(a)(3)(ii). For transactions that are not subject to §1026.19(e), (f), or (g), creditors can determine the date the creditor received the consumer's application, for purposes of this comment, in accordance with either §1026.2(a)(3)(i) or (ii).

43(a) Scope.

1. *Consumer credit*. In general, §1026.43 applies to consumer credit transactions secured by a dwelling, but certain dwelling-secured consumer credit transactions are exempt or partially exempt from coverage under §1026.43(a)(1) through (3). (See §1026.2(a)(12) for the definition of ''consumer credit.'') Section 1026.43 does not apply to an extension of credit primarily for a business, commercial, or agricultural purpose, even if it is secured by a dwelling. See §1026.3 and associated commentary for guidance in determining the primary purpose of an extension of credit. In addition, §1026.43 does not apply to any change to an existing loan that is not treated as a refinancing under §1026.20(a).

2. *Real property*. ''Dwelling'' means a residential structure that contains one to four units, whether or not the structure is attached to real property. *See* §1026.2(a)(19). For purposes of §1026.43, the term ''dwelling'' includes any real property to which the residential structure is attached that also secures the covered transaction. For example, for purposes of §1026.43(c)(2)(i), the value of the dwelling that secures the covered transaction includes the value of any real property to which the residential structure is attached that also secures the covered transaction.

Paragraph 43(a)(3).

1. *Renewable temporary or ''bridge'' loan*. Under §1026.43(a)(3)(ii), a temporary or ''bridge'' loan with a term of 12 months or less is exempt from §1026.43(c) through (f). Examples of such a loan are a loan to finance the purchase of a new dwelling where the consumer plans to sell a current dwelling within 12 months and a loan to finance the initial construction of a dwelling. Where a temporary or ''bridge loan'' is renewable, the loan term does not include any additional period of time that could result from a renewal provision provided that any renewal possible under the loan contract is for one year or less. For example, if a construction loan has an initial loan term of 12 months but is renewable for another 12-month loan term, the loan is exempt from §1026.43(c) through (f) because the initial loan term is 12 months.

2. *Construction phase of a construction-to-permanent loan*. Under §1026.43(a)(3)(iii), a construction phase of 12 months or less of a construction-to-permanent loan is exempt from §1026.43(c) through (f). A construction-to-permanent loan is a potentially multiple-advance loan to finance the construction, rehabilitation, or improvement of a dwelling that may be permanently financed by the same creditor. For such a loan, the construction phase and the permanent phase may be treated as separate transactions for the purpose of compliance with §1026.43(c) through (f), and the construction phase of the loan is exempt from §1026.43(c) through (f), provided the initial term is 12 months or less. See §1026.17(c)(6)(ii), allowing similar treatment for disclosures. Where the construction phase of a construction-to-permanent loan is renewable for a period of one year or less, the term of that construction phase does not include any additional period of time that could result from a renewal provision. For example, if the construction phase of a construction-to-permanent loan has an initial term of 12 months but is renewable for another 12-month term before permanent financing begins, the construction phase is exempt from §1026.43(c) through (f) because the initial term is 12 months. Any renewal of one

year or less also qualifies for the exemption. The permanent phase of the loan is treated as a separate transaction and is not exempt under § 1026.43(a)(3)(iii). It may be a qualified mortgage if it satisfies the appropriate requirements.

Paragraph 43(a)(3)(iv).

1. *General.* The requirements of § 1026.43(c) through (f) do not apply to an extension of credit made pursuant to a program administered by a Housing Finance Agency, as defined under 24 CFR 266.5. Under the exemption, the requirements of § 1026.43(c) through (f) do not apply to extensions of credit made by housing finance agencies and extensions of credit made by intermediaries (*e.g.*, private creditors) pursuant to a program administered by a housing finance agency. For example, if a creditor is extending credit, including a subordinate-lien covered transaction, that will be made pursuant to a program administered by a housing finance agency, the creditor is exempt from the requirements of § 1026.43(c) through (f). Similarly, the creditor is exempt from the requirements of § 1026.43(c) through (f) regardless of whether the program administered by a housing finance agency is funded by Federal, State, or other sources.

Paragraph 43(a)(3)(v)(D).

1. *General.* An extension of credit is exempt from the requirements of § 1026.43(c) through (f) if the credit is extended by a creditor described in § 1026.43(a)(3)(v)(D), provided the conditions specified in that section are satisfied. The conditions specified in § 1026.43(a)(3)(v)(D)(*1*) and (*2*) are determined according to activity that occurred in the calendar year preceding the calendar year in which the consumer's application was received. Section 1026.43(a)(3)(v)(D)(*2*) provides that, during the preceding calendar year, the creditor must have extended credit only to consumers with income that did not exceed the limit then in effect for low- and moderate-income households, as specified in regulations prescribed by the U.S. Department of Housing and Urban Development pursuant to 24 CFR 570.3. For example, a creditor has satisfied the requirement in § 1026.43(a)(3)(v)(D)(*2*) if the creditor extended credit only to consumers with incomes that did not exceed the limit in effect on the dates the creditor received each consumer's individual application. The condition specified in § 1026.43(a)(3)(v)(D)(*3*), which relates to the current extension of credit, provides that the extension of credit must be to a consumer with income that does not exceed the limit specified in § 1026.43(a)(3)(v)(D)(*2*) in effect on the date the creditor received the consumer's application. For example, assume that a creditor with a tax exemption ruling under section 501(c)(3) of the Internal Revenue Code of 1986 has satisfied the conditions identified in § 1026.43(a)(3)(v)(D)(*1*) and (*2*). If, on May 21, 2014, the creditor in this example extends credit secured by a dwelling to a consumer whose application reflected income in excess of the limit identified in § 1026.43(a)(3)(v)(D)(*2*) in effect on the date the creditor received that consumer's application, the creditor has not satisfied the condition in § 1026.43(a)(3)(v)(D)(*3*) and this extension of credit is not exempt from the requirements of § 1026.43(c) through (f).

Paragraph 43(a)(3)(vi).

1. *General.* The requirements of § 1026.43(c) through (f) do not apply to a mortgage loan modification made in connection with a program authorized by sections 101 and 109 of the Emergency Economic Stabilization Act of 2008. If a creditor is underwriting an extension of credit that is a refinancing, as defined by § 1026.20(a), that will be made pursuant to a program authorized by sections 101 and 109 of the Emergency Economic Stabilization Act of 2008, the creditor also need not comply with § 1026.43(c) through (f). A creditor need not determine whether the mortgage loan modification is considered a refinancing under § 1026.20(a) for purposes of determining applicability of § 1026.43; if the transaction is made in connection with these programs, the requirements of § 1026.43(c) through (f) do not apply. In addition, if a creditor underwrites a new extension of credit, such as a subordinate-lien mortgage loan, that will be made pursuant to a program authorized by sections 101 and 109 of the Emergency Economic Stabilization Act of 2008, the creditor need not comply with the requirements of § 1026.43(c) through (f).

Paragraph 43(a)(3)(vii).

1. *Requirements of exclusion.* Section 1026.43(a)(3)(vii) excludes certain transactions from the credit extension limit set forth in § 1026.43(a)(3)(v)(D)(*1*), provided a transaction meets several conditions. The terms of the credit contract must satisfy the conditions that the transaction not require the payment of interest under § 1026.43(a)(3)(vii)(C) and that repayment of the amount of credit extended be forgiven or deferred in accordance with § 1026.43(a)(3)(vii)(D). The other requirements of § 1026.43(a)(3)(vii) need not be reflected in the credit contract, but the creditor must retain evidence of compliance with those provisions, as required by § 1026.25(a). In particular, the creditor must have information reflecting that the total of closing costs imposed in connection with the transaction is less than 1 percent of the amount of credit extended and include no charges other than recordation, application, and housing counseling fees, in accordance with § 1026.43(a)(3)(vii)(E). Unless an itemization of the amount financed sufficiently details this requirement, the creditor must establish compliance with § 1026.43(a)(3)(vii)(E) by some other written document and retain it in accordance with § 1026.25(a).

43(b) Definitions.

43(b)(1) Covered transaction.

1. The definition of covered transaction restates the scope of the rule as described at §1026.43(a).

43(b)(3) Fully indexed rate.

1. *Discounted and premium adjustable-rate transactions.* In some adjustable-rate transactions, creditors may set an initial interest rate that is not determined by the index or formula used to make later interest rate adjustments. In some cases, the initial rate charged to consumers is lower than the rate would be if it were calculated using the index or formula that will apply after recast, as determined at consummation (*i.e.,* a ''discounted rate''). In other cases, the initial rate may be higher (*i.e.,* a ''premium rate''). For purposes of determining the fully indexed rate where the initial interest rate is not determined using the index or formula for subsequent interest rate adjustments, the creditor must use the interest rate that would have applied had the creditor used such index or formula plus margin at the time of consummation. That is, in determining the fully indexed rate, the creditor must not take into account any discounted or premium rate. To illustrate, assume an adjustable-rate transaction where the initial interest rate is not based on an index or formula, or is based on an index or formula that will not apply after recast, and is set at 5 percent for the first five years. The loan agreement provides that future interest rate adjustments will be calculated based on a specific index plus a 3 percent margin. If the value of the index at consummation is 5 percent, the interest rate that would have been applied at consummation had the creditor based the initial rate on this index is 8 percent (5 percent plus 3 percent margin). For purposes of §1026.43(b)(3), the fully indexed rate is 8 percent. For discussion of payment calculations based on the greater of the fully indexed rate or premium rate for purposes of the repayment ability determination under §1026.43(c), see §1026.43(c)(5)(i) and comment 43(c)(5)(i)–2.

2. *Index or formula value at consummation.* The value at consummation of the index or formula need not be used if the contract provides for a delay in the implementation of changes in an index value or formula. For example, if the contract specifies that rate changes are based on the index value in effect 45 days before the change date, the creditor may use any index value in effect during the 45 days before consummation in calculating the fully indexed rate.

3. *Interest rate adjustment caps.* If the terms of the legal obligation contain a periodic interest rate adjustment cap that would prevent the initial rate, at the time of the first adjustment, from changing to the rate determined using the index or formula value at consummation (*i.e.,* the fully indexed rate), the creditor must not give any effect to that rate cap when determining the fully indexed rate. That is, a creditor must determine the fully indexed rate without taking into account any periodic interest rate adjustment cap that may limit how quickly the fully indexed rate may be reached at any time during the loan term under the terms of the legal obligation. To illustrate, assume an adjustable-rate mortgage has an initial fixed rate of 5 percent for the first three years of the loan, after which the rate will adjust annually to a specified index plus a margin of 3 percent. The loan agreement provides for a 2 percent annual interest rate adjustment cap, and a lifetime maximum interest rate of 10 percent. The index value in effect at consummation is 4.5 percent; the fully indexed rate is 7.5 percent (4.5 percent plus 3 percent), regardless of the 2 percent annual interest rate adjustment cap that would limit when the fully indexed rate would take effect under the terms of the legal obligation.

4. *Lifetime maximum interest rate.* A creditor may choose, in its sole discretion, to take into account the lifetime maximum interest rate provided under the terms of the legal obligation when determining the fully indexed rate. To illustrate, assume an adjustable-rate mortgage has an initial fixed rate of 5 percent for the first three years of the loan, after which the rate will adjust annually to a specified index plus a margin of 3 percent. The loan agreement provides for a 2 percent annual interest rate adjustment cap and a lifetime maximum interest rate of 7 percent. The index value in effect at consummation is 4.5 percent; under the generally applicable rule, the fully indexed rate is 7.5 percent (4.5 percent plus 3 percent). Nevertheless, the creditor may choose to use the lifetime maximum interest rate of 7 percent as the fully indexed rate, rather than 7.5 percent, for purposes of §1026.43(b)(3). Furthermore, if the creditor chooses to use the lifetime maximum interest rate and the loan agreement provides a range for the maximum interest rate, then the creditor complies by using the highest rate in that range as the maximum interest rate for purposes of §1026.43(b)(3).

5. *Step-rate and fixed-rate mortgages.* Where the interest rate offered under the terms of the legal obligation is not based on, and does not vary with, an index or formula (*i.e.,* there is no fully indexed rate), the creditor must use the maximum interest rate that may apply at any time during the loan term. To illustrate:

i. Assume a step-rate mortgage with an interest rate fixed at 6.5 percent for the first two years of the loan, 7 percent for the next three years, and 7.5 percent thereafter for the remainder of loan term. For purposes of this section, the creditor must use 7.5 percent, which is the maximum rate that may apply during the loan term. ''Step-rate mortgage'' is defined in §1026.18(s)(7)(ii).

ii. Assume a fixed-rate mortgage with an interest rate at consummation of 7 percent that is fixed for the 30-year loan term. For purposes of this section, the maximum interest rate that may apply during the loan term is 7 percent, which is the interest rate that is fixed at consummation. ''Fixed-rate mortgage'' is defined in §1026.18(s)(7)(iii).

43(b)(4) Higher-Priced Covered Transaction

1. *Average prime offer rate.* The average prime offer rate is defined in §1026.35(a)(2). For further explanation of the meaning of ''average prime offer rate,'' and additional guidance on determining the average prime offer rate, *see* comments 35(a)(2)–1 through –4.

2. *Comparable transaction.* A higher-priced covered transaction is a consumer credit transaction that is secured by the consumer's dwelling with an annual percentage rate that exceeds by the specified amount the average prime offer rate for a comparable transaction as of the date the interest rate is set. The published tables of average prime offer rates indicate how to identify a comparable transaction. *See* comment 35(a)(2)–2.

3. *Rate set.* A transaction's annual percentage rate is compared to the average prime offer rate as of the date the transaction's interest rate is set (or ''locked'') before consummation. Sometimes a creditor sets the interest rate initially and then re-sets it at a different level before consummation. The creditor should use the last date the interest rate is set before consummation.

4. *Determining the annual percentage rate for certain loans for which the interest rate may or will change.* Provisions in subpart C of this part, including the commentary to §1026.17(c)(1), address how to determine the annual percentage rate disclosures for closed-end credit transactions. Provisions in §1026.32(a)(3) address how to determine the annual percentage rate to determine coverage under §1026.32(a)(1)(i). Section 1026.43(b)(4) requires, only for the purposes of a qualified mortgage under §1026.43(e)(2), a different determination of the annual percentage rate for purposes of §1026.43(b)(4) for a loan for which the interest rate may or will change within the first five years after the date on which the first regular periodic payment will be due. *See* comment 43(e)(2)(vi)–4 for how to determine the annual percentage rate of such a loan.

43(b)(5) Loan amount.

1. *Disbursement of the loan amount.* The definition of ''loan amount'' requires the creditor to use the entire loan amount as reflected in the loan contract or promissory note, even though the loan amount may not be fully disbursed at consummation. For example, assume the consumer enters into a loan agreement where the consumer is obligated to repay the creditor $200,000 over 15 years, but only $100,000 is disbursed at consummation and the remaining $100,000 will be disbursed during the year following consummation in a series of advances ($25,000 each quarter). For purposes of this section, the creditor must use the loan amount of $200,000, even though the loan agreement provides that only $100,000 will be disbursed to the consumer at consummation. Generally, creditors should rely on §1026.17(c)(6) and associated commentary regarding treatment of multiple-advance and construction-to-permanent loans as single or multiple transactions. *See also* comment 43(a)(3)–2.

43(b)(6) Loan term.

1. *General.* The loan term is the period of time it takes to repay the loan amount in full. For example, a loan with an initial discounted rate that is fixed for the first two years, and that adjusts periodically for the next 28 years has a loan term of 30 years, which is the amortization period on which the periodic amortizing payments are based.

43(b)(7) Maximum loan amount.

1. *Calculation of maximum loan amount.* For purposes of §1026.43(c)(2)(iii) and (c)(5)(ii)(C), a creditor must determine the maximum loan amount for a negative amortization loan by using the loan amount plus any increase in principal balance that can result from negative amortization based on the terms of the legal obligation. In determining the maximum loan amount, a creditor must assume that the consumer makes the minimum periodic payment permitted under the loan agreement for as long as possible, until the consumer must begin making fully amortizing payments; and that the interest rate rises as quickly as possible after consummation under the terms of the legal obligation. Thus, creditors must assume that the consumer makes the minimum periodic payment until any negative amortization cap is reached or until the period permitting minimum periodic payments expires, whichever occurs first. ''Loan amount'' is defined in §1026.43(b)(5); ''negative amortization loan'' is defined in §1026.18(s)(7)(v).

2. *Assumed interest rate.* In calculating the maximum loan amount for an adjustable-rate mortgage that is a negative amortization loan, the creditor must assume that the interest rate will increase as rapidly as possible after consummation, taking into account any periodic interest rate adjustment caps provided in the loan agreement. For an adjustable-rate mortgage with a lifetime maximum interest rate but no periodic interest rate adjustment cap, the creditor must assume that the interest rate increases to the maximum lifetime interest rate at the first adjustment.

3. *Examples.* The following are examples of how to determine the maximum loan amount for a negative amortization loan (all amounts shown are rounded, and all amounts are calculated using non-rounded values):

i. *Adjustable-rate mortgage with negative amortization*. A. Assume an adjustable-rate mortgage in the amount of $200,000 with a 30-year loan term. The loan agreement provides that the consumer can make minimum monthly payments that cover only part of the interest accrued each month until the principal balance reaches 115 percent of its original balance (*i.e.*, a negative amortization cap of 115 percent) or for the first five years of the loan (60 monthly payments), whichever occurs first. The introductory interest rate at consummation is 1.5 percent. One month after the first day of the first full calendar month following consummation, the interest rate adjusts and will adjust monthly thereafter based on the specified index plus a margin of 3.5 percent. The maximum lifetime interest rate is 10.5 percent; there are no other periodic interest rate adjustment caps that limit how quickly the maximum lifetime rate may be reached. The minimum monthly payment for the first year is based on the initial interest rate of 1.5 percent. After that, the minimum monthly payment adjusts annually, but may increase by no more than 7.5 percent over the previous year's payment. The minimum monthly payment is $690 in the first year, $742 in the second year, and $797 in the first part of the third year.

B. To determine the maximum loan amount, assume that the initial interest rate increases to the maximum lifetime interest rate of 10.5 percent at the first adjustment (*i.e.*, the due date of the first periodic monthly payment) and accrues at that rate until the loan is recast. Assume the consumer makes the minimum monthly payments as scheduled, which are capped at 7.5 percent from year-to-year. As a result, the consumer's minimum monthly payments are less than the interest accrued each month, resulting in negative amortization (*i.e.*, the accrued but unpaid interest is added to the principal balance). Thus, assuming that the consumer makes the minimum monthly payments for as long as possible and that the maximum interest rate of 10.5 percent is reached at the first rate adjustment (*i.e.*, the due date of the first periodic monthly payment), the negative amortization cap of 115 percent is reached on the due date of the 27th monthly payment and the loan is recast. The maximum loan amount as of the due date of the 27th monthly payment is $229,251.

ii. *Fixed-rate, graduated payment mortgage with negative amortization*. A loan in the amount of $200,000 has a 30-year loan term. The loan agreement provides for a fixed interest rate of 7.5 percent, and requires the consumer to make minimum monthly payments during the first year, with payments increasing 12.5 percent over the previous year every year for four years. The payment schedule provides for payments of $943 in the first year, $1,061 in the second year, $1,193 in the third year, $1,343 in the fourth year, and $1,511 for the remaining term of the loan. During the first three years of the loan, the payments are less than the interest accrued each month, resulting in negative amortization. Assuming that the consumer makes the minimum periodic payments for as long as possible, the maximum loan amount is $207,662, which is reached at the end of the third year of the loan (on the due date of the 36th monthly payment). See comment 43(c)(5)(ii)(C)–3 providing examples of how to determine the consumer's repayment ability for a negative amortization loan.

43(b)(8) Mortgage-related obligations.

1. *General*. Section 1026.43(b)(8) defines mortgage-related obligations, which must be considered in determining a consumer's ability to repay pursuant to §1026.43(c). Section 1026.43(b)(8) includes, in the evaluation of mortgage-related obligations, fees and special assessments owed to a condominium, cooperative, or homeowners association. Section 1026.43(b)(8) includes ground rent and leasehold payments in the definition of mortgage-related obligations. See commentary to §1026.43(c)(2)(v) regarding the requirement to take into account any mortgage-related obligations for purposes of determining a consumer's ability to repay.

2. *Property taxes*. Section 1026.43(b)(8) includes property taxes in the evaluation of mortgage-related obligations. Obligations that are related to the ownership or use of real property and paid to a taxing authority, whether on a monthly, quarterly, annual, or other basis, are property taxes for purposes of §1026.43(b)(8). Section 1026.43(b)(8) includes obligations that are equivalent to property taxes, even if such obligations are not denominated as "taxes." For example, governments may establish or allow independent districts with the authority to impose levies on properties within the district to fund a special purpose, such as a local development bond district, water district, or other public purpose. These levies may be referred to as taxes, assessments, surcharges, or by some other name. For purposes of §1026.43(b)(8), these are property taxes and are included in the determination of mortgage-related obligations.

3. *Insurance premiums and similar charges*. Section 1026.43(b)(8) includes in the evaluation of mortgage-related obligations premiums and similar charges identified in §1026.4(b)(5), (7), (8), or (10) that are required by the creditor. This includes all premiums or charges related to coverage protecting the creditor against a consumer's default, credit loss, collateral loss, or similar loss, if the consumer is required to pay the premium or charge. For example, if Federal law requires flood insurance to be obtained in connection with the mortgage loan, the flood insurance premium is a mortgage-related obligation for purposes of §1026.43(b)(8). Section

1026.43(b)(8) does not include premiums or similar charges identified in §1026.4(b)(5), (7), (8), or (10) that are not required by the creditor and that the consumer purchases voluntarily. For example:

i. If a creditor does not require earthquake insurance to be obtained in connection with the mortgage loan, but the consumer voluntarily chooses to purchase such insurance, the earthquake insurance premium is not a mortgage-related obligation for purposes of §1026.43(b)(8).

ii. If a creditor requires a minimum amount of coverage for homeowners' insurance and the consumer voluntarily chooses to purchase a more comprehensive amount of coverage, the portion of the premium allocated to the required minimum coverage is a mortgage-related obligation for purposes of §1026.43(b)(8), while the portion of the premium allocated to the more comprehensive coverage voluntarily purchased by the consumer is not a mortgage-related obligation for purposes of §1026.43(b)(8).

iii. If the consumer purchases insurance or similar coverage not required by the creditor at consummation without having requested the specific non-required insurance or similar coverage and without having agreed to the premium or charge for the specific non-required insurance or similar coverage prior to consummation, the premium or charge is not voluntary for purposes of §1026.43(b)(8) and is a mortgage-related obligation.

4. *Mortgage insurance, guarantee, or similar charges*. Section 1026.43(b)(8) includes in the evaluation of mortgage-related obligations premiums or charges protecting the creditor against the consumer's default or other credit loss. This includes all premiums or similar charges, whether denominated as mortgage insurance, guarantee, or otherwise, as determined according to applicable State or Federal law. For example, monthly "private mortgage insurance" payments paid to a non-governmental entity, annual "guarantee fee" payments required by a Federal housing program, and a quarterly "mortgage insurance" payment paid to a State agency administering a housing program are all mortgage-related obligations for purposes of §1026.43(b)(8). Section 1026.43(b)(8) includes these charges in the definition of mortgage-related obligations if the creditor requires the consumer to pay them, even if the consumer is not legally obligated to pay the charges under the terms of the insurance program. For example, if a mortgage insurance program obligates the creditor to make recurring mortgage insurance payments, and the creditor requires the consumer to reimburse the creditor for such recurring payments, the consumer's payments are mortgage-related obligations for purposes of §1026.43(b)(8). However, if a mortgage insurance program obligates the creditor to make recurring mortgage insurance payments, and the creditor does not require the consumer to reimburse the creditor for the cost of the mortgage insurance payments, the recurring mortgage insurance payments are not mortgage-related obligations for purposes of §1026.43(b)(8).

5. *Relation to the finance charge*. Section 1026.43(b)(8) includes in the evaluation of mortgage-related obligations premiums and similar charges identified in §1026.4(b)(5), (7), (8), or (10) that are required by the creditor. These premiums and similar charges are mortgage-related obligations regardless of whether the premium or similar charge is excluded from the finance charge pursuant to §1026.4(d). For example, a premium for insurance against loss or damage to the property written in connection with the credit transaction is a premium identified in §1026.4(b)(8). If this premium is required by the creditor, the premium is a mortgage-related obligation pursuant to §1026.43(b)(8), regardless of whether the premium is excluded from the finance charge pursuant to §1026.4(d)(2).

43(b)(11) Recast.

1. *Date of the recast*. The term "recast" means, for an adjustable-rate mortgage, the expiration of the period during which payments based on the introductory fixed rate are permitted; for an interest-only loan, the expiration of the period during which the interest-only payments are permitted; and, for a negative amortization loan, the expiration of the period during which negatively amortizing payments are permitted. For adjustable-rate mortgages, interest-only loans, and negative amortization loans, the date on which the recast is considered to occur is the due date of the last monthly payment based on the introductory fixed rate, the interest-only payment, or the negatively amortizing payment, respectively. To illustrate: A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides for a fixed interest rate and permits interest-only payments for the first five years of the loan (60 months). The loan is recast on the due date of the 60th monthly payment. Thus, the term of the loan remaining as of the date the loan is recast is 25 years (300 months).

43(b)(12) Simultaneous loan.

1. *General*. Section 1026.43(b)(12) defines a simultaneous loan as another covered transaction or a home equity line of credit (HELOC) subject to §1026.40 that will be secured by the same dwelling and made to the same consumer at or before consummation of the covered transaction, whether it is made by the same creditor or a third-party creditor. (As with all of §1026.43, the term "dwelling" includes any real property attached to a dwelling.) For example, assume a consumer will enter into a legal obligation that is a covered transaction with Creditor A. Immediately prior to consummation of the covered transaction with Creditor A, the

consumer opens a HELOC that is secured by the same dwelling with Creditor B. For purposes of this section, the loan extended by Creditor B is a simultaneous loan. See commentary to §1026.43(c)(2)(iv) and (c)(6), discussing the requirement to consider the consumer's payment obligation on any simultaneous loan for purposes of determining the consumer's ability to repay the covered transaction subject to this section.

2. *Same consumer*. For purposes of the definition of ''simultaneous loan,'' the term ''same consumer'' includes any consumer, as that term is defined in §1026.2(a)(11), that enters into a loan that is a covered transaction and also enters into another loan (*e.g.*, second-lien covered transaction or HELOC) secured by the same dwelling. Where two or more consumers enter into a legal obligation that is a covered transaction, but only one of them enters into another loan secured by the same dwelling, the ''same consumer'' includes the person that has entered into both legal obligations. For example, assume Consumer A and Consumer B will both enter into a legal obligation that is a covered transaction with a creditor. Immediately prior to consummation of the covered transaction, Consumer B opens a HELOC that is secured by the same dwelling with the same creditor; Consumer A is not a signatory to the HELOC. For purposes of this definition, Consumer B is the same consumer and the creditor must include the HELOC as a simultaneous loan.

43(b)(13) Third-party record.

1. *Electronic records*. Third-party records include records transmitted electronically. For example, to verify a consumer's credit history using third-party records as required by §1026.43(c)(2)(viii) and 1026.43(c)(3), a creditor may use a credit report prepared by a consumer reporting agency that is transmitted electronically.

2. *Forms*. A record prepared by a third party includes a form a creditor gives to a third party to provide information, even if the creditor completes parts of the form unrelated to the information sought. For example, if a creditor gives a consumer's employer a form for verifying the consumer's employment status and income, the creditor may fill in the creditor's name and other portions of the form unrelated to the consumer's employment status or income.

Paragraph 43(b)(13)(i).

1. *Reviewed record*. Under §1026.43(b)(13)(i), a third-party record includes a document or other record prepared by the consumer, the creditor, the mortgage broker, or the creditor's or mortgage broker's agent, if the record is reviewed by an appropriate third party. For example, a profit-and-loss statement prepared by a self-employed consumer and reviewed by a third-party accountant is a third-party record under §1026.43(b)(13)(i). In contrast, a profit-and-loss statement prepared by a self-employed consumer and reviewed by the consumer's non-accountant spouse is not a third-party record under §1026.43(b)(13)(i).

Paragraph 43(b)(13)(iii).

1. *Creditor's records*. Section 1026.43(b)(13)(iii) provides that a third-party record includes a record the creditor maintains for an account of the consumer held by the creditor. Examples of such accounts include checking accounts, savings accounts, and retirement accounts. Examples of such accounts also include accounts related to a consumer's outstanding obligations to a creditor. For example, a third-party record includes the creditor's records for a first-lien mortgage to a consumer who applies for a subordinate-lien home equity loan.

43(c) Repayment ability.

43(c)(1) General requirement.

1. *Reasonable and good faith determination*. i. *General*. Creditors generally are required by §1026.43(c)(1) to make reasonable and good faith determinations of consumers' ability to repay. Section 1026.43(c) and the accompanying commentary describe certain requirements for making this ability-to-repay determination, but do not provide comprehensive underwriting standards to which creditors must adhere. For example, the rule and commentary do not specify how much income is needed to support a particular level of debt or how credit history should be weighed against other factors. So long as creditors consider the factors set forth in §1026.43(c)(2) according to the requirements of §1026.43(c), creditors are permitted to develop their own underwriting standards and make changes to those standards over time in response to empirical information and changing economic and other conditions. Whether a particular ability-to-repay determination is reasonable and in good faith will depend not only on the underwriting standards adopted by the creditor, but on the facts and circumstances of an individual extension of credit and how a creditor's underwriting standards were applied to those facts and circumstances. A consumer's statement or attestation that the consumer has the ability to repay the loan is not indicative of whether the creditor's determination was reasonable and in good faith.

ii. *Considerations*. A. The following may be evidence that a creditor's ability-to-repay determination was reasonable and in good faith:

1. The consumer demonstrated actual ability to repay the loan by making timely payments, without modification or accommodation, for a significant period of time after consummation or, for an adjustable-rate, interest-only, or negative-amortization mortgage, for a significant period of time after recast;

2. The creditor used underwriting standards that have historically resulted in comparatively low rates of delinquency and default during adverse economic conditions; or

3. The creditor used underwriting standards based on empirically derived, demonstrably and statistically sound models.

B. In contrast, the following may be evidence that a creditor's ability-to-repay determination was not reasonable or in good faith:

1. The consumer defaulted on the loan a short time after consummation or, for an adjustable-rate, interest-only, or negative-amortization mortgage, a short time after recast;

2. The creditor used underwriting standards that have historically resulted in comparatively high levels of delinquency and default during adverse economic conditions;

3. The creditor applied underwriting standards inconsistently or used underwriting standards different from those used for similar loans without reasonable justification;

4. The creditor disregarded evidence that the underwriting standards it used are not effective at determining consumers' repayment ability;

5. The creditor disregarded evidence that the consumer may have insufficient residual income to cover other recurring obligations and expenses, taking into account the consumer's assets other than the property securing the loan, after paying his or her monthly payments for the covered transaction, any simultaneous loans, mortgage-related obligations, and any current debt obligations; or

6. The creditor disregarded evidence that the consumer would have the ability to repay only if the consumer subsequently refinanced the loan or sold the property securing the loan.

C. All of the considerations listed in paragraphs (A) and (B) above may be relevant to whether a creditor's ability-to-repay determination was reasonable and in good faith. However, these considerations are not requirements or prohibitions with which creditors must comply, nor are they elements of a claim that a consumer must prove to establish a violation of the ability-to-repay requirements. For example, creditors are not required to validate their underwriting criteria using mathematical models. These considerations also are not absolute in their application; instead they exist on a continuum and may apply to varying degrees. For example, the longer a consumer successfully makes timely payments after consummation or recast the less likely it is that the creditor's determination of ability to repay was unreasonable or not in good faith. Finally, each of these considerations must be viewed in the context of all facts and circumstances relevant to a particular extension of credit. For example, in some cases inconsistent application of underwriting standards may indicate that a creditor is manipulating those standards to approve a loan despite a consumer's inability to repay. The creditor's ability-to-repay determination therefore may be unreasonable or in bad faith. However, in other cases inconsistently applied underwriting standards may be the result of, for example, inadequate training and may nonetheless yield a reasonable and good faith ability-to-repay determination in a particular case. Similarly, although an early payment default on a mortgage will often be persuasive evidence that the creditor did not have a reasonable and good faith belief in the consumer's ability to repay (and such evidence may even be sufficient to establish a prima facie case of an ability-to-repay violation), a particular ability-to-repay determination may be reasonable and in good faith even though the consumer defaulted shortly after consummation if, for example, the consumer experienced a sudden and unexpected loss of income. In contrast, an ability-to-repay determination may be unreasonable or not in good faith even though the consumer made timely payments for a significant period of time if, for example, the consumer was able to make those payments only by foregoing necessities such as food and heat.

2. *Repayment ability at consummation.* Section 1026.43(c)(1) requires the creditor to determine, at or before the time the loan is consummated, that a consumer will have a reasonable ability to repay the loan. A change in the consumer's circumstances after consummation (for example, a significant reduction in income due to a job loss or a significant obligation arising from a major medical expense) that cannot be reasonably anticipated from the consumer's application or the records used to determine repayment ability is not relevant to determining a creditor's compliance with the rule. However, if the application or records considered at or before consummation indicate there will be a change in a consumer's repayment ability after consummation (for example, if a consumer's application states that the consumer plans to retire within 12 months without obtaining new employment or that the consumer will transition from full-time to part-time employment), the creditor must consider that information under the rule.

3. *Interaction with Regulation B.* Section 1026.43(c)(1) does not require or permit the creditor to make inquiries or verifications prohibited by Regulation B, 12 CFR part 1002.

43(c)(2) Basis for determination.

1. *General.* Section 1026.43(c)(2) sets forth factors creditors must consider when making the ability-to-repay determination required under §1026.43(c)(1) and the accompanying commentary provides guidance regarding these factors. Creditors must conform to these requirements and may rely on guidance provided in the commentary. However,

§1026.43(c) and the accompanying commentary do not provide comprehensive guidance on definitions and other technical underwriting criteria necessary for evaluating these factors in practice. So long as a creditor complies with the provisions of §1026.43(c), the creditor is permitted to use its own definitions and other technical underwriting criteria. A creditor may, but is not required to, look to guidance issued by entities such as the Federal Housing Administration, the U.S. Department of Veterans Affairs, the U.S. Department of Agriculture, or Fannie Mae or Freddie Mac while operating under the conservatorship of the Federal Housing Finance Agency. For example, a creditor may refer to such guidance to classify particular inflows, obligations, or property as ''income,'' ''debt,'' or ''assets.'' Similarly, a creditor may refer to such guidance to determine what information to use when evaluating the income of a self-employed or seasonally employed consumer or what information to use when evaluating the credit history of a consumer who has obtained few or no extensions of traditional ''credit'' as defined in §1026.2(a)(14). These examples are illustrative, and creditors are not required to conform to guidance issued by these or other such entities. However, as required by §1026.43(c)(1), a creditor must ensure that its underwriting criteria, as applied to the facts and circumstances of a particular extension of credit, result in a reasonable, good faith determination of a consumer's ability to repay. For example, a definition used in underwriting that is reasonable in isolation may lead to ability-to-repay determinations that are unreasonable or not in good faith when considered in the context of a creditor's underwriting standards or when adopted or applied in bad faith. Similarly, an ability-to-repay determination is not unreasonable or in bad faith merely because the underwriting criteria used included a definition that was by itself unreasonable.

Paragraph 43(c)(2)(i).

1. *Income or assets generally.* A creditor may base its determination of repayment ability on current or reasonably expected income from employment or other sources, assets other than the dwelling that secures the covered transaction, or both. The creditor may consider any type of current or reasonably expected income, including, for example, the following: salary; wages; self-employment income; military or reserve duty income; bonus pay; tips; commissions; interest payments; dividends; retirement benefits or entitlements; rental income; royalty payments; trust income; public assistance payments; and alimony, child support, and separate maintenance payments. The creditor may consider any of the consumer's assets, other than the value of the dwelling that secures the covered transaction, including, for example, the following: funds in a savings or checking account, amounts vested in a retirement account, stocks, bonds, certificates of deposit, and amounts available to the consumer from a trust fund. (As stated in §1026.43(a), the value of the dwelling includes the value of the real property to which the residential structure is attached, if the real property also secures the covered transaction.)

2. *Income or assets relied on.* A creditor need consider only the income or assets necessary to support a determination that the consumer can repay the covered transaction. For example, if a consumer's loan application states that the consumer earns an annual salary from both a full-time job and a part-time job and the creditor reasonably determines that the consumer's income from the full-time job is sufficient to repay the loan, the creditor need not consider the consumer's income from the part-time job. Further, a creditor need verify only the income (or assets) relied on to determine the consumer's repayment ability. *See* comment 43(c)(4)–1.

3. *Reasonably expected income.* If a creditor relies on expected income in excess of the consumer's income, either in addition to or instead of current income, the expectation that the income will be available for repayment must be reasonable and verified with third-party records that provide reasonably reliable evidence of the consumer's expected income. For example, if the creditor relies on an expectation that a consumer will receive an annual bonus, the creditor may verify the basis for that expectation with records that show the consumer's past annual bonuses, and the expected bonus must bear a reasonable relationship to the past bonuses. Similarly, if the creditor relies on a consumer's expected salary from a job the consumer has accepted and will begin after receiving an educational degree, the creditor may verify that expectation with a written statement from an employer indicating that the consumer will be employed upon graduation at a specified salary.

4. *Seasonal or irregular income.* A creditor reasonably may determine that a consumer can make periodic loan payments even if the consumer's income, such as self-employment income, is seasonal or irregular. For example, assume a consumer receives seasonal income from the sale of crops or from agricultural employment. Each year, the consumer's income arrives during only a few months. If the creditor determines that the consumer's annual income divided equally across 12 months is sufficient for the consumer to make monthly loan payments, the creditor reasonably may determine that the consumer can repay the loan, even though the consumer may not receive income during certain months.

5. *Multiple applicants.* When two or more consumers apply for an extension of credit as joint obligors with primary liability on an obligation, §1026.43(c)(2)(i) does not require the creditor to consider income or assets that are not needed to support the creditor's repayment ability determination. If the income or assets of one applicant are sufficient to support the creditor's repayment ability determination, the creditor is not required to consider the income or assets of the other applicant. For example, if a husband and wife jointly apply for a loan and the creditor reasonably determines that the wife's income is sufficient to repay the loan, the creditor is not required to consider the husband's income.

Paragraph 43(c)(2)(ii).

1. *Employment status and income.* Employment status need not be full-time, and employment need not occur at regular intervals. If, in determining the consumer's repayment ability, the creditor relies on income from the consumer's employment, then that employment may be, for example, full-time, part-time, seasonal, irregular, military, or self-employment, so long as the creditor considers those characteristics of the employment. Under §1026.43(c)(2)(ii), a creditor must verify a consumer's current employment status only if the creditor relies on the consumer's employment income in determining the consumer's repayment ability. For example, if a creditor relies wholly on a consumer's investment income to determine repayment ability, the creditor need not verify or document employment status. See comments 43(c)(2)(i)–5 and 43(c)(4)–2 for guidance on which income to consider when multiple consumers apply jointly for a loan.

Paragraph 43(c)(2)(iii).

1. *General.* For purposes of the repayment ability determination required under §1026.43(c)(2), a creditor must consider the consumer's monthly payment on a covered transaction that is calculated as required under §1026.43(c)(5).

Paragraph 43(c)(2)(iv).

1. *Home equity lines of credit.* For purposes of §1026.43(c)(2)(iv), a simultaneous loan includes any covered transaction or home equity line of credit (HELOC) subject to §1026.40 that will be made to the same consumer at or before consummation of the covered transaction and secured by the same dwelling that secures the covered transaction. A HELOC that is a simultaneous loan that the creditor knows or has reason to know about must be considered as a mortgage obligation in determining a consumer's ability to repay the covered transaction even though the HELOC is not a covered transaction subject to §1026.43. See §1026.43(a) discussing the scope of this section. ''Simultaneous loan'' is defined in §1026.43(b)(12). For further explanation of ''same consumer,'' see comment 43(b)(12)–2.

2. *Knows or has reason to know.* In determining a consumer's repayment ability for a covered transaction under §1026.43(c)(2), a creditor must consider the consumer's payment obligation on any simultaneous loan that the creditor knows or has reason to know will be or has been made at or before consummation of the covered transaction. For example, where a covered transaction is a home purchase loan, the creditor must consider the consumer's periodic payment obligation for any ''piggyback'' second-lien loan that the creditor knows or has reason to know will be used to finance part of the consumer's down payment. The creditor complies with this requirement where, for example, the creditor follows policies and procedures that are designed to determine whether at or before consummation the same consumer has applied for another credit transaction secured by the same dwelling. To illustrate, assume a creditor receives an application for a home purchase loan where the requested loan amount is less than the home purchase price. The creditor's policies and procedures must require the consumer to state the source of the down payment and provide verification. If the creditor determines the source of the down payment is another extension of credit that will be made to the same consumer at or before consummation and secured by the same dwelling, the creditor knows or has reason to know of the simultaneous loan and must consider the simultaneous loan. Alternatively, if the creditor has information that suggests the down payment source is the consumer's existing assets, the creditor would be under no further obligation to determine whether a simultaneous loan will be extended at or before consummation of the covered transaction. The creditor is not obligated to investigate beyond reasonable underwriting policies and procedures to determine whether a simultaneous loan will be extended at or before consummation of the covered transaction.

3. *Scope of timing.* For purposes of §1026.43(c)(2)(iv), a simultaneous loan includes a loan that comes into existence concurrently with the covered transaction subject to §1026.43(c). A simultaneous loan does not include a credit transaction that occurs after consummation of the covered transaction that is subject to this section. However, any simultaneous loan that specifically covers closing costs of the covered transaction, but is scheduled to be extended after consummation must be considered for the purposes of §1026.43(c)(2)(iv).

Paragraph 43(c)(2)(v).

1. *General.* A creditor must include in its repayment ability assessment the consumer's monthly payment for mortgage-related obligations, such as the expected property taxes and premiums or similar charges identified in §1026.4(b)(5), (7), (8), or (10) that

are required by the creditor. See §1026.43(b)(8) defining the term ''mortgage-related obligations.'' Mortgage-related obligations must be included in the creditor's determination of repayment ability regardless of whether the amounts are included in the monthly payment or whether there is an escrow account established. Section 1026.43(c)(2)(v) includes only payments that occur on an ongoing or recurring basis in the evaluation of the consumer's monthly payment for mortgage-related obligations. One-time charges, or obligations satisfied at or before consummation, are not ongoing or recurring, and are therefore not part of the consumer's monthly payment for purposes of §1026.43(c)(2)(v). For example:

i. Assume that a consumer will be required to pay property taxes, as described in comment 43(b)(8)–2, on a quarterly, annual, or other basis after consummation. Section 1026.43(c)(2)(v) includes these recurring property taxes in the evaluation of the consumer's monthly payment for mortgage-related obligations. However, if the consumer will incur a one-time charge to satisfy property taxes that are past due, §1026.43(c)(2)(v) does not include this one-time charge in the evaluation of the consumer's monthly payment for mortgage-related obligations.

ii. Assume that a consumer will be required to pay mortgage insurance premiums, as described in comment 43(b)(8)–2, on a monthly, annual, or other basis after consummation. Section 1026.43(c)(2)(v) includes these recurring mortgage insurance payments in the evaluation of the consumer's monthly payment for mortgage-related obligations. However, if the consumer will incur a one-time fee or charge for mortgage insurance or similar purposes, such as an up-front mortgage insurance premium imposed at consummation, §1026.43(c)(2)(v) does not include this up-front mortgage insurance premium in the evaluation of the consumer's monthly payment for mortgage-related obligations.

2. *Obligations to an association, other than special assessments*. Section 1026.43(b)(8) defines mortgage-related obligations to include obligations owed to a condominium, cooperative, or homeowners association. However, §1026.43(c)(2)(v) does not require a creditor to include in the evaluation of the consumer's monthly payment for mortgage-related obligations payments to such associations imposed in connection with the extension of credit, or imposed as an incident to the transfer of ownership, if such obligations are fully satisfied at or before consummation. For example, if a homeowners association imposes a one-time transfer fee on the transaction, and the consumer will pay the fee at or before consummation, §1026.43(c)(2)(v) does not require the creditor to include this one-time transfer fee in the evaluation of the consumer's monthly payment for mortgage-related obligations. Section 1026.43(c)(2)(v) also does not require the creditor to include this fee in the evaluation of the consumer's monthly payment for mortgage-related obligations if the consumer finances the fee in the loan amount. However, if the consumer incurs the obligation and will satisfy the obligation with recurring payments after consummation, regardless of whether the obligation is escrowed, §1026.43(c)(2)(v) requires the creditor to include the transfer fee in the evaluation of the consumer's monthly payment for mortgage-related obligations.

3. *Special assessments imposed by an association*. Section 1026.43(b)(8) defines mortgage-related obligations to include special assessments imposed by a condominium, cooperative, or homeowners association. Section 1026.43(c)(2)(v) does not require a creditor to include special assessments in the evaluation of the consumer's monthly payment for mortgage-related obligations if the special assessments are fully satisfied at or before consummation. For example, if a homeowners association imposes a special assessment that the consumer will have to pay in full at or before consummation, §1026.43(c)(2)(v) does not include the special assessment in the evaluation of the consumer's monthly payment for mortgage-related obligations. Section 1026.43(c)(2)(v) does not require a creditor to include special assessments in the evaluation of the consumer's monthly payment for mortgage-related obligations if the special assessments are imposed as a one-time charge. For example, if a homeowners association imposes a special assessment that the consumer will have to satisfy in one payment, §1026.43(c)(2)(v) does not include this one-time special assessment in the evaluation of the consumer's monthly payment for mortgage-related obligations. However, if the consumer will pay the special assessment on a recurring basis after consummation, regardless of whether the consumer's payments for the special assessment are escrowed, §1026.43(c)(2)(v) requires the creditor to include this recurring special assessment in the evaluation of the consumer's monthly payment for mortgage-related obligations.

4. *Pro rata amount*. For purposes of §1026.43(c)(2)(v), the creditor may divide the recurring payments for mortgage-related obligations into monthly, pro rata amounts. In considering a mortgage-related obligation that is not paid monthly, if the mortgage loan is originated pursuant to a government program the creditor may determine the pro rata monthly amount of the mortgage-related obligation in accordance with the specific requirements of that program. If the mortgage loan is originated pursuant to a government program that does not contain specific standards for determining the pro

rata monthly amount of the mortgage-related obligation, or if the mortgage loan is not originated pursuant to a government program, the creditor complies with §1026.43(c)(2)(v) by dividing the total amount of a particular non-monthly mortgage-related obligation by no more than the number of months from the month that the non-monthly mortgage-related obligation was due prior to consummation until the month that the non-monthly mortgage-related obligation will be due after consummation. When determining the pro rata monthly payment amount, the creditor may also consider comment 43(c)(2)(v)–5, which explains that the creditor need not project potential changes. The following examples further illustrate how a creditor may determine the pro rata monthly amount of mortgage-related obligations, pursuant to §1026.43(c)(2)(v):

i. Assume that a consumer applies for a mortgage loan on February 1st. Assume further that the subject property is located in a jurisdiction where property taxes are paid in arrears on the first day of October. The creditor complies with §1026.43(c)(2)(v) by determining the annual property tax amount owed in the prior October, dividing the amount by 12, and using the resulting amount as the pro rata monthly property tax payment amount for the determination of the consumer's monthly payment for mortgage-related obligations. The creditor complies even if the consumer will likely owe more in the next year than the amount owed the prior October because the jurisdiction normally increases the property tax rate annually, provided that the creditor does not have knowledge of an increase in the property tax rate at the time of underwriting. See also comment 43(c)(2)(v)–5 regarding estimates of mortgage-related obligations.

ii. Assume that a subject property is located in a special water district, the assessments for which are billed separately from local property taxes. The creditor complies with §1026.43(c)(2)(v) by dividing the full amount that will be owed by the number of months in the assessment period, and including the resulting amount in the calculation of monthly mortgage-related obligations. However, §1026.43(c)(2)(v) does not require a creditor to adjust the monthly amount to account for potential deviations from the average monthly amount. For example, assume in this example that the special water assessment is billed every eight months, that the consumer will have to pay the first water district bill four months after consummation, and that the seller will not provide the consumer with any funds to pay for the seller's obligation (*i.e.*, the four months prior to consummation). Although the consumer will be required to budget twice the average monthly amount to pay the first water district bill, §1026.43(c)(2)(v) does not require the creditor to use the increased amount; the creditor complies with §1026.43(c)(2)(v) by using the average monthly amount.

iii. Assume that the subject property is located in an area where flood insurance is required by Federal law, and assume further that the flood insurance policy premium is paid every three years following consummation. The creditor complies with §1026.43(c)(2)(v) by dividing the three-year premium by 36 months and including the resulting amount in the determination of the consumer's monthly payment for mortgage-related obligations. The creditor complies even if the consumer will not establish a monthly escrow for flood insurance.

iv. Assume that the subject property is part of a homeowners association that has imposed upon the seller a special assessment of $1,200. Assume further that this special assessment will become the consumer's obligation upon consummation of the transaction, that the consumer is permitted to pay the special assessment in twelve $100 installments after consummation, and that the mortgage loan will not be originated pursuant to a government program that contains specific requirements for prorating special assessments. The creditor complies with §1026.43(c)(2)(v) by dividing the $1,200 special assessment by 12 months and including the resulting $100 monthly amount in the determination of the consumer's monthly payment for mortgage-related obligations. The creditor complies by using this calculation even if the consumer intends to pay the special assessment in a manner other than that used by the creditor in determining the monthly pro rata amount, such as where the consumer intends to pay six $200 installments.

5. *Estimates.* Estimates of mortgage-related obligations should be based upon information that is known to the creditor at the time the creditor underwrites the mortgage obligation. Information is known if it is reasonably available to the creditor at the time of underwriting the loan. Creditors may rely on guidance provided under comment 17(c)(2)(i)–1 in determining if information is reasonably available. For purposes of this section, the creditor need not project potential changes, such as by estimating possible increases in taxes and insurance. See comment 43(c)(2)(v)–4 for additional examples discussing the projection of potential changes. The following examples further illustrate the requirements of §1026.43(c)(2)(v):

i. Assume that the property is subject to a community governance association, such as a homeowners association. The creditor complies with §1026.43(c)(2)(v) by relying on an estimate of mortgage-related obligations prepared by the homeowners association. In accordance with the guidance provided under comment 17(c)(2)(i)–1, the creditor need only exercise due diligence in determining mortgage-related obligations, and complies with §1026.43(c)(2)(v) by relying on the representations of other reliable parties in preparing estimates.

ii. Assume that the homeowners association has imposed a special assessment on the seller, but the seller does not inform the creditor of the special assessment, the homeowners association does not include the special assessment in the estimate of expenses prepared for the creditor, and the creditor is unaware of the special assessment. The creditor complies with §1026.43(c)(2)(v) if it does not include the special assessment in the determination of mortgage-related obligations. The creditor may rely on the representations of other reliable parties, in accordance with the guidance provided under comment 17(c)(2)(i)–1.

iii. Assume that the homeowners association imposes a special assessment after the creditor has completed underwriting, but prior to consummation. The creditor does not violate §1026.43(c)(2)(v) if the creditor does not include the special assessment in the determination of the consumer's monthly payment for mortgage-related obligations, provided the homeowners association does not inform the creditor about the special assessment during underwriting. Section 1026.43(c)(2)(v) does not require the creditor to re-underwrite the loan. The creditor has complied with §1026.43(c)(2)(v) by including the obligations known to the creditor at the time the loan is underwritten, even if the creditor learns of new mortgage-related obligations before the transaction is consummated.

Paragraph 43(c)(2)(vi).

1. *Consideration of current debt obligations.* Section 1026.43(c)(2)(vi) requires creditors to consider a consumer's current debt obligations and any alimony or child support the consumer is required to pay. Examples of current debt obligations include student loans, automobile loans, revolving debt, and existing mortgages that will not be paid off at or before consummation. Creditors have significant flexibility to consider current debt obligations in light of attendant facts and circumstances, including that an obligation is likely to be paid off soon after consummation. For example, a creditor may take into account that an existing mortgage is likely to be paid off soon after consummation because there is an existing contract for sale of the property that secures that mortgage. Similarly, creditors should consider whether debt obligations in forbearance or deferral at the time of underwriting are likely to affect the consumer's ability to repay based on the payment for which the consumer will be liable upon expiration of the forbearance or deferral period and other relevant facts and circumstances, such as when the forbearance or deferral period will expire.

2. *Multiple applicants.* When two or more consumers apply for an extension of credit as joint obligors with primary liability on an obligation, §1026.43(c)(2)(vi) requires a creditor to consider the debt obligations of all such joint applicants. For example, if a co-applicant is repaying a student loan at the time of underwriting, the creditor complies with §1026.43(c)(2)(vi) by considering the co-applicant's student loan obligation. If one consumer is merely a surety or guarantor, §1026.43(c)(2)(vi) does not require a creditor to consider the debt obligations of such surety or guarantor. The requirements of §1026.43(c)(2)(vi) do not affect the disclosure requirements of this part, such as, for example, §§1026.17(d), 1026.23(b), 1026.31(e), 1026.39(b)(3), and 1026.46(f).

Paragraph 43(c)(2)(vii).

1. *Monthly debt-to-income ratio and residual income.* See §1026.43(c)(7) and its associated commentary regarding the definitions and calculations for the monthly debt-to-income ratio and residual income.

Paragraph 43(c)(2)(viii).

1. *Consideration of credit history.* ''Credit history'' may include factors such as the number and age of credit lines, payment history, and any judgments, collections, or bankruptcies. Section 1026.43(c)(2)(viii) does not require creditors to obtain or consider a consolidated credit score or prescribe a minimum credit score that creditors must apply. The rule also does not specify which aspects of credit history a creditor must consider or how various aspects of credit history should be weighed against each other or against other underwriting factors. Some aspects of a consumer's credit history, whether positive or negative, may not be directly indicative of the consumer's ability to repay. A creditor therefore may give various aspects of a consumer's credit history as much or as little weight as is appropriate to reach a reasonable, good faith determination of ability to repay. Where a consumer has obtained few or no extensions of traditional ''credit,'' as defined in §1026.2(a)(14), a creditor may, but is not required to, look to nontraditional credit references, such as rental payment history or utility payments.

2. *Multiple applicants.* When two or more consumers apply for an extension of credit as joint obligors with primary liability on an obligation, §1026.43(c)(2)(viii) requires a creditor to consider the credit history of all such joint applicants. If a consumer is merely a surety or guarantor, §1026.43(c)(2)(viii) does not require a creditor to consider the credit history of such surety or guarantor. The requirements of §1026.43(c)(2)(viii) do not affect the disclosure requirements of this part, such as, for example, §§1026.17(d), 1026.23(b), 1026.31(e), 1026.39(b)(3), and 1026.46(f).

43(c)(3) Verification using third-party records.

1. *Records specific to the individual consumer*. Records a creditor uses for verification under §1026.43(c)(3) and (4) must be specific to the individual consumer. Records regarding average incomes in the consumer's geographic location or average wages paid by the consumer's employer, for example, are not specific to the individual consumer and are not sufficient for verification.

2. *Obtaining records*. To conduct verification under §1026.43(c)(3) and (4), a creditor may obtain records from a third-party service provider, such as a party the consumer's employer uses to respond to income verification requests, as long as the records are reasonably reliable and specific to the individual consumer. A creditor also may obtain third-party records directly from the consumer, likewise as long as the records are reasonably reliable and specific to the individual consumer. For example, a creditor using payroll statements to verify the consumer's income, as allowed under §1026.43(c)(4)(iii), may obtain the payroll statements from the consumer.

3. *Credit report as a reasonably reliable third-party record*. A credit report generally is considered a reasonably reliable third-party record under §1026.43(c)(3) for purposes of verifying items customarily found on a credit report, such as the consumer's current debt obligations, monthly debts, and credit history. Section 1026.43(c)(3) generally does not require creditors to obtain additional reasonably reliable third-party records to verify information contained in a credit report. For example, if a credit report states the existence and amount of a consumer's debt obligation, the creditor is not required to obtain additional verification of the existence or amount of that obligation. In contrast, a credit report does not serve as a reasonably reliably third-party record for purposes of verifying items that do not appear on the credit report. For example, certain monthly debt obligations, such as legal obligations like alimony or child support, may not be reflected on a credit report. Thus, a credit report that does not list a consumer's monthly alimony obligation does not serve as a reasonably reliable third-party record for purposes of verifying that obligation. If a credit report reflects a current debt obligation that a consumer has not listed on the application, the creditor complies with §1026.43(c)(3) if the creditor considers the existence and amount of the debt obligation as it is reflected in the credit report. However, in some cases a creditor may know or have reason to know that a credit report may be inaccurate in whole or in part. For example, a creditor may have information indicating that a credit report is subject to a fraud alert, extended alert, active duty alert, or similar alert identified in 15 U.S.C. 1681c–1 or that a debt obligation listed on a credit report is subject to a statement of dispute pursuant to 15 U.S.C. 1681i(b). A creditor may also have other reasonably reliable third-party records or other information or evidence that the creditor reasonably finds to be reliable that contradict the credit report or otherwise indicate that the credit report is inaccurate. If a creditor knows or has reason to know that a credit report may be inaccurate in whole or in part, the creditor complies with §1026.43(c)(3) by disregarding an inaccurate or disputed item, items, or credit report, but does not have to obtain additional third-party records. The creditor may also, but is not required, to obtain other reasonably reliable third-party records to verify information with respect to which the credit report, or item therein, may be inaccurate. For example, the creditor might obtain statements or bank records regarding a particular debt obligation subject to a statement of dispute. See also comment 43(c)(3)–6, which describes a situation in which a consumer reports a debt obligation that is not listed on a credit report.

4. *Verification of simultaneous loans*. Although a credit report may be used to verify current obligations, it will not reflect a simultaneous loan that has not yet been consummated and may not reflect a loan that has just recently been consummated. If the creditor knows or has reason to know that there will be a simultaneous loan extended at or before consummation, the creditor may verify the simultaneous loan by obtaining third-party verification from the third-party creditor of the simultaneous loan. For example, the creditor may obtain a copy of the promissory note or other written verification from the third-party creditor. For further guidance, see comments 43(c)(3)–1 and –2 discussing verification using third-party records.

5. *Verification of mortgage-related obligations*. Creditors must make the repayment ability determination required under §1026.43(c)(2) based on information verified from reasonably reliable records. For general guidance regarding verification see comments 43(c)(3)–1 and –2, which discuss verification using third-party records. With respect to the verification of mortgage-related obligations that are property taxes required to be considered under §1026.43(c)(2)(v), a record is reasonably reliable if the information in the record was provided by a governmental organization, such as a taxing authority or local government. The creditor complies with §1026.43(c)(2)(v) by relying on property taxes referenced in the title report if the source of the property tax information was a local taxing authority. With respect to other information in a record provided by an entity assessing charges, such as a homeowners association, the creditor complies with §1026.43(c)(2)(v) if it relies on homeowners association billing statements provided by the seller. Records are also reasonably reliable if

the information in the record was obtained from a valid and legally executed contract. For example, the creditor complies with §1026.43(c)(2)(v) by relying on the amount of monthly ground rent referenced in the ground rent agreement currently in effect and applicable to the subject property. Records, other than those discussed above, may be reasonably reliable for purposes of §1026.43(c)(2)(v) if the source provided the information objectively.

6. *Verification of current debt obligations.* Section 1026.43(c)(3) does not require creditors to obtain additional records to verify the existence or amount of obligations shown on a consumer's credit report or listed on the consumer's application, absent circumstances described in comment 43(c)(3)–3. Under §1026.43(c)(3)(iii), if a creditor relies on a consumer's credit report to verify a consumer's current debt obligations and the consumer's application lists a debt obligation not shown on the credit report, the creditor may consider the existence and amount of the obligation as it is stated on the consumer's application. The creditor is not required to further verify the existence or amount of the obligation, absent circumstances described in comment 43(c)(3)–3.

7. *Verification of credit history.* To verify credit history, a creditor may, for example, look to credit reports from credit bureaus or to reasonably reliable third-party records that evidence nontraditional credit references, such as evidence of rental payment history or public utility payments.

8. *Verification of military employment.* A creditor may verify the employment status of military personnel by using a military Leave and Earnings Statement or by using the electronic database maintained by the Department of Defense to facilitate identification of consumers covered by credit protections provided pursuant to 10 U.S.C. 987.

43(c)(4) Verification of Income or Assets

1. *Income or assets relied on.* A creditor need consider, and therefore need verify, only the income or assets the creditor relies on to evaluate the consumer's repayment ability. *See* comment 43(c)(2)(i)–2. For example, if a consumer's application states that the consumer earns a salary and is paid an annual bonus and the creditor relies on only the consumer's salary to evaluate the consumer's repayment ability, the creditor need verify only the salary. *See also* comments 43(c)(3)–1 and –2.

2. *Multiple applicants.* If multiple consumers jointly apply for a loan and each lists income or assets on the application, the creditor need verify only the income or assets the creditor relies on in determining repayment ability. *See* comment 43(c)(2)(i)–5.

3. *Tax-return transcript.* Under §1026.43(c)(4), a creditor may verify a consumer's income using an Internal Revenue Service (IRS) tax-return transcript, which summarizes the information in a consumer's filed tax return, another record that provides reasonably reliable evidence of the consumer's income, or both. A creditor may obtain a copy of a tax-return transcript or a filed tax return directly from the consumer or from a service provider. A creditor need not obtain the copy directly from the IRS or other taxing authority. *See* comment 43(c)(3)–2.

4. *Unidentified funds.* A creditor does not meet the requirements of §1026.43(c)(4) if it observes an inflow of funds into the consumer's account without confirming that the funds are income. For example, a creditor would not meet the requirements of §1026.43(c)(4) where it observes an unidentified $5,000 deposit in the consumer's account but fails to take any measures to confirm or lacks any basis to conclude that the deposit represents the consumer's personal income and not, for example, proceeds from the disbursement of a loan.

Paragraph 43(c)(4)(vi).

1. *Government benefits.* In verifying a consumer's income, a creditor may use a written or electronic record from a government agency of the amount of any benefit payments or awards, such as a ''proof of income letter'' issued by the Social Security Administration (also known as a ''budget letter,'' ''benefits letter,'' or ''proof of award letter'').

43(c)(5) Payment calculation.

43(c)(5)(i) General rule.

1. *General.* For purposes of §1026.43(c)(2)(iii), a creditor must determine the consumer's ability to repay the covered transaction using the payment calculation methods set forth in §1026.43(c)(5). The payment calculation methods differ depending on the type of credit extended. The payment calculation method set forth in §1026.43(c)(5)(i) applies to any covered transaction that does not have a balloon payment, or that is not an interest-only or negative amortization loan, whether such covered transaction is a fixed-rate, adjustable-rate or step-rate mortgage. The terms ''fixed-rate mortgage,'' ''adjustable-rate mortgage,'' ''step-rate mortgage,'' ''interest-only loan'' and ''negative amortization loan'' are defined in §1026.18(s)(7)(iii), (i), (ii), (iv) and (v), respectively. For the meaning of the term ''balloon payment,'' see §1026.18(s)(5)(i). The payment calculation methods set forth in §1026.43(c)(5)(ii) apply to any covered transaction that is a loan with a balloon payment, interest-only loan, or negative amortization loan. See comment 43(c)(5)(i)–5 and the commentary to §1026.43(c)(5)(ii), which provide examples for calculating the monthly payment for purposes of the repayment ability determination required under §1026.43(c)(2)(iii).

2. *Greater of the fully indexed rate or introductory rate; premium adjustable-rate transactions.* A creditor must determine a consumer's repayment ability for the covered transaction using substantially equal, monthly, fully amortizing payments that are based on the greater of the fully indexed rate or any introductory interest rate. In some adjustable-rate transactions, creditors may set an initial interest rate that is not determined by the index or formula used to make later interest rate adjustments. Sometimes, this initial rate charged to consumers is lower than the rate would be if it were determined by using the index plus margin, or formula (*i.e.*, fully indexed rate). However, an initial rate that is a premium rate is higher than the rate based on the index or formula. In such cases, creditors must calculate the fully amortizing payment based on the initial "premium" rate. "Fully indexed rate" is defined in §1026.43(b)(3).

3. *Monthly, fully amortizing payments.* Section 1026.43(c)(5)(i) does not prescribe the terms or loan features that a creditor may choose to offer or extend to a consumer, but establishes the calculation method a creditor must use to determine the consumer's repayment ability for a covered transaction. For example, the terms of the loan agreement may require that the consumer repay the loan in quarterly or bi-weekly scheduled payments, but for purposes of the repayment ability determination, the creditor must convert these scheduled payments to monthly payments in accordance with §1026.43(c)(5)(i)(B). Similarly, the loan agreement may not require the consumer to make fully amortizing payments, but for purposes of the repayment ability determination under §1026.43(c)(5)(i), the creditor must convert any non-amortizing payments to fully amortizing payments.

4. *Substantially equal.* In determining whether monthly, fully amortizing payments are substantially equal, creditors should disregard minor variations due to payment-schedule irregularities and odd periods, such as a long or short first or last payment period. That is, monthly payments of principal and interest that repay the loan amount over the loan term need not be equal, but the monthly payments should be substantially the same without significant variation in the monthly combined payments of both principal and interest. For example, where no two monthly payments vary from each other by more than 1 percent (excluding odd periods, such as a long or short first or last payment period), such monthly payments would be considered substantially equal for purposes of this section. In general, creditors should determine whether the monthly, fully amortizing payments are substantially equal based on guidance provided in §1026.17(c)(3) (discussing minor variations), and §1026.17(c)(4)(i) through (iii) (discussing payment-schedule irregularities and measuring odd periods due to a long or short first period) and associated commentary.

5. *Examples.* The following are examples of how to determine the consumer's repayment ability based on substantially equal, monthly, fully amortizing payments as required under §1026.43(c)(5)(i) (all amounts shown are rounded, and all amounts are calculated using non-rounded values):

i. *Fixed-rate mortgage.* A loan in an amount of $200,000 has a 30-year loan term and a fixed interest rate of 7 percent. For purposes of §1026.43(c)(2)(iii), the creditor must determine the consumer's ability to repay the loan based on a payment of $1,331, which is the substantially equal, monthly, fully amortizing payment that will repay $200,000 over 30 years using the fixed interest rate of 7 percent.

ii. *Adjustable-rate mortgage with discount for five years.* A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides for a discounted interest rate of 6 percent that is fixed for an initial period of five years, after which the interest rate will adjust annually based on a specified index plus a margin of 3 percent, subject to a 2 percent annual periodic interest rate adjustment cap. The index value in effect at consummation is 4.5 percent; the fully indexed rate is 7.5 percent (4.5 percent plus 3 percent). Even though the scheduled monthly payment required for the first five years is $1199, for purposes of §1026.43(c)(2)(iii) the creditor must determine the consumer's ability to repay the loan based on a payment of $1,398, which is the substantially equal, monthly, fully amortizing payment that will repay $200,000 over 30 years using the fully indexed rate of 7.5 percent.

iii. *Step-rate mortgage.* A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides that the interest rate will be 6.5 percent for the first two years of the loan, 7 percent for the next three years of the loan, and 7.5 percent thereafter. Accordingly, the scheduled payment amounts are $1,264 for the first two years, $1,328 for the next three years, and $1,388 thereafter for the remainder of the term. For purposes of §1026.43(c)(2)(iii), the creditor must determine the consumer's ability to repay the loan based on a payment of $1,398, which is the substantially equal, monthly, fully amortizing payment that would repay $200,000 over 30 years using the fully indexed rate of 7.5 percent.

43(c)(5)(ii) Special rules for loans with a balloon payment, interest-only loans, and negative amortization loans.

Paragraph 43(c)(5)(ii)(A).

1. *General.* For loans with a balloon payment, the rules differ depending on whether the loan is a higher-priced covered transaction, as defined under §1026.43(b)(4), or is

not a higher-priced covered transaction because the annual percentage rate does not exceed the applicable threshold calculated using the applicable average prime offer rate (APOR) for a comparable transaction. ''Average prime offer rate'' is defined in §1026.35(a)(2); ''higher-priced covered transaction'' is defined in §1026.43(b)(4). For higher-priced covered transactions with a balloon payment, the creditor must consider the consumer's ability to repay the loan based on the payment schedule under the terms of the legal obligation, including any required balloon payment. For loans with a balloon payment that are not higher-priced covered transactions, the creditor should use the maximum payment scheduled during the first five years of the loan following the date on which the first regular periodic payment will be due. ''Balloon payment'' is defined in §1026.18(s)(5)(i).

2. *First five years after the date on which the first regular periodic payment will be due.* Under §1026.43(c)(5)(ii)(A)(*1*), the creditor must determine a consumer's ability to repay a loan with a balloon payment that is not a higher-priced covered transaction using the maximum payment scheduled during the first five years (60 months) after the date on which the first regular periodic payment will be due. To illustrate:

i. Assume a loan that provides for regular monthly payments and a balloon payment due at the end of a six-year loan term. The loan is consummated on August 15, 2014, and the first monthly payment is due on October 1, 2014. The first five years after the first monthly payment end on October 1, 2019. The balloon payment must be made on the due date of the 72nd monthly payment, which is September 1, 2020. For purposes of determining the consumer's ability to repay the loan under §1026.43(c)(2)(iii), the creditor need not consider the balloon payment that is due on September 1, 2020.

ii. Assume a loan that provides for regular monthly payments and a balloon payment due at the end of a five-year loan term. The loan is consummated on August 15, 2014, and the first monthly payment is due on October 1, 2014. The first five years after the first monthly payment end on October 1, 2019. The balloon payment must be made on the due date of the 60th monthly payment, which is September 1, 2019. For purposes of determining the consumer's ability to repay the loan under §1026.43(c)(2)(iii), the creditor must consider the balloon payment that is due on September 1, 2019.

3. *Renewable balloon-payment mortgage; loan term.* A balloon-payment mortgage that is not a higher-priced covered transaction could provide that a creditor is unconditionally obligated to renew a balloon-payment mortgage at the consumer's option (or is obligated to renew subject to conditions within the consumer's control). See comment 17(c)(1)–11 discussing renewable balloon-payment mortgages. For purposes of this section, the loan term does not include any period of time that could result from a renewal provision. To illustrate, assume a three-year balloon-payment mortgage that is not a higher-priced covered transaction contains an unconditional obligation to renew for another three years at the consumer's option. In this example, the loan term for the balloon-payment mortgage is three years, and not the potential six years that could result if the consumer chooses to renew the loan. Accordingly, the creditor must underwrite the loan using the maximum payment scheduled in the first five years after consummation, which includes the balloon payment due at the end of the three-year loan term. See comment 43(c)(5)(ii)(A)–4.ii, which provides an example of how to determine the consumer's repayment ability for a three-year renewable balloon-payment mortgage that is not a higher-priced covered transaction.

4. *Examples of loans with a balloon payment that are not higher-priced covered transactions.* The following are examples of how to determine the maximum payment scheduled during the first five years after the date on which the first regular periodic payment will be due (all amounts shown are rounded, and all amounts are calculated using non-rounded values):

i. *Balloon-payment mortgage with a three-year loan term; fixed interest rate.* A loan agreement provides for a fixed interest rate of 6 percent, which is below the APOR-calculated threshold for a comparable transaction; thus the loan is not a higher-priced covered transaction. The loan amount is $200,000, and the loan has a three-year loan term but is amortized over 30 years. The monthly payment scheduled for the first three years following consummation is $1,199, with a balloon payment of $193,367 due at the end of the third year. For purposes of §1026.43(c)(2)(iii), the creditor must determine the consumer's ability to repay the loan based on the balloon payment of $193,367.

ii. *Renewable balloon-payment mortgage with a three-year loan term.* Assume the same facts above in comment 43(c)(5)(ii)(A)–4.i, except that the loan agreement also provides that the creditor is unconditionally obligated to renew the balloon-payment mortgage at the consumer's option at the end of the three-year term for another three years. In determining the maximum payment scheduled during the first five years after the date on which the first regular periodic payment will be due, the creditor must use a loan term of three years. Accordingly, for purposes of §1026.43(c)(2)(iii), the creditor must determine the consumer's ability to repay the loan based on the balloon payment of $193,367.

iii. *Balloon-payment mortgage with a six-year loan term; fixed interest rate.* A loan provides for a fixed interest rate of 6 percent, which is below the APOR threshold for a comparable transaction, and thus, the loan is not a higher-priced covered transaction. The loan amount is $200,000, and the loan has a six-year loan term but is amortized over 30 years. The loan is consummated on March 15, 2014, and the monthly payment scheduled for the first six years following consummation is $1,199, with the first monthly payment due on May 1, 2014. The first five years after the date on which the first regular periodic payment will be due end on May 1, 2019. The balloon payment of $183,995 is required on the due date of the 72nd monthly payment, which is April 1, 2020 (more than five years after the date on which the first regular periodic payment will be due). For purposes of §1026.43(c)(2)(iii), the creditor may determine the consumer's ability to repay the loan based on the monthly payment of $1,199, and need not consider the balloon payment of $183,995 due on April 1, 2020.

5. *Higher-priced covered transaction with a balloon payment.* Where a loan with a balloon payment is a higher-priced covered transaction, the creditor must determine the consumer's repayment ability based on the loan's payment schedule, including any balloon payment. For example (all amounts are rounded): Assume a higher-priced covered transaction with a fixed interest rate of 7 percent. The loan amount is $200,000 and the loan has a ten year loan term, but is amortized over 30 years. The monthly payment scheduled for the first ten years is $1,331, with a balloon payment of $172,955. For purposes of §1026.43(c)(2)(iii), the creditor must consider the consumer's ability to repay the loan based on the payment schedule that fully repays the loan amount, including the balloon payment of $172,955.

Paragraph 43(c)(5)(ii)(B).

1. *General.* For loans that permit interest-only payments, the creditor must use the fully indexed rate or introductory rate, whichever is greater, to calculate the substantially equal, monthly payment of principal and interest that will repay the loan amount over the term of the loan remaining as of the date the loan is recast. For discussion regarding the fully indexed rate, and the meaning of ''substantially equal,'' see comments 43(b)(3)–1 through –5 and 43(c)(5)(i)–4, respectively. Under §1026.43(c)(5)(ii)(B), the relevant term of the loan is the period of time that remains as of the date the loan is recast to require fully amortizing payments. For a loan on which only interest and no principal has been paid, the loan amount will be the outstanding principal balance at the time of the recast. ''Loan amount'' and ''recast'' are defined in §1026.43(b)(5) and (b)(11), respectively. ''Interest-only'' and ''Interest-only loan'' are defined in §1026.18(s)(7)(iv).

2. *Examples.* The following are examples of how to determine the consumer's repayment ability based on substantially equal, monthly payments of principal and interest under §1026.43(c)(5)(ii)(B) (all amounts shown are rounded, and all amounts are calculated using non-rounded values):

i. *Fixed-rate mortgage with interest-only payments for five years.* A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides for a fixed interest rate of 7 percent, and permits interest-only payments for the first five years. The monthly payment of $1,167 scheduled for the first five years would cover only the interest due. The loan is recast on the due date of the 60th monthly payment, after which the scheduled monthly payments increase to $1,414, a monthly payment that repays the loan amount of $200,000 over the 25 years remaining as of the date the loan is recast (300 months). For purposes of §1026.43(c)(2)(iii), the creditor must determine the consumer's ability to repay the loan based on a payment of $1,414, which is the substantially equal, monthly, fully amortizing payment that would repay $200,000 over the 25 years remaining as of the date the loan is recast using the fixed interest rate of 7 percent.

ii. *Adjustable-rate mortgage with discount for three years and interest-only payments for five years.* A loan in an amount of $200,000 has a 30-year loan term, but provides for interest-only payments for the first five years. The loan agreement provides for a discounted interest rate of 5 percent that is fixed for an initial period of three years, after which the interest rate will adjust each year based on a specified index plus a margin of 3 percent, subject to an annual interest rate adjustment cap of 2 percent. The index value in effect at consummation is 4.5 percent; the fully indexed rate is 7.5 percent (4.5 percent plus 3 percent). The monthly payments for the first three years are $833. For the fourth year, the payments are $1,167, based on an interest rate of 7 percent, calculated by adding the 2 percent annual adjustment cap to the initial rate of 5 percent. For the fifth year, the payments are $1,250, applying the fully indexed rate of 7.5 percent. These first five years of payments will cover only the interest due. The loan is recast on the due date of the 60th monthly payment, after which the scheduled monthly payments increase to $1,478, a monthly payment that will repay the loan amount of $200,000 over the remaining 25 years of the loan (300 months). For purposes of §1026.43(c)(2)(iii), the creditor must determine the consumer's ability to repay the loan based on a monthly payment of $1,478, which is the substantially equal, monthly payment of principal and interest that would repay $200,000 over the 25 years remaining as of the date the loan is recast using the fully indexed rate of 7.5 percent.

Paragraph 43(c)(5)(ii)(C).

1. *General.* For purposes of determining the consumer's ability to repay a negative amortization loan, the creditor must use substantially equal, monthly payments of principal and interest based on the fully indexed rate or the introductory rate, whichever is greater, that will repay the maximum loan amount over the term of the loan that remains as of the date the loan is recast. Accordingly, before determining the substantially equal, monthly payments the creditor must first determine the maximum loan amount and the period of time that remains in the loan term after the loan is recast. ''Recast'' is defined in §1026.43(b)(11). Second, the creditor must use the fully indexed rate or introductory rate, whichever is greater, to calculate the substantially equal, monthly payment amount that will repay the maximum loan amount over the term of the loan remaining as of the date the loan is recast. For discussion regarding the fully indexed rate and the meaning of ''substantially equal,'' see comments 43(b)(3)–1 through –5 and 43(c)(5)(i)–4, respectively. For the meaning of the term ''maximum loan amount'' and a discussion of how to determine the maximum loan amount for purposes of §1026.43(c)(5)(ii)(C), see §1026.43(b)(7) and associated commentary. ''Negative amortization loan'' is defined in §1026.18(s)(7)(v).

2. *Term of loan.* Under §1026.43(c)(5)(ii)(C), the relevant term of the loan is the period of time that remains as of the date the terms of the legal obligation recast. That is, the creditor must determine substantially equal, monthly payments of principal and interest that will repay the maximum loan amount based on the period of time that remains after any negative amortization cap is triggered or any period permitting minimum periodic payments expires, whichever occurs first.

3. *Examples.* The following are examples of how to determine the consumer's repayment ability based on substantially equal, monthly payments of principal and interest as required under §1026.43(c)(5)(ii)(C) (all amounts shown are rounded, and all amounts are calculated using non-rounded values):

i. *Adjustable-rate mortgage with negative amortization.* A. Assume an adjustable-rate mortgage in the amount of $200,000 with a 30-year loan term. The loan agreement provides that the consumer can make minimum monthly payments that cover only part of the interest accrued each month until the date on which the principal balance reaches 115 percent of its original balance (*i.e.*, a negative amortization cap of 115 percent) or for the first five years of the loan (60 monthly payments), whichever occurs first. The introductory interest rate at consummation is 1.5 percent. One month after consummation, the interest rate adjusts and will adjust monthly thereafter based on the specified index plus a margin of 3.5 percent. The index value in effect at consummation is 4.5 percent; the fully indexed rate is 8 percent (4.5 percent plus 3.5 percent). The maximum lifetime interest rate is 10.5 percent; there are no other periodic interest rate adjustment caps that limit how quickly the maximum lifetime rate may be reached. The minimum monthly payment for the first year is based on the initial interest rate of 1.5 percent. After that, the minimum monthly payment adjusts annually, but may increase by no more than 7.5 percent over the previous year's payment. The minimum monthly payment is $690 in the first year, $742 in the second year, and $797 in the first part of the third year.

B. To determine the maximum loan amount, assume that the interest rate increases to the maximum lifetime interest rate of 10.5 percent at the first adjustment (*i.e.*, the due date of the first periodic monthly payment), and interest accrues at that rate until the loan is recast. Assume that the consumer makes the minimum monthly payments scheduled, which are capped at 7.5 percent from year-to-year, for the maximum possible time. Because the consumer's minimum monthly payments are less than the interest accrued each month, negative amortization occurs (*i.e.*, the accrued but unpaid interest is added to the principal balance). Thus, assuming that the consumer makes the minimum monthly payments for as long as possible and that the maximum interest rate of 10.5 percent is reached at the first rate adjustment (*i.e.*, the due date of the first periodic monthly payment), the negative amortization cap of 115 percent is reached on the due date of the 27th monthly payment and the loan is recast as of that date. The maximum loan amount as of the due date of the 27th monthly payment is $229,251, and the remaining term of the loan is 27 years and nine months (333 months).

C. For purposes of §1026.43(c)(2)(iii), the creditor must determine the consumer's ability to repay the loan based on a monthly payment of $1,716, which is the substantially equal, monthly payment of principal and interest that will repay the maximum loan amount of $229,251 over the remaining loan term of 333 months using the fully indexed rate of 8 percent. See comments 43(b)(7)–1 and –2 discussing the calculation of the maximum loan amount, and §1026.43(b)(11) for the meaning of the term ''recast.''

ii. *Fixed-rate, graduated payment mortgage.* A loan in the amount of $200,000 has a 30-year loan term. The loan agreement provides for a fixed interest rate of 7.5 percent, and requires the consumer to make minimum monthly payments during the first year, with payments increasing 12.5 percent over the previous year every year for four years (the annual payment cap). The payment schedule provides for payments of $943 in the first year, $1,061 in the second year, $1,193 in the third year, $1,343 in the fourth year, and then requires $1,511 for the remaining term of the loan. During the first three years of the loan, the payments are less than the interest accrued each month, resulting in negative amortization. Assuming the minimum payments increase year-to-year up to the 12.5 percent payment cap, the consumer will begin making payments that cover at least all of the interest accrued at the end of the third year. Thus, the loan is recast on the due date of the 36th monthly payment. The maximum loan amount on that date is $207,662, and the remaining loan term is 27 years (324 months). For purposes of §1026.43(c)(2)(iii), the creditor must determine the consumer's ability to repay the loan based on a monthly payment of $1,497, which is the substantially equal, monthly payment of principal and interest that will repay the maximum loan amount of $207,662 over the remaining loan term of 27 years using the fixed interest rate of 7.5 percent.

43(c)(6) Payment calculation for simultaneous loans.

1. *Scope.* In determining the consumer's repayment ability for a covered transaction under §1026.43(c)(2)(iii), a creditor must include consideration of any simultaneous loan which it knows, or has reason to know, will be made at or before consummation of the covered transaction. For a discussion of the standard ''knows or has reason to know,'' see comment 43(c)(2)(iv)–2. For the meaning of the term ''simultaneous loan,'' see §1026.43(b)(12).

2. *Payment calculation—covered transaction.* For a simultaneous loan that is a covered transaction, as that term is defined under §1026.43(b)(1), a creditor must determine a consumer's ability to repay the monthly payment obligation for a simultaneous loan as set forth in §1026.43(c)(5), taking into account any mortgage-related obligations required to be considered under §1026.43(c)(2)(v). For the meaning of the term ''mortgage-related obligations,'' see §1026.43(b)(8).

3. *Payment calculation—home equity line of credit.* For a simultaneous loan that is a home equity line of credit subject to §1026.40, the creditor must consider the periodic payment required under the terms of the plan when assessing the consumer's ability to repay the covered transaction secured by the same dwelling as the simultaneous loan. Under §1026.43(c)(6)(ii), a creditor must determine the periodic payment required under the terms of the plan by considering the actual amount of credit to be drawn by the consumer at consummation of the covered transaction. The amount to be drawn is the amount requested by the consumer; when the amount requested will be disbursed, or actual receipt of funds, is not determinative. Any additional draw against the line of credit that the creditor of the covered transaction does not know or have reason to know about before or during underwriting need not be considered in relation to ability to repay. For example, where the creditor's policies and procedures require the source of down payment to be verified, and the creditor verifies that a simultaneous loan that is a HELOC will provide the source of down payment for the first-lien covered transaction, the creditor must consider the periodic payment on the HELOC by assuming the amount drawn is at least the down payment amount. In general, a creditor should determine the periodic payment based on guidance in the commentary to §1026.40(d)(5) (discussing payment terms).

43(c)(7) Monthly Debt-to-Income Ratio or Residual Income

1. *Monthly debt-to-income ratio or monthly residual income.* Under §1026.43(c)(2)(vii), the creditor must consider the consumer's monthly debt-to-income ratio, or the consumer's monthly residual income, in accordance with the requirements in §1026.43(c)(7). Section 1026.43(c) does not prescribe a specific monthly debt-to-income ratio with which creditors must comply. Instead, an appropriate threshold for a consumer's monthly debt-to-income ratio or monthly residual income is for the creditor to determine in making a reasonable and good faith determination of a consumer's ability to repay.

2. *Use of both monthly debt-to-income ratio and monthly residual income.* If a creditor considers the consumer's monthly debt-to-income ratio, the creditor may also consider the consumer's residual income as further validation of the assessment made using the consumer's monthly debt-to-income ratio.

3. *Compensating factors.* The creditor may consider factors in addition to the monthly debt-to-income ratio or residual income in assessing a consumer's repayment ability. For example, the creditor may reasonably and in good faith determine that a consumer has the ability to repay despite a higher debt-to-income ratio or lower residual income in light of the consumer's assets other than the dwelling, including any real property attached to the dwelling, securing the covered transaction, such as a savings account. The creditor may also reasonably and in good faith determine that a consumer has the ability to repay despite a higher debt-to-income ratio in light of the consumer's residual income.

43(d) Refinancing of non-standard mortgages.

43(d)(1) Definitions.

43(d)(1)(i) Non-standard mortgage.

Paragraph 43(d)(1)(i)(A).

1. *Adjustable-rate mortgage with an introductory fixed rate.* Under §1026.43(d)(1)(i)(A), an adjustable-rate mortgage with an introductory fixed interest rate for one year or longer is considered a ''non-standard mortgage.'' For example, a covered transaction that has a fixed introductory rate for the

first two, three, or five years and then converts to a variable rate for the remaining 28, 27, or 25 years, respectively, is a ''non-standard mortgage.'' A covered transaction with an introductory rate for six months that then converts to a variable rate for the remaining 29 and one-half years is not a ''non-standard mortgage.''

43(d)(1)(ii) Standard mortgage.

Paragraph 43(d)(1)(ii)(A).

1. *Regular periodic payments.* Under §1026.43(d)(1)(ii)(A), a ''standard mortgage'' must provide for regular periodic payments that do not result in an increase of the principal balance (negative amortization), allow the consumer to defer repayment of principal (*see* comment 43(e)(2)(i)–2), or result in a balloon payment. Thus, the terms of the legal obligation must require the consumer to make payments of principal and interest on a monthly or other periodic basis that will repay the loan amount over the loan term. Except for payments resulting from any interest rate changes after consummation in an adjustable-rate or step-rate mortgage, the periodic payments must be substantially equal. For an explanation of the term ''substantially equal,'' see comment 43(c)(5)(i)–4. In addition, a single-payment transaction is not a ''standard mortgage'' because it does not require ''regular periodic payments.'' *See also* comment 43(e)(2)(i)–1.

Paragraph 43(d)(1)(ii)(D).

1. *First five years after consummation.* A ''standard mortgage'' must have an interest rate that is fixed for at least the first five years (60 months) after consummation. For example, assume an adjustable-rate mortgage that applies the same fixed interest rate to determine the first 60 payments of principal and interest due. The loan is consummated on August 15, 2013, and the first monthly payment is due on October 1, 2013. The date that is five years after consummation is August 15, 2018. The first interest rate adjustment occurs on September 1, 2018. This loan meets the criterion for a ''standard mortgage'' under §1026.43(d)(1)(ii)(D) because the interest rate is fixed until September 1, 2018, which is more than five years after consummation. For guidance regarding step-rate mortgages, see comment 43(e)(2)(iv)–3.iii.

Paragraph 43(d)(1)(ii)(E).

1. *Permissible use of proceeds.* To qualify as a ''standard mortgage,'' the loan's proceeds may be used for only two purposes: paying off the non-standard mortgage and paying for closing costs, including paying escrow amounts required at or before closing. If the proceeds of a covered transaction are used for other purposes, such as to pay off other liens or to provide additional cash to the consumer for discretionary spending, the transaction does not meet the definition of a ''standard mortgage.''

43(d)(2) Scope.

1. *Written application.* For an explanation of the requirements for a ''written application'' in §1026.43(d)(2)(iii), (d)(2)(iv), and (d)(2)(v), see comment 19(a)(1)(i)–3.

Paragraph 43(d)(2)(ii).

1. *Materially lower.* The exemptions afforded under §1026.43(d)(3) apply to a refinancing only if the monthly payment for the new loan is ''materially lower'' than the monthly payment for an existing non-standard mortgage. The payments to be compared must be calculated based on the requirements under §1026.43(d)(5). Whether the new loan payment is ''materially lower'' than the non-standard mortgage payment depends on the facts and circumstances. In all cases, a payment reduction of 10 percent or more meets the ''materially lower'' standard.

Paragraph 43(d)(2)(iv).

1. *Late payment—12 months prior to application.* Under §1026.43(d)(2)(iv), the exemptions in §1026.43(d)(3) apply to a covered transaction only if, during the 12 months immediately preceding the creditor's receipt of the consumer's written application for a refinancing, the consumer has made no more than one payment on the non-standard mortgage more than 30 days late. (For an explanation of ''written application,'' see comment 43(d)(2)–1.) For example, assume a consumer applies for a refinancing on May 1, 2014. Assume also that the consumer made a non-standard mortgage payment on August 15, 2013, that was 45 days late. The consumer made no other late payments on the non-standard mortgage between May 1, 2013, and May 1, 2014. In this example, the requirement under §1026.43(d)(2)(iv) is met because the consumer made only one payment that was over 30 days late within the 12 months prior to applying for the refinancing (*i.e.*, eight and one-half months prior to application).

2. *Payment due date.* Whether a payment is more than 30 days late is measured in relation to the contractual due date not accounting for any grace period. For example, if the contractual due date for a non-standard mortgage payment is the first day of every month, but no late fee will be charged as long as the payment is received by the 16th of the month, the payment due date for purposes of §1026.43(d)(2)(iv) and (v) is the first day of the month, not the 16th day of the month. Thus, a payment due under the contract on October 1st that is paid on November 1st is made more than 30 days after the payment due date.

Paragraph 43(d)(2)(v).

1. *Late payment—six months prior to application.* Under §1026.43(d)(2)(v), the exemptions in §1026.43(d)(3) apply to a covered transaction only if, during the six months immediately preceding the creditor's receipt of the consumer's written application for a refinancing, the consumer has made no payments on the non-standard mortgage more than 30 days late. (For an explanation of

''written application'' and how to determine the payment due date, see comments 43(d)(2)–1 and 43(d)(2)(iv)–2.) For example, assume a consumer with a non-standard mortgage applies for a refinancing on May 1, 2014. If the consumer made a payment on March 15, 2014, that was 45 days late, the requirement under §1026.43(d)(2)(v) is not met because the consumer made a payment more than 30 days late one and one-half months prior to application. If the number of months between consummation of the non-standard mortgage and the consumer's application for the standard mortgage is six or fewer, the consumer may not have made any payment more than 30 days late on the non-standard mortgage.

Paragraph 43(d)(2)(vi).

1. *Non-standard mortgage loan made in accordance with ability-to-repay or qualified mortgage requirements.* For non-standard mortgages that are consummated on or after January 10, 2014, §1026.43(d)(2)(vi) provides that the refinancing provisions set forth in §1026.43(d) apply only if the non-standard mortgage was made in accordance with the requirements of §1026.43(c) or (e), as applicable. For example, if a creditor originated a non-standard mortgage on or after January 10, 2014 that did not comply with the requirements of §1026.43(c) and was not a qualified mortgage pursuant to §1026.43(e), §1026.43(d) would not apply to the refinancing of the non-standard mortgage loan into a standard mortgage loan. However, §1026.43(d) applies to the refinancing of a non-standard mortgage loan into a standard mortgage loan, regardless of whether the non-standard mortgage loan was made in compliance with §1026.43(c) or (e), if the non-standard mortgage loan was consummated prior to January 10, 2014.

43(d)(3) Exemption from repayment ability requirements.

1. *Two-part determination.* To qualify for the exemptions in §1026.43(d)(3), a creditor must have considered, first, whether the consumer is likely to default on the existing mortgage once that loan is recast and, second, whether the new mortgage likely would prevent the consumer's default.

43(d)(4) Offer of rate discounts and other favorable terms.

1. *Documented underwriting practices.* In connection with a refinancing made pursuant to §1026.43(d), §1026.43(d)(4) requires a creditor offering a consumer rate discounts and terms that are the same as, or better than, the rate discounts and terms offered to new consumers to make such an offer consistent with the creditor's documented underwriting practices. Section 1026.43(d)(4) does not require a creditor making a refinancing pursuant to §1026.43(d) to comply with the underwriting requirements of §1026.43(c). Rather, §1026.43(d)(4) requires creditors providing such discounts to do so consistent with documented policies related to loan pricing, loan term qualifications, or other similar underwriting practices. For example, assume that a creditor is providing a consumer with a refinancing made pursuant to §1026.43(d) and that this creditor has a documented practice of offering rate discounts to consumers with credit scores above a certain threshold. Assume further that the consumer receiving the refinancing has a credit score below this threshold, and therefore would not normally qualify for the rate discount available to consumers with high credit scores. This creditor complies with §1026.43(d)(4) by offering the consumer the discounted rate in connection with the refinancing made pursuant to §1026.43(d), even if the consumer would not normally qualify for that discounted rate, provided that the offer of the discounted rate is not prohibited by applicable State or Federal law. However, §1026.43(d)(4) does not require a creditor to offer a consumer such a discounted rate.

43(d)(5) Payment calculations.

43(d)(5)(i) Non-Standard mortgage.

1. *Payment calculation for a non-standard mortgage.* In determining whether the monthly periodic payment for a standard mortgage is materially lower than the monthly periodic payment for the non-standard mortgage under §1026.43(d)(2)(ii), the creditor must consider the monthly payment for the non-standard mortgage that will result after the loan is ''recast,'' assuming substantially equal payments of principal and interest that amortize the remaining loan amount over the remaining term as of the date the mortgage is recast. For guidance regarding the meaning of ''substantially equal,'' see comment 43(c)(5)(i)–4. For the meaning of ''recast,'' see §1026.43(b)(11) and associated commentary.

2. *Fully indexed rate.* The term ''fully indexed rate'' in §1026.43(d)(5)(i)(A) for calculating the payment for a non-standard mortgage is generally defined in §1026.43(b)(3) and associated commentary. Under §1026.43(b)(3) the fully indexed rate is calculated at the time of consummation. For purposes of §1026.43(d)(5)(i), however, the fully indexed rate is calculated within a reasonable period of time before or after the date the creditor receives the consumer's written application for the standard mortgage. Thirty days is generally considered ''a reasonable period of time.''

3. *Written application.* For an explanation of the requirements for a ''written application'' in §1026.43(d)(5)(i), see comment 19(a)(1)(i)–3.

4. *Payment calculation for an adjustable-rate mortgage with an introductory fixed rate.* Under §1026.43(d)(5)(i), the monthly periodic payment for an adjustable-rate mortgage with an introductory fixed interest rate for a period of one or more years must be calculated based on several assumptions.

i. First, the payment must be based on the outstanding principal balance as of the date on which the mortgage is recast, assuming all scheduled payments have been made up to that date and the last payment due under those terms is made and credited on that date. For example, assume an adjustable-rate mortgage with a 30-year loan term. The loan agreement provides that the payments for the first 24 months are based on a fixed rate, after which the interest rate will adjust annually based on a specified index and margin. The loan is recast on the due date of the 24th payment. If the 24th payment is due on September 1, 2014, the creditor must calculate the outstanding principal balance as of September 1, 2014, assuming that all 24 payments under the fixed rate terms have been made and credited timely.

ii. Second, the payment calculation must be based on substantially equal monthly payments of principal and interest that will fully repay the outstanding principal balance over the term of the loan remaining as of the date the loan is recast. Thus, in the example above, the creditor must assume a loan term of 28 years (336 monthly payments).

iii. Third, the payment must be based on the fully indexed rate, as described in §1026.43(d)(5)(i)(A).

5. *Example of payment calculation for an adjustable-rate mortgage with an introductory fixed rate*. The following example illustrates the rule described in comment 43(d)(5)(i)–4:

i. A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides for a discounted introductory interest rate of 5 percent that is fixed for an initial period of two years, after which the interest rate will adjust annually based on a specified index plus a margin of 3 percentage points.

ii. The non-standard mortgage is consummated on February 15, 2014, and the first monthly payment is due on April 1, 2014. The loan is recast on the due date of the 24th monthly payment, which is March 1, 2016.

iii. On March 15, 2015, the creditor receives the consumer's written application for a refinancing after the consumer has made 12 monthly on-time payments. On this date, the index value is 4.5 percent.

iv. To calculate the non-standard mortgage payment that must be compared to the standard mortgage payment under §1026.43(d)(2)(ii), the creditor must use:

A. The outstanding principal balance as of March 1, 2016, assuming all scheduled payments have been made up to March 1, 2016, and the last payment due under the fixed rate terms is made and credited on March 1, 2016. In this example, the outstanding principal balance is $193,948.

B. The fully indexed rate of 7.5 percent, which is the index value of 4.5 percent as of March 15, 2015 (the date on which the application for a refinancing is received) plus the margin of 3 percent.

C. The remaining loan term as of March 1, 2016, the date of the recast, which is 28 years (336 monthly payments).

v. Based on these assumptions, the monthly payment for the non-standard mortgage for purposes of determining whether the standard mortgage monthly payment is lower than the non-standard mortgage monthly payment (*see* §1026.43(d)(2)(ii)) is $1,383. This is the substantially equal, monthly payment of principal and interest required to repay the outstanding principal balance at the fully indexed rate over the remaining term.

6. *Payment calculation for an interest-only loan*. Under §1026.43(d)(5)(i), the monthly periodic payment for an interest-only loan must be calculated based on several assumptions:

i. First, the payment must be based on the outstanding principal balance as of the date of the recast, assuming all scheduled payments are made under the terms of the legal obligation in effect before the mortgage is recast. For a loan on which only interest and no principal has been paid, the outstanding principal balance at the time of recast will be the loan amount, as defined in §1026.43(b)(5), assuming all scheduled payments are made under the terms of the legal obligation in effect before the mortgage is recast. For example, assume that a mortgage has a 30-year loan term, and provides that the first 24 months of payments are interest-only. If the 24th payment is due on September 1, 2015, the creditor must calculate the outstanding principal balance as of September 1, 2015, assuming that all 24 payments under the interest-only payment terms have been made and credited timely and that no payments of principal have been made.

ii. Second, the payment calculation must be based on substantially equal monthly payments of principal and interest that will fully repay the loan amount over the term of the loan remaining as of the date the loan is recast. Thus, in the example above, the creditor must assume a loan term of 28 years (336 monthly payments).

iii. Third, the payment must be based on the fully indexed rate, as described in §1026.43(d)(5)(i)(A).

7. *Example of payment calculation for an interest-only loan*. The following example illustrates the rule described in comment 43(d)(5)(i)–6:

i. A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides for a fixed interest rate of 7 percent, and permits interest-only payments for the first two years (the first 24 payments), after which time amortizing payments of principal and interest are required.

ii. The non-standard mortgage is consummated on February 15, 2014, and the first monthly payment is due on April 1, 2014. The loan is recast on the due date of the 24th monthly payment, which is March 1, 2016.

iii. On March 15, 2015, the creditor receives the consumer's written application for a refinancing, after the consumer has made 12 monthly on-time payments. The consumer has made no additional payments of principal.

iv. To calculate the non-standard mortgage payment that must be compared to the standard mortgage payment under §1026.43(d)(2)(ii), the creditor must use:

A. The loan amount, which is the outstanding principal balance as of March 1, 2016, assuming all scheduled interest-only payments have been made and credited up to that date. In this example, the loan amount is $200,000.

B. An interest rate of 7 percent, which is the interest rate in effect at the time of consummation of this fixed-rate non-standard mortgage.

C. The remaining loan term as of March 1, 2016, the date of the recast, which is 28 years (336 monthly payments).

v. Based on these assumptions, the monthly payment for the non-standard mortgage for purposes of determining whether the standard mortgage monthly payment is lower than the non-standard mortgage monthly payment (*see* §1026.43(d)(2)(ii)) is $1,359. This is the substantially equal, monthly payment of principal and interest required to repay the loan amount at the fully indexed rate over the remaining term.

8. *Payment calculation for a negative amortization loan*. Under §1026.43(d)(5)(i), the monthly periodic payment for a negative amortization loan must be calculated based on several assumptions:

i. First, the calculation must be based on the maximum loan amount, determined after adjusting for the outstanding principal balance. If the consumer makes only the minimum periodic payments for the maximum possible time, until the consumer must begin making fully amortizing payments, the outstanding principal balance will be the maximum loan amount, as defined in §1026.43(b)(7). In this event, the creditor complies with §1026.43(d)(5)(i)(C)(*3*) by relying on the examples of how to calculate the maximum loan amount, see comment 43(b)(7)–3. If the consumer makes payments above the minimum periodic payments for the maximum possible time, the creditor must calculate the maximum loan amount based on the outstanding principal balance. In this event, the creditor complies with §1026.43(d)(5)(i)(C)(*3*) by relying on the examples of how to calculate the maximum loan amount in comment 43(d)(5)(i)–10.

ii. Second, the calculation must be based on substantially equal monthly payments of principal and interest that will fully repay the maximum loan amount over the term of the loan remaining as of the date the loan is recast. For example, if the loan term is 30 years and the loan is recast on the due date of the 60th monthly payment, the creditor must assume a remaining loan term of 25 years (300 monthly payments).

iii. Third, the payment must be based on the fully indexed rate as of the date of the written application for the standard mortgage.

9. *Example of payment calculation for a negative amortization loan if only minimum payments made*. The following example illustrates the rule described in comment 43(d)(5)(i)–8:

i. A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides that the consumer can make minimum monthly payments that cover only part of the interest accrued each month until the date on which the principal balance increases to the negative amortization cap of 115 percent of the loan amount, or for the first five years of monthly payments (60 payments), whichever occurs first. The loan is an adjustable-rate mortgage that adjusts monthly according to a specified index plus a margin of 3.5 percent.

ii. The non-standard mortgage is consummated on February 15, 2014, and the first monthly payment is due on April 1, 2014. Assume that the consumer has made only the minimum periodic payments. Assume further that, based on the calculation of the maximum loan amount required under §1026.43(b)(7) and associated commentary, the negative amortization cap of 115 percent would be reached on June 1, 2016, the due date of the 27th monthly payment.

iii. On March 15, 2015, the creditor receives the consumer's written application for a refinancing, after the consumer has made 12 monthly on-time payments. On this date, the index value is 4.5 percent.

iv. To calculate the non-standard mortgage payment that must be compared to the standard mortgage payment under §1026.43(d)(2)(ii), the creditor must use:

A. The maximum loan amount of $229,251 as of June 1, 2016;

B. The fully indexed rate of 8 percent, which is the index value of 4.5 percent as of March 15, 2015 (the date on which the creditor receives the application for a refinancing) plus the margin of 3.5 percent; and

C. The remaining loan term as of June 1, 2016, the date of the recast, which is 27 years and nine months (333 monthly payments).

v. Based on these assumptions, the monthly payment for the non-standard mortgage for purposes of determining whether the standard mortgage monthly payment is lower than the non-standard mortgage monthly payment (*see* §1026.43(d)(2)(ii)) is $1,716. This is the substantially equal, monthly payment of principal and interest required to repay the maximum loan amount at the fully indexed rate over the remaining term.

10. *Example of payment calculation for a negative amortization loan if payments above minimum amount made.* The following example illustrates the rule described in comment 43(d)(5)(i)–8:

i. A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides that the consumer can make minimum monthly payments that cover only part of the interest accrued each month until the date on which the principal balance increases to the negative amortization cap of 115 percent of the loan amount, or for the first five years of monthly payments (60 payments), whichever occurs first. The loan is an adjustable-rate mortgage that adjusts monthly according to a specified index plus a margin of 3.5 percent. The introductory interest rate at consummation is 1.5 percent. One month after consummation, the interest rate adjusts and will adjust monthly thereafter based on the specified index plus a margin of 3.5 percent. The maximum lifetime interest rate is 10.5 percent; there are no other periodic interest rate adjustment caps that limit how quickly the maximum lifetime rate may be reached. The minimum monthly payment for the first year is based on the initial interest rate of 1.5 percent. After that, the minimum monthly payment adjusts annually, but may increase by no more than 7.5 percent over the previous year's payment. The minimum monthly payment is $690 in the first year, $742 in the second year, $798 in the third year, $857 in the fourth year, and $922 in the fifth year.

ii. The non-standard mortgage is consummated on February 15, 2014, and the first monthly payment is due on April 1, 2014. Assume that the consumer has made more than the minimum periodic payments, and that after the consumer's 12th monthly on-time payment the outstanding principal balance is $195,000. Based on the calculation of the maximum loan amount after adjusting for this outstanding principal balance, the negative amortization cap of 115 percent would be reached on March 1, 2019, the due date of the 60th monthly payment.

iii. On March 15, 2015, the creditor receives the consumer's written application for a refinancing, after the consumer has made 12 monthly on-time payments. On this date, the index value is 4.5 percent.

iv. To calculate the non-standard mortgage payment that must be compared to the standard mortgage payment under §1026.43(d)(2)(ii), the creditor must use:

A. The maximum loan amount of $229,219 as of March 1, 2019.

B. The fully indexed rate of 8 percent, which is the index value of 4.5 percent as of March 15, 2015 (the date on which the creditor receives the application for a refinancing) plus the margin of 3.5 percent.

C. The remaining loan term as of March 1, 2019, the date of the recast, which is exactly 25 years (300 monthly payments).

v. Based on these assumptions, the monthly payment for the non-standard mortgage for purposes of determining whether the standard mortgage monthly payment is lower than the non-standard mortgage monthly payment (*see* §1026.43(d)(2)(ii)) is $1,769. This is the substantially equal, monthly payment of principal and interest required to repay the maximum loan amount at the fully indexed rate over the remaining term.

43(d)(5)(ii) Standard mortgage.

1. *Payment calculation for a standard mortgage.* In determining whether the monthly periodic payment for a standard mortgage is materially lower than the monthly periodic payment for a non-standard mortgage, the creditor must consider the monthly payment for the standard mortgage that will result in substantially equal, monthly, fully amortizing payments (as defined in §1026.43(b)(2)) using the rate as of consummation. For guidance regarding the meaning of "substantially equal" see comment 43(c)(5)(i)–4. For a mortgage with a single, fixed rate for the first five years after consummation, the maximum rate that will apply during the first five years after consummation will be the rate at consummation. For a step-rate mortgage, however, the rate that must be used is the highest rate that will apply during the first five years after consummation. For example, if the rate for the first two years after the date on which the first regular periodic payment will be due is 4 percent, the rate for the following two years is 5 percent, and the rate for the next two years is 6 percent, the rate that must be used is 6 percent.

2. *Example of payment calculation for a standard mortgage.* The following example illustrates the rule described in comment 43(d)(5)(ii)–1: A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides for an interest rate of 6 percent that is fixed for an initial period of five years, after which time the interest rate will adjust annually based on a specified index plus a margin of 3 percent, subject to a 2 percent annual interest rate adjustment cap. The creditor must determine whether the standard mortgage monthly payment is materially lower than the non-standard mortgage monthly payment (*see* §1026.43(d)(2)(ii)) based on a standard mortgage payment of $1,199. This is the substantially equal, monthly payment of principal and interest required to repay $200,000 over 30 years at an interest rate of 6 percent.

43(e) Qualified mortgages.

43(e)(1) Safe harbor and presumption of compliance.

1. *General.* Section 1026.43(c) requires a creditor to make a reasonable and good faith

determination at or before consummation that a consumer will be able to repay a covered transaction. Section 1026.43(e)(1)(i) and (ii) provide a safe harbor or presumption of compliance, respectively, with the repayment ability requirements of §1026.43(c) for creditors and assignees of covered transactions that satisfy the requirements of a qualified mortgage under §1026.43(e)(2), (4), (5), (6), (7), or (f). *See* §1026.43(e)(1)(i) and (ii) and associated commentary.

43(e)(1)(i)(A) Safe harbor for transactions that are not higher-priced covered transactions.

1. *Higher-priced covered transactions.* For guidance on determining whether a loan is a higher-priced covered transaction, see comments 43(b)(4)–1 through –3.

43(e)(1)(ii) Presumption of compliance for higher-priced covered transactions.

1. *General.* Under §1026.43(e)(1)(ii), a creditor or assignee of a qualified mortgage under §1026.43(e)(2), (e)(4), or (f) that is a higher-priced covered transaction is presumed to comply with the repayment ability requirements of §1026.43(c). To rebut the presumption, it must be proven that, despite meeting the standards for a qualified mortgage (including either the debt-to-income standard in §1026.43(e)(2)(vi) or the standards of one of the entities specified in §1026.43(e)(4)(ii)), the creditor did not have a reasonable and good faith belief in the consumer's repayment ability. Specifically, it must be proven that, at the time of consummation, based on the information available to the creditor, the consumer's income, debt obligations, alimony, child support, and the consumer's monthly payment (including mortgage-related obligations) on the covered transaction and on any simultaneous loans of which the creditor was aware at consummation would leave the consumer with insufficient residual income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan with which to meet living expenses, including any recurring and material non-debt obligations of which the creditor was aware at the time of consummation, and that the creditor thereby did not make a reasonable and good faith determination of the consumer's repayment ability. For example, a consumer may rebut the presumption with evidence demonstrating that the consumer's residual income was insufficient to meet living expenses, such as food, clothing, gasoline, and health care, including the payment of recurring medical expenses of which the creditor was aware at the time of consummation, and after taking into account the consumer's assets other than the value of the dwelling securing the loan, such as a savings account. In addition, the longer the period of time that the consumer has demonstrated actual ability to repay the loan by making timely payments, without modification or accommodation, after consummation or, for an adjustable-rate mortgage, after recast, the less likely the consumer will be able to rebut the presumption based on insufficient residual income and prove that, at the time the loan was made, the creditor failed to make a reasonable and good faith determination that the consumer had the reasonable ability to repay the loan.

43(e)(2) Qualified mortgage defined—general.

1. *General QM Amendments Effective on March 1, 2021.* Comment 43–2 provides that, for a transaction for which a creditor received an application on or after March 1, 2021 but prior to October 1, 2022, a person has the option of complying either: With 12 CFR part 1026 as it is in effect; or with 12 CFR part 1026 as it was in effect on February 26, 2021, together with any amendments to 12 CFR part 1026 that become effective after February 26, 2021, other than the revisions to Regulation Z contained in Qualified Mortgage Definition Under the Truth in Lending Act (Regulation Z): General QM Loan Definition published on December 29, 2020 (2021 General QM Amendments). Prior to the effective date of the 2021 General QM Amendments, §1026.43(e)(2) provided a qualified mortgage definition that, among other things, required that the ratio of the consumer's total monthly debt to total monthly income at the time of consummation not exceed 43 percent. The 2021 General QM Amendments removed that requirement and replaced it with the annual percentage rate thresholds in §1026.43(e)(2)(vi), among other revisions. Both the qualified mortgage definition in §1026.43(e)(2) that was in effect prior to the 2021 General QM Amendments and the qualified mortgage definition in §1026.43(e)(2) as amended by the 2021 General QM Amendments are available to creditors for transactions for which a creditor received an application on or after March 1, 2021 but prior to October 1, 2022. *See* comment 43–2 for an explanation of how creditors determine the date the creditor received the consumer's application for purposes of that comment.

Paragraph 43(e)(2)(i).

1. *Regular periodic payments.* Under §1026.43(e)(2)(i), a qualified mortgage must provide for regular periodic payments that may not result in an increase of the principal balance (negative amortization), deferral of principal repayment, or a balloon payment. Thus, the terms of the legal obligation must require the consumer to make payments of principal and interest, on a monthly or other periodic basis, that will fully repay the loan amount over the loan term. The periodic payments must be substantially equal except for the effect that any interest rate change after consummation has on the payment in the case of an adjustable-rate or step-rate mortgage. In addition, because §1026.43(e)(2)(i) requires that a qualified

mortgage provide for regular periodic payments, a single-payment transaction may not be a qualified mortgage.

2. *Deferral of principal repayment*. Under §1026.43(e)(2)(i)(B), a qualified mortgage's regular periodic payments may not allow the consumer to defer repayment of principal, except as provided in §1026.43(f). A loan allows the deferral of principal repayment if one or more of the periodic payments may be applied solely to accrued interest and not to loan principal. Deferred principal repayment also occurs if the payment is applied to both accrued interest and principal but the consumer is permitted to make periodic payments that are less than the amount that would be required under a payment schedule that has substantially equal payments that fully repay the loan amount over the loan term. Graduated payment mortgages, for example, allow deferral of principal repayment in this manner and therefore may not be qualified mortgages.

Paragraph 43(e)(2)(ii).

1. *General*. The 30-year term limitation in §1026.43(e)(2)(ii) is applied without regard to any interim period between consummation and the beginning of the first full unit period of the repayment schedule. For example, assume a covered transaction is consummated on March 20, 2014 and the due date of the first regular periodic payment is April 30, 2014. The beginning of the first full unit period of the repayment schedule is April 1, 2014 and the loan term therefore ends on April 1, 2044. The transaction would comply with the 30-year term limitation in §1026.43(e)(2)(ii).

Paragraph 43(e)(2)(iv).

1. *Maximum interest rate during the first five years*. For a qualified mortgage, the creditor must underwrite the loan using a periodic payment of principal and interest based on the maximum interest rate that may apply during the first five years after the date on which the first regular periodic payment will be due. Creditors must use the maximum rate that could apply at any time during the first five years after the date on which the first regular periodic payment will be due, regardless of whether the maximum rate is reached at the first or subsequent adjustment during the five year period.

2. *Fixed-rate mortgage*. For a fixed-rate mortgage, creditors should use the interest rate in effect at consummation. "Fixed-rate mortgage" is defined in §1026.18(s)(7)(iii).

3. *Interest rate adjustment caps*. For an adjustable-rate mortgage, creditors should assume the interest rate increases after consummation as rapidly as possible, taking into account the terms of the legal obligation. That is, creditors should account for any periodic interest rate adjustment cap that may limit how quickly the interest rate can increase under the terms of the legal obligation. Where a range for the maximum interest rate during the first five years is provided, the highest rate in that range is the maximum interest rate for purposes of §1026.43(e)(2)(iv). Where the terms of the legal obligation are not based on an index plus margin or formula, the creditor must use the maximum interest rate that occurs during the first five years after the date on which the first regular periodic payment will be due. To illustrate:

i. *Adjustable-rate mortgage with discount for three years*. Assume an adjustable-rate mortgage has an initial discounted rate of 5 percent that is fixed for the first three years, measured from the first day of the first full calendar month following consummation, after which the rate will adjust annually based on a specified index plus a margin of 3 percent. The index value in effect at consummation is 4.5 percent. The loan agreement provides for an annual interest rate adjustment cap of 2 percent, and a lifetime maximum interest rate of 12 percent. The first rate adjustment occurs on the due date of the 36th monthly payment; the rate can adjust to no more than 7 percent (5 percent initial discounted rate plus 2 percent annual interest rate adjustment cap). The second rate adjustment occurs on the due date of the 48th monthly payment; the rate can adjust to no more than 9 percent (7 percent rate plus 2 percent annual interest rate adjustment cap). The third rate adjustment occurs on the due date of the 60th monthly payment; the rate can adjust to no more than 11 percent (9 percent rate plus 2 percent annual interest rate cap adjustment). The maximum interest rate during the first five years after the date on which the first regular periodic payment will be due is 11 percent (the rate on the due date of the 60th monthly payment). For further discussion of how to determine whether a rate adjustment occurs during the first five years after the date on which the first regular periodic payment will be due, see comment 43(e)(2)(iv)–7.

ii. *Adjustable-rate mortgage with discount for three years*. Assume the same facts as in paragraph 3.i except that the lifetime maximum interest rate is 10 percent, which is less than the maximum interest rate in the first five years after the date on which the first regular periodic payment will be due of 11 percent that would apply but for the lifetime maximum interest rate. The maximum interest rate during the first five years after the date on which the first regular periodic payment will be due is 10 percent.

iii. *Step-rate mortgage*. Assume a step-rate mortgage with an interest rate fixed at 6.5 percent for the first two years, measured from the first day of the first full calendar month following consummation, 7 percent for the next three years, and then 7.5 percent for the remainder of the loan term. The maximum interest rate during the first five years after the date on which the first regular periodic payment will be due is 7.5 percent.

4. *First five years after the date on which the first regular periodic payment will be due.* Under §1026.43(e)(2)(iv)(A), the creditor must underwrite the loan using the maximum interest rate that may apply during the first five years after the date on which the first regular periodic payment will be due. To illustrate, assume an adjustable-rate mortgage with an initial fixed interest rate of 5 percent for the first five years, measured from the first day of the first full calendar month following consummation, after which the interest rate will adjust annually to the specified index plus a margin of 6 percent, subject to a 2 percent annual interest rate adjustment cap. The index value in effect at consummation is 5.5 percent. The loan consummates on September 15, 2014, and the first monthly payment is due on November 1, 2014. The first rate adjustment to no more than 7 percent (5 percent plus 2 percent annual interest rate adjustment cap) occurs on the due date of the 60th monthly payment, which is October 1, 2019, and therefore, the rate adjustment occurs during the first five years after the date on which the first regular periodic payment will be due. To meet the definition of qualified mortgage under §1026.43(e)(2), the creditor must underwrite the loan using a monthly payment of principal and interest based on an interest rate of 7 percent.

5. *Loan amount.* To meet the definition of qualified mortgage under §1026.43(e)(2), a creditor must determine the periodic payment of principal and interest using the maximum interest rate permitted during the first five years after the date on which the first regular periodic payment will be due that repays either:

i. The outstanding principal balance as of the earliest date the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due can take effect under the terms of the legal obligation, over the remaining term of the loan. To illustrate, assume a loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides for a discounted interest rate of 5 percent that is fixed for an initial period of three years, measured from the first day of the first full calendar month following consummation, after which the interest rate will adjust annually based on a specified index plus a margin of 3 percent, subject to a 2 percent annual interest rate adjustment cap and a lifetime maximum interest rate of 9 percent. The index value in effect at consummation equals 4.5 percent. Assuming the interest rate increases after consummation as quickly as possible, the rate adjustment to the lifetime maximum interest rate of 9 percent occurs on the due date of the 48th monthly payment. The outstanding principal balance on the loan at the end of the fourth year (after the 48th monthly payment is credited) is $188,218. The creditor will meet the definition of qualified mortgage if it underwrites the covered transaction using the monthly payment of principal and interest of $1,564 to repay the outstanding principal balance of $188,218 over the remaining 26 years of the loan term (312 months) using the maximum interest rate during the first five years of 9 percent; or

ii. The loan amount, as that term is defined in §1026.43(b)(5), over the entire loan term, as that term is defined in §1026.43(b)(6). Using the same example above, the creditor will meet the definition of qualified mortgage if it underwrites the covered transaction using the monthly payment of principal and interest of $1,609 to repay the loan amount of $200,000 over the 30-year loan term using the maximum interest rate during the first five years of 9 percent.

6. *Mortgage-related obligations.* Section 1026.43(e)(2)(iv) requires creditors to take the consumer's monthly payment for mortgage-related obligations into account when underwriting the loan. For the meaning of the term ''mortgage-related obligations,'' see §1026.43(b)(8) and associated commentary.

7. *Examples.* The following are examples of how to determine the periodic payment of principal and interest based on the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due for purposes of meeting the definition of qualified mortgage under §1026.43(e) (all payment amounts shown are rounded, and all amounts are calculated using non-rounded values; all initial fixed interest rate periods are measured from the first day of the first full calendar month following consummation):

i. *Fixed-rate mortgage.* A loan in an amount of $200,000 has a 30-year loan term and a fixed interest rate of 7 percent. The maximum interest rate during the first five years after the date on which the first regular periodic payment will be due for a fixed-rate mortgage is the interest rate in effect at consummation, which is 7 percent under this example. The monthly fully amortizing payment scheduled over the 30 years is $1,331. The creditor will meet the definition of qualified mortgage if it underwrites the loan using the fully amortizing payment of $1,331.

ii. *Adjustable-rate mortgage with discount for three years.* A. A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides for a discounted interest rate of 5 percent that is fixed for an initial period of three years, after which the interest rate will adjust annually based on a specified index plus a margin of 3 percent, subject to a 2 percent annual interest rate adjustment cap and a lifetime maximum interest rate of

9 percent. The index value in effect at consummation is 4.5 percent. The loan is consummated on March 15, 2014, and the first regular periodic payment is due May 1, 2014. The loan agreement provides that the first rate adjustment occurs on April 1, 2017 (the due date of the 36th monthly payment); the second rate adjustment occurs on April 1, 2018 (the due date of the 48th monthly payment); and the third rate adjustment occurs on April 1, 2019 (the due date of the 60th monthly payment). Under this example, the maximum interest rate during the first five years after the date on which the first regular periodic payment due is 9 percent (the lifetime interest rate cap), which applies beginning on April 1, 2018 (the due date of the 48th monthly payment). The outstanding principal balance at the end of the fourth year (after the 48th payment is credited) is $188,218.

B. The transaction will meet the definition of a qualified mortgage if the creditor underwrites the loan using the monthly payment of principal and interest of $1,564 to repay the outstanding principal balance at the end of the fourth year of $188,218 over the remaining 26 years of the loan term (312 months), using the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due of 9 percent. Alternatively, the transaction will meet the definition of a qualified mortgage if the creditor underwrites the loan using the monthly payment of principal and interest of $1,609 to repay the loan amount of $200,000 over the 30-year loan term, using the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due of 9 percent.

iii. *Adjustable-rate mortgage with discount for five years.* A. A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides for a discounted interest rate of 6 percent that is fixed for an initial period of five years, after which the interest rate will adjust annually based on a specified index plus a margin of 3 percent, subject to a 2 percent annual interest rate adjustment cap. The index value in effect at consummation is 4.5 percent. The loan consummates on March 15, 2014 and the first regular periodic payment is due May 1, 2014. Under the terms of the loan agreement, the first rate adjustment to no more than 8 percent (6 percent plus 2 percent annual interest rate adjustment cap) is on April 1, 2019 (the due date of the 60th monthly payment), which occurs less than five years after the date on which the first regular periodic payment will be due. Thus, the maximum interest rate under the terms of the loan during the first five years after the date on which the first regular periodic payment will be due is 8 percent.

B. The transaction will meet the definition of a qualified mortgage if the creditor underwrites the loan using the monthly payment of principal and interest of $1,436 to repay the outstanding principal balance at the end of the fifth year of $186,109 over the remaining 25 years of the loan term (300 months), using the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due of 8 percent. Alternatively, the transaction will meet the definition of a qualified mortgage if the creditor underwrites the loan using the monthly payment of principal and interest of $1,468 to repay the loan amount of $200,000 over the 30-year loan term, using the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due of 8 percent.

iv. *Adjustable-rate mortgage with discount for seven years.* A. A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides for a discounted interest rate of 6 percent that is fixed for an initial period of seven years, after which the interest rate will adjust annually based on a specified index plus a margin of 3 percent, subject to a 2 percent annual interest rate adjustment cap. The index value in effect at consummation is 4.5 percent. The loan is consummated on March 15, 2014, and the first regular periodic payment is due May 1, 2014. Under the terms of the loan agreement, the first rate adjustment is on April 1, 2021 (the due date of the 84th monthly payment), which occurs more than five years after the date on which the first regular periodic payment will be due. Thus, the maximum interest rate under the terms of the loan during the first five years after the date on which the first regular periodic payment will be due is 6 percent.

B. The transaction will meet the definition of a qualified mortgage if the creditor underwrites the loan using the monthly payment of principal and interest of $1,199 to repay the loan amount of $200,000 over the 30-year loan term using the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due of 6 percent.

iv. *Step-rate mortgage.* A. A loan in an amount of $200,000 has a 30-year loan term. The loan agreement provides that the interest rate is 6.5 percent for the first two years of the loan, 7 percent for the next three years, and then 7.5 percent for remainder of the loan term. The maximum interest rate during the first five years after the date on which the first regular periodic payment will be due is 7.5 percent, which occurs on the due date of the 60th monthly payment. The outstanding principal balance at the end of the fifth year (after the 60th payment is credited) is $187,868.

B. The transaction will meet the definition of a qualified mortgage if the creditor underwrites the loan using a monthly payment of principal and interest of $1,388 to repay the outstanding principal balance of $187,868 over the remaining 25 years of the loan term (300 months), using the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due of 7.5 percent. Alternatively, the transaction will meet the definition of a qualified mortgage if the creditor underwrites the loan using a monthly payment of principal and interest of $1,398 to repay $200,000 over the 30-year loan term using the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due of 7.5 percent.

Paragraph 43(e)(2)(v)

1. *General*. For guidance on satisfying §1026.43(e)(2)(v), a creditor may rely on commentary to §1026.43(c)(2)(i) and (vi), (c)(3), and (c)(4).

Paragraph 43(e)(2)(v)(A)

Consider. In order to comply with the requirement to consider under §1026.43(e)(2)(v)(A), a creditor must take into account current or reasonably expected income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan, debt obligations, alimony, child support, and monthly debt-to-income ratio or residual income in its ability-to-repay determination. A creditor must maintain written policies and procedures for how it takes into account, pursuant to its underwriting standards, income or assets, debt obligations, alimony, child support, and monthly debt-to-income ratio or residual income in its ability-to-repay determination. A creditor must also retain documentation showing how it took into account income or assets, debt obligations, alimony, child support, and monthly debt-to-income ratio or residual income in its ability-to-repay determination, including how it applied its policies and procedures, in order to meet this requirement to consider and thereby meet the requirements for a qualified mortgage under §1026.43(e)(2). This documentation may include, for example, an underwriter worksheet or a final automated underwriting system certification, in combination with the creditor's applicable underwriting standards and any applicable exceptions described in its policies and procedures, that shows how these required factors were taken into account in the creditor's ability-to-repay determination.

2. *Requirement to consider monthly debt-to-income ratio or residual income*. Section 1026.43(e)(2)(v)(A) does not prescribe specifically how a creditor must consider monthly debt-to-income ratio or residual income. Section 1026.43(e)(2)(v)(A) also does not prescribe a particular monthly debt-to-income ratio or residual income threshold with which a creditor must comply. A creditor may, for example, consider monthly debt-to-income ratio or residual income by establishing monthly debt-to-income or residual income thresholds for its own underwriting standards and documenting how it applied those thresholds to determine the consumer's ability to repay. A creditor may also consider these factors by establishing monthly debt-to-income or residual income thresholds and exceptions to those thresholds based on other compensating factors, and documenting application of the thresholds along with any applicable exceptions.

3. *Flexibility to consider additional factors related to a consumer's ability to repay*. The requirement to consider income or assets, debt obligations, alimony, child support, and monthly debt-to-income ratio or residual income does not preclude the creditor from taking into account additional factors that are relevant in determining a consumer's ability to repay the loan. For guidance on considering additional factors in determining the consumer's ability to repay, see comment 43(c)(7)–3.

Paragraph 43(e)(2)(v)(B)

1. *Verification of income, assets, debt obligations, alimony, and child support*. Section 1026.43(e)(2)(v)(B) does not prescribe specific methods of underwriting that creditors must use. Section 1026.43(e)(2)(v)(B)(*1*) requires a creditor to verify the consumer's current or reasonably expected income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan in accordance with §1026.43(c)(4), which states that a creditor must verify such amounts using third-party records that provide reasonably reliable evidence of the consumer's income or assets. Section 1026.43(e)(2)(v)(B)(*2*) requires a creditor to verify the consumer's current debt obligations, alimony, and child support in accordance with §1026.43(c)(3), which states that a creditor must verify such amounts using reasonably reliable third-party records. So long as a creditor complies with the provisions of §1026.43(c)(3) with respect to debt obligations, alimony, and child support and §1026.43(c)(4) with respect to income and assets, the creditor is permitted to use any reasonable verification methods and criteria.

2. *Classifying and counting income, assets, debt obligations, alimony, and child support*. ''Current and reasonably expected income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan'' is determined in accordance with §1026.43(c)(2)(i) and

its commentary. ''Current debt obligations, alimony, and child support'' has the same meaning as under §1026.43(c)(2)(vi) and its commentary. Section 1026.43(c)(2)(i) and (vi) and the associated commentary apply to a creditor's determination with respect to what inflows and property it may classify and count as income or assets and what obligations it must classify and count as debt obligations, alimony, and child support, pursuant to its compliance with §1026.43(e)(2)(v)(B).

3. *Safe harbor for compliance with specified external standards.*

i. Meeting the standards in the following manuals for verifying current or reasonably expected income or assets using third-party records provides a creditor with reasonably reliable evidence of the consumer's income or assets. Meeting the standards in the following manuals for verifying current debt obligations, alimony, and child support using third-party records provides a creditor with reasonably reliable evidence of the consumer's debt obligations, alimony, and child support obligations. Accordingly, a creditor complies with §1026.43(e)(2)(v)(B) if it complies with verification standards in one or more of the following manuals:

A. Chapters B3–3 through B3–6 of the Fannie Mae Single Family Selling Guide, published June 3, 2020;

B. Sections 5102 through 5500 of the Freddie Mac Single-Family Seller/Servicer Guide, published June 10, 2020;

C. Sections II.A.1 and II.A.4–5 of the Federal Housing Administration's Single Family Housing Policy Handbook, issued October 24, 2019;

D. Chapter 4 of the U.S. Department of Veterans Affairs' Lenders Handbook, revised February 22, 2019;

E. Chapter 4 of the U.S. Department of Agriculture's Field Office Handbook for the Direct Single Family Housing Program, revised March 15, 2019; and

F. Chapters 9 through 11 of the U.S. Department of Agriculture's Handbook for the Single Family Guaranteed Loan Program, revised March 19, 2020.

ii. *Applicable provisions in manuals.* A creditor complies with §1026.43(e)(2)(v)(B) if it complies with requirements in the manuals listed in comment 43(e)(2)(v)(B)–3 for creditors to verify income, assets, debt obligations, alimony and child support using specified reasonably reliable third-party documents or to include or exclude particular inflows, property, and obligations as income, assets, debt obligations, alimony, and child support.

iii. *Inapplicable provisions in manuals.* For purposes of compliance with §1026.43(e)(2)(v)(B), a creditor need not comply with requirements in the manuals listed in comment 43(e)(2)(v)(B)–3 other than those that require creditors to verify income, assets, debt obligations, alimony and child support using specified documents or to classify and count particular inflows, property, and obligations as income, assets, debt obligations, alimony, and child support.

iv. *Revised versions of manuals.* A creditor also complies with §1026.43(e)(2)(v)(B) where it complies with revised versions of the manuals listed in comment 43(e)(2)(v)(B)–3.i, provided that the two versions are substantially similar.

v. *Use of standards from more than one manual.* A creditor complies with §1026.43(e)(2)(v)(B) if it complies with the verification standards in one or more of the manuals specified in comment 43(e)(2)(v)(B)–3.i. Accordingly, a creditor may, but need not, comply with §1026.43(e)(2)(v)(B) by complying with the verification standards from more than one manual (in other words, by ''mixing and matching'' verification standards).

Paragraph 43(e)(2)(vi).

1. *Determining the average prime offer rate for a comparable transaction as of the date the interest rate is set.* For guidance on determining the average prime offer rate for a comparable transaction as of the date the interest rate is set, see comments 43(b)(4)–1 through –3.

2. *Determination of applicable threshold.* A creditor must determine the applicable threshold by determining which category the loan falls into based on the face amount of the note (the ''loan amount'' as defined in §1026.43(b)(5)). For example, for a first-lien covered transaction with a loan amount of $75,000, the loan would fall into the tier for loans greater than or equal to $66,156 (indexed for inflation) but less than $110,260 (indexed for inflation), for which the applicable threshold is 3.5 or more percentage points.

3. *Annual adjustment for inflation.* The dollar amounts in §1026.43(e)(2)(vi) will be adjusted annually on January 1 by the annual percentage change in the CPI–U that was in effect on the preceding June 1. The Bureau will publish adjustments after the June figures become available each year.

i. For 2022, reflecting a 4.2 percent increase in the CPI–U that was reported on the preceding June 1, to satisfy §1026.43(e)(2)(vi), the annual percentage rate may not exceed the average prime offer rate for a comparable transaction as of the date the interest rate is set by the following amounts:

A. For a first-lien covered transaction with a loan amount greater than or equal to $114,847, 2.25 or more percentage points;

B. For a first-lien covered transaction with a loan amount greater than or equal to $68,908 but less than $114,847, 3.5 or more percentage points;

C. For a first-lien covered transaction with a loan amount less than $68,908, 6.5 or more percentage points;

D. For a first-lien covered transaction secured by a manufactured home with a loan amount less than $114,847, 6.5 or more percentage points;

E. For a subordinate-lien covered transaction with a loan amount greater than or equal to $68,908, 3.5 or more percentage points;

F. For a subordinate-lien covered transaction with a loan amount less than $68,908, 6.5 or more percentage points.

ii. For 2023, reflecting an 8.3 percent increase in the CPI–U that was reported on the preceding June 1, to satisfy §1026.43(e)(2)(vi), the annual percentage rate may not exceed the average prime offer rate for a comparable transaction as of the date the interest rate is set by the following amounts:

A. For a first-lien covered transaction with a loan amount greater than or equal to $124,331, 2.25 or more percentage points;

B. For a first-lien covered transaction with a loan amount greater than or equal to $74,599 but less than $124,331, 3.5 or more percentage points;

C. For a first-lien covered transaction with a loan amount less than $74,599, 6.5 or more percentage points;

D. For a first-lien covered transaction secured by a manufactured home with a loan amount less than $124,331, 6.5 or more percentage points;

E. For a subordinate-lien covered transaction with a loan amount greater than or equal to $74,599, 3.5 or more percentage points;

F. For a subordinate-lien covered transaction with a loan amount less than $74,599, 6.5 or more percentage points.

iii. For 2024, reflecting a 4.9 percent increase in the CPI–U that was reported on the preceding June 1, to satisfy §1026.43(e)(2)(vi), the annual percentage rate may not exceed the average prime offer rate for a comparable transaction as of the date the interest rate is set by the following amounts:

A. For a first-lien covered transaction with a loan amount greater than or equal to $130,461, 2.25 or more percentage points;

B. For a first-lien covered transaction with a loan amount greater than or equal to $78,277 but less than $130,461, 3.5 or more percentage points;

C. For a first-lien covered transaction with a loan amount less than $78,277, 6.5 or more percentage points;

D. For a first-lien covered transaction secured by a manufactured home with a loan amount less than $130,461, 6.5 or more percentage points;

E. For a subordinate-lien covered transaction with a loan amount greater than or equal to $78,277, 3.5 or more percentage points;

F. For a subordinate-lien covered transaction with a loan amount less than $78,277, 6.5 or more percentage points.

4. *Determining the annual percentage rate for certain loans for which the interest rate may or will change.*

i. *In general.* The commentary to §1026.17(c)(1) and other provisions in subpart C address how to determine the annual percentage rate disclosures for closed-end credit transactions. Provisions in §1026.32(a)(3) address how to determine the annual percentage rate to determine coverage under §1026.32(a)(1)(i). Section 1026.43(e)(2)(vi) requires, for the purposes of §1026.43(e)(2)(vi), a different determination of the annual percentage rate for a qualified mortgage under §1026.43(e)(2) for which the interest rate may or will change within the first five years after the date on which the first regular periodic payment will be due. An identical special rule for determining the annual percentage rate for such a loan also applies for purposes of §1026.43(b)(4).

ii. *Loans for which the interest rate may or will change.* Section 1026.43(e)(2)(vi) includes a special rule for determining the annual percentage rate for a loan for which the interest rate may or will change within the first five years after the date on which the first regular periodic payment will be due. This rule applies to adjustable-rate mortgages that have a fixed-rate period of five years or less and to step-rate mortgages for which the interest rate changes within that five-year period.

iii. *Maximum interest rate during the first five years.* For a loan for which the interest rate may or will change within the first five years after the date on which the first regular periodic payment will be due, a creditor must treat the maximum interest rate that could apply at any time during that five-year period as the interest rate for the full term of the loan to determine the annual percentage rate for purposes of §1026.43(e)(2)(vi), regardless of whether the maximum interest rate is reached at the first or subsequent adjustment during the five-year period. For additional instruction on how to determine the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due, see comments 43(e)(2)(iv)–3 and –4.

iv. *Treatment of the maximum interest rate in determining the annual percentage rate.* For a loan for which the interest rate may or will change within the first five years after the date on which the first regular periodic payment will be due, the creditor must determine the annual percentage rate for purposes of §1026.43(e)(2)(vi) by treating the maximum interest rate that may apply within the first five years as the interest rate for the full term of the loan. For example, assume an adjustable-rate mortgage with a loan term of 30 years and an initial discounted rate of 5.0 percent that is fixed for the first three years.

Assume that the maximum interest rate during the first five years after the date on which the first regular periodic payment will be due is 7.0 percent. Pursuant to §1026.43(e)(2)(vi), the creditor must determine the annual percentage rate based on an interest rate of 7.0 percent applied for the full 30-year loan term.

5. *Meaning of a manufactured home.* For purposes of §1026.43(e)(2)(vi)(D), manufactured home means any residential structure as defined under regulations of the U.S. Department of Housing and Urban Development (HUD) establishing manufactured home construction and safety standards (24 CFR 3280.2). Modular or other factory-built homes that do not meet the HUD code standards are not manufactured homes for purposes of §1026.43(e)(2)(vi)(D).

6. *Scope of threshold for transactions secured by a manufactured home.* The threshold in §1026.43(e)(2)(vi)(D) applies to first-lien covered transactions less than $110,260 (indexed for inflation) that are secured by a manufactured home and land, or by a manufactured home only.

43(e)(3) Limits on points and fees for qualified mortgages.

Paragraph 43(e)(3)(i).

1. *Total loan amount.* The term ''total loan amount'' is defined in §1026.32(b)(4)(i). For an explanation of how to calculate the ''total loan amount'' under §1026.43(e)(3)(i), see comment 32(b)(4)(i)–1.

2. *Calculation of allowable points and fees.* A creditor must determine which category the loan falls into based on the face amount of the note (the ''loan amount'' as defined in §1026.43(b)(5)). For categories with a percentage limit, the creditor must apply the allowable points and fees percentage to the ''total loan amount,'' which may be different than the loan amount. A creditor must calculate the allowable amount of points and fees for a qualified mortgage as follows:

i. First, the creditor must determine the ''tier'' into which the loan falls based on the loan amount. The loan amount is the principal amount the consumer will borrow, as reflected in the promissory note or loan contract. *See* §1026.43(b)(5). For example, if the loan amount is $55,000, the loan falls into the tier for loans greater than or equal to $20,000 but less than $60,000, to which a 5 percent cap on points and fees applies. For tiers with a prescribed dollar limit on points and fees (*e.g.*, for loans from $60,000 up to $100,000, the limit is $3,000), the creditor does not need to do any further calculations.

ii. Second, for tiers with a percentage limit, the creditor must determine the total loan amount based on the calculation for the total loan amount under comment 32(b)(4)(i)–1. If the loan amount is $55,000, for example, the total loan amount may be a different amount, such as $52,000.

iii. Third, the creditor must apply the percentage cap on points and fees to the total loan amount. For example, for a loan of $55,000 where the total loan amount is $52,000, the allowable points and fees are 5 percent of $52,000, or $2,600.

3. *Sample determination of allowable points and fees.*

i. A covered transaction with a loan amount of $105,000 falls into the first points and fees tier, to which a points and fees cap of 3 percent of the total loan amount applies. *See* §1026.43(e)(3)(i)(A). Therefore, if the calculation under comment 32(b)(4)(i)–1 results in a total loan amount of $102,000, then the allowable total points and fees for this loan are 3 percent of $102,000, or $3,060.

ii. A covered transaction with a loan amount of $75,000 falls into the second points and fees tier, to which a points and fees cap of $3,000 applies. *See* §1026.43(e)(3)(i)(B). The allowable total points and fees for this loan are $3,000, regardless of the total loan amount.

iii. A covered transaction with a loan amount of $50,000 falls into the third points and fees tier, to which a points and fees cap of 5 percent of the total loan amount applies. *See* §1026.43(e)(3)(i)(C). Therefore, if the calculation under comment 32(b)(4)(i)–1 results in a total loan amount of $48,000, then the allowable total points and fees for this loan are 5 percent of $48,000, or $2,400.

iv. A covered transaction with a loan amount of $15,000 falls into the fourth points and fees tier, to which a points and fees cap of $1,000 applies. *See* §1026.43(e)(3)(i)(D). The allowable total points and fees for this loan are $1,000, regardless of the total loan amount.

v. A covered transaction with a loan amount of $10,000 falls into the fifth points and fees tier, to which a points and fees cap of 8 percent of the total loan amount applies. *See* §1026.43(e)(3)(i)(E). Therefore, if the calculation under comment 32(b)(4)(i)–1 results in a total loan amount of $7,000, then the allowable total points and fees for this loan are 8 percent of $7,000, or $560.

Paragraph 43(e)(3)(ii).

1. *Annual adjustment for inflation.* The dollar amounts, including the loan amounts, in §1026.43(e)(3)(i) will be adjusted annually on January 1 by the annual percentage change in the CPI–U that was in effect on the preceding June 1. The Bureau will publish adjustments after the June figures become available each year.

i. For 2015, reflecting a 2 percent increase in the CPI–U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transactions total points and fees do not exceed;

A. For a loan amount greater than or equal to $101,953: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to $61,172 but less than $101,953: $3,059;

C. For a loan amount greater than or equal to $20,391 but less than $61,172: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to $12,744 but less than $20,391; $1,020;

E. For a loan amount less than $12,744: 8 percent of the total loan amount.

ii. For 2016, reflecting a 0.2 percent decrease in the CPI–U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transactions total points and fees do not exceed;

A. For a loan amount greater than or equal to $101,749: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to $61,050 but less than $101,749: $3,052;

C. For a loan amount greater than or equal to $20,350 but less than $61,050: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to $12,719 but less than $20,350; $1,017;

E. For a loan amount less than $12,719: 8 percent of the total loan amount.

iii. For 2017, reflecting a 1.1 percent increase in the CPI–U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transactions total points and fees do not exceed:

A. For a loan amount greater than or equal to $102,894: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to $61,737 but less than $102,894: $3,087;

C. For a loan amount greater than or equal to $20,579 but less than $61,737: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to $12,862 but less than $20,579: $1,029;

E. For a loan amount less than $12,862: 8 percent of the total loan amount.

iv. For 2018, reflecting a 2.2 percent increase in the CPI–U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transaction's total points and fees do not exceed:

A. For a loan amount greater than or equal to $105,158: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to $63,095 but less than $105,158: $3,155;

C. For a loan amount greater than or equal to $21,032 but less than $63,095: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to $13,145 but less than $21,032: $1,052;

E. For a loan amount less than $13,145: 8 percent of the total loan amount.

v. For 2019, reflecting a 2.5 percent increase in the CPI–U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transaction's total points and fees do not exceed:

A. For a loan amount greater than or equal to $107,747: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to $64,648 but less than $107,747: $3,232;

C. For a loan amount greater than or equal to $21,549 but less than $64,648: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to $13,468 but less than $21,549: $1,077;

E. For a loan amount less than $13,468: 8 percent of the total loan amount.

vi. For 2020, reflecting a 2 percent increase in the CPI–U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transaction's total points and fees do not exceed:

A. For a loan amount greater than or equal to $109,898: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to $65,939 but less than $109,898: $3,297;

C. For a loan amount greater than or equal to $21,980 but less than $65,939: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to $13,737 but less than $21,980: $1,099;

E. For a loan amount less than $13,737: 8 percent of the total loan amount.

vii. For 2021, reflecting a 0.3 percent increase in the CPI–U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transaction's total points and fees do not exceed:

A. For a loan amount greater than or equal to $110,260: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to $66,156 but less than $110,260: $3,308;

C. For a loan amount greater than or equal to $22,052 but less than $66,156: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to $13,783 but less than $22,052: $1,103;

E. For a loan amount less than $13,783: 8 percent of the total loan amount.

viii. For 2022, reflecting a 4.2 percent increase in the CPI–U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transaction's total points and fees do not exceed:

A. For a loan amount greater than or equal to $114,847: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to $68,908 but less than $114,847: $3,445;

C. For a loan amount greater than or equal to $22,969 but less than $68,908: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to $14,356 but less than $22,969: $1,148;

E. For a loan amount less than $14,356: 8 percent of the total loan amount.

ix. For 2023, reflecting an 8.3 percent increase in the CPI–U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transaction's total points and fees do not exceed:

A. For a loan amount greater than or equal to $124,331: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to $74,599 but less than $124,331: $3,730;

C. For a loan amount greater than or equal to $24,866 but less than $74,599: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to $15,541 but less than $24,866: $1,243;

E. For a loan amount less than $15,541: 8 percent of the total loan amount.

x. For 2024, reflecting a 4.9 percent increase in the CPI–U that was reported on the preceding June 1, a covered transaction is not a qualified mortgage unless the transaction's total points and fees do not exceed:

A. For a loan amount greater than or equal to $130,461: 3 percent of the total loan amount;

B. For a loan amount greater than or equal to $78,277 but less than $130,461: $3,914;

C. For a loan amount greater than or equal to $26,092 but less than $78,277: 5 percent of the total loan amount;

D. For a loan amount greater than or equal to $16,308 but less than $26,092: $1,305;

E. For a loan amount less than $16,308: 8 percent of the total loan amount.

Paragraph 43(e)(3)(iv).

1. *Interest rate.* For purposes of §1026.43(e)(3)(iv)(B), interest is calculated using the contract interest rate applicable during the period from consummation until the payment described in §1026.43(e)(3)(iv) is made to the consumer. In an adjustable-rate or step-rate transaction in which more than one interest rate applies during the period from consummation until payment is made to the consumer, the minimum payment amount is determined by calculating interest on the dollar amount described in §1026.43(e)(3)(iv)(A) at each such interest rate for the part of the overall period during which that rate applies. However, §1026.43(e)(3)(iv) provides that, for purposes of §1026.43(e)(3)(iii), the creditor or assignee can pay to the consumer an amount that exceeds the sum of the amounts described in §1026.43(e)(3)(iv)(A) and (B). Therefore, a creditor or assignee may, for example, elect to calculate interest using the maximum interest rate that may apply during the period from consummation until payment is made to the consumer. See comment 43(e)(3)(iii)–1 for guidance on making payments to the consumer.

2. *Relationship to RESPA tolerance cure.* Under Regulation X (12 CFR 1024.7(i)), if any charges at settlement exceed the charges listed on the good faith estimate of settlement costs by more than the amounts permitted under 12 CFR 1024.7(e), the loan originator may cure the tolerance violation by reimbursing the amount by which the tolerance was exceeded at settlement or within 30 calendar days after settlement. Similarly, under §1026.19(f)(2)(v), if amounts paid by the consumer exceed the amounts specified under §1026.19(e)(3)(i) or (ii), the creditor complies with §1026.19(e)(1)(i) if the creditor refunds the excess to the consumer no later than 60 days after consummation. The amount paid to the consumer pursuant to §1026.43(e)(3)(iv) may be offset by the amount paid to the consumer pursuant to 12 CFR 1024.7(i) or §1026.19(f)(2)(v), to the extent that the amount paid to the consumer pursuant to 12 CFR 1024.7(i) or §1026.19(f)(2)(v) is being applied to fees or charges included in points and fees pursuant to §1026.32(b)(1). However, a creditor or assignee has not satisfied §1026.43(e)(3)(iii) unless the total amount described in §1026.43(e)(3)(iv), including any offset due to a payment made pursuant to 12 CFR 1024.7(i) or §1026.19(f)(2)(v), is paid to the consumer within 210 days after consummation and prior to the occurrence of any of the events in §1026.43(e)(3)(iii)(B)(*1*) through (*3*).

43(e)(4) Qualified mortgage defined—other agencies.

1. *General.* The Department of Housing and Urban Development, Department of Veterans Affairs, and the Department of Agriculture have promulgated definitions for qualified mortgages under mortgage programs they insure, guarantee, or provide under applicable law. Cross-references to those definitions are listed in §1026.43(e)(4) to acknowledge the covered transactions covered by those definitions are qualified mortgages for purposes of this section.

2. *Mortgages for which the creditor received the consumer's application prior to October 1, 2022.* Covered transactions that met the requirements of §1026.43(e)(2)(i) through (iii), were eligible for purchase or guarantee by the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac) (or any limited-life regulatory entity succeeding the charter of either) operating under the conservatorship or receivership of the Federal Housing Finance Agency pursuant to section 1367 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617), and for which the creditor received the consumer's application prior to the mandatory compliance date of October 1, 2022, continue to be qualified mortgages for the purposes of this section, including those covered transactions that were consummated on or after October 1, 2022.

3. *Mortgages for which the creditor received the consumer's application on or after March 1, 2021 but prior to October 1, 2022.* For a discussion of the optional early compliance period for the 2021 General QM Amendments, please see comment 43–2.

4. [Reserved].

5. [Reserved].

Paragraph 43(e)(5)

1. *Satisfaction of qualified mortgage requirements.* For a covered transaction to be a qualified mortgage under §1026.43(e)(5), the mortgage must satisfy the requirements for a qualified mortgage under §1026.43(e)(2), other than the requirements in §1026.43(e)(2)(v) and (vi). For example, a qualified mortgage under §1026.43(e)(5) may not have a loan term in excess of 30 years because longer terms are prohibited for qualified mortgages under §1026.43(e)(2)(ii). Similarly, a qualified mortgage under §1026.43(e)(5) may not result in a balloon payment because §1026.43(e)(2)(i)(C) provides that qualified mortgages may not have balloon payments except as provided under §1026.43(f). However, a covered transaction need not comply with §1026.43(e)(2)(v) and (vi).

2. *Debt-to-income ratio or residual income.* Section 1026.43(e)(5) does not prescribe a specific monthly debt-to-income ratio with which creditors must comply. Instead, creditors must consider a consumer's debt-to-income ratio or residual income calculated generally in accordance with §1026.43(c)(7) and verify the information used to calculate the debt-to-income ratio or residual income in accordance with §1026.43(c)(3) and (4). However, §1026.43(c)(7) refers creditors to §1026.43(c)(5) for instructions on calculating the payment on the covered transaction. Section 1026.43(c)(5) requires creditors to calculate the payment differently than §1026.43(e)(2)(iv). For purposes of the qualified mortgage definition in §1026.43(e)(5), creditors must base their calculation of the consumer's debt-to-income ratio or residual income on the payment on the covered transaction calculated according to §1026.43(e)(2)(iv) instead of according to §1026.43(c)(5).

3. *Forward commitments.* A creditor may make a mortgage loan that will be transferred or sold to a purchaser pursuant to an agreement that has been entered into at or before the time the transaction is consummated. Such an agreement is sometimes known as a ''forward commitment.'' A mortgage that will be acquired by a purchaser pursuant to a forward commitment does not satisfy the requirements of §1026.43(e)(5), whether the forward commitment provides for the purchase and sale of the specific transaction or for the purchase and sale of transactions with certain prescribed criteria that the transaction meets. However, a forward commitment to another person that also meets the requirements of §1026.43(e)(5)(i)(D) is permitted. For example, assume a creditor that is eligible to make qualified mortgages under §1026.43(e)(5) makes a mortgage. If that mortgage meets the purchase criteria of an investor with which the creditor has an agreement to sell loans after consummation, then the loan does not meet the definition of a qualified mortgage under §1026.43(e)(5). However, if the investor meets the requirements of §1026.43(e)(5)(i)(D), the mortgage will be a qualified mortgage if all other applicable criteria also are satisfied.

4. *Creditor qualifications.* To be eligible to make qualified mortgages under §1026.43(e)(5), a creditor must satisfy the requirements stated in §1026.35(b)(2)(iii)(B) and (C). Section 1026.35(b)(2)(iii)(B) requires that, during the preceding calendar year, or, if the application for the transaction was received before April 1 of the current calendar year, during either of the two preceding calendar years, the creditor and its affiliates together extended no more than 2,000 covered transactions, as defined by §1026.43(b)(1), secured by first liens, that were sold, assigned, or otherwise transferred to another person, or that were subject at the time of consummation to a commitment to be acquired by another person. Section 1026.35(b)(2)(iii)(C) requires that, as of the preceding December 31st, or, if the application for the transaction was received before April 1 of the current calendar year, as of either of the two preceding December 31sts, the creditor and its affiliates that regularly extended, during the applicable period, covered transactions, as defined by §1026.43(b)(1), secured by first liens, together, had total assets of less than $2 billion, adjusted annually by the Bureau for inflation.

5. *Requirement to hold in portfolio.* Creditors generally must hold a loan in portfolio to maintain the transaction's status as a qualified mortgage under §1026.43(e)(5), subject to four exceptions. Unless one of these exceptions applies, a loan is no longer a qualified mortgage under §1026.43(e)(5) once legal title to the debt obligation is sold, assigned, or otherwise transferred to another person. Accordingly, unless one of the exceptions applies, the transferee could not benefit from the presumption of compliance for qualified mortgages under §1026.43(e)(1) unless the loan also met the requirements of another qualified mortgage definition.

6. *Application to subsequent transferees.* The exceptions contained in §1026.43(e)(5)(ii) apply not only to an initial sale, assignment, or other transfer by the originating creditor but to subsequent sales, assignments, and other transfers as well. For example, assume Creditor A originates a qualified mortgage under §1026.43(e)(5). Six months after consummation, Creditor A sells the qualified mortgage to Creditor B pursuant to §1026.43(e)(5)(ii)(B) and the loan retains its qualified mortgage status because Creditor B complies with the limits on asset size and number of transactions. If Creditor B sells the qualified mortgage, it will lose its qualified mortgage status under §1026.43(e)(5) unless the sale qualifies for one of the

§1026.43(e)(5)(ii) exceptions for sales three or more years after consummation, to another qualifying institution, as required by supervisory action, or pursuant to a merger or acquisition.

7. *Transfer three years after consummation.* Under §1026.43(e)(5)(ii)(A), if a qualified mortgage under §1026.43(e)(5) is sold, assigned, or otherwise transferred three years or more after consummation, the loan retains its status as a qualified mortgage under §1026.43(e)(5) following the transfer. The transferee need not be eligible to originate qualified mortgages under §1026.43(e)(5). The loan will continue to be a qualified mortgage throughout its life, and the transferee, and any subsequent transferees, may invoke the presumption of compliance for qualified mortgages under §1026.43(e)(1).

8. *Transfer to another qualifying creditor.* Under §1026.43(e)(5)(ii)(B), a qualified mortgage under §1026.43(e)(5) may be sold, assigned, or otherwise transferred at any time to another creditor that meets the requirements of §1026.43(e)(5)(i)(D). That section requires that a creditor together with all its affiliates, extended no more than 2,000 first-lien covered transactions that were sold, assigned, or otherwise transferred by the creditor or its affiliates to another person, or that were subject at the time of consummation to a commitment to be acquired by another person; and have, together with its affiliates that regularly extended covered transactions secured by first liens, total assets less than $2 billion (as adjusted for inflation). These tests are assessed based on transactions and assets from the calendar year preceding the current calendar year or from either of the two calendar years preceding the current calendar year if the application for the transaction was received before April 1 of the current calendar year. A qualified mortgage under §1026.43(e)(5) transferred to a creditor that meets these criteria would retain its qualified mortgage status even if it is transferred less than three years after consummation.

9. *Supervisory sales.* Section 1026.43(e)(5)(ii)(C) facilitates sales that are deemed necessary by supervisory agencies to revive troubled creditors and resolve failed creditors. A qualified mortgage under §1026.43(e)(5) retains its qualified mortgage status if it is sold, assigned, or otherwise transferred to another person pursuant to: A capital restoration plan or other action under 12 U.S.C. 1831o; the actions or instructions of any person acting as conservator, receiver or bankruptcy trustee; an order of a State or Federal government agency with jurisdiction to examine the creditor pursuant to State or Federal law; or an agreement between the creditor and such an agency. A qualified mortgage under §1026.43(e)(5) that is sold, assigned, or otherwise transferred under these circumstances retains its qualified mortgage status regardless of how long after consummation it is sold and regardless of the size or other characteristics of the transferee. Section 1026.43(e)(5)(ii)(C) does not apply to transfers done to comply with a generally applicable regulation with future effect designed to implement, interpret, or prescribe law or policy in the absence of a specific order by or a specific agreement with a governmental agency described in §1026.43(e)(5)(ii)(C) directing the sale of one or more qualified mortgages under §1026.43(e)(5) held by the creditor or one of the other circumstances listed in §1026.43(e)(5)(ii)(C). For example, a qualified mortgage under §1026.43(e)(5) that is sold pursuant to a capital restoration plan under 12 U.S.C. 1831o would retain its status as a qualified mortgage following the sale. However, if the creditor simply chose to sell the same qualified mortgage as one way to comply with general regulatory capital requirements in the absence of supervisory action or agreement it would lose its status as a qualified mortgage following the sale unless it qualifies under another definition of qualified mortgage.

10. *Mergers and acquisitions.* A qualified mortgage under §1026.43(e)(5) retains its qualified mortgage status if a creditor merges with, is acquired by, or acquires another person regardless of whether the creditor or its successor is eligible to originate new qualified mortgages under §1026.43(e)(5) after the merger or acquisition. However, the creditor or its successor can originate new qualified mortgages under §1026.43(e)(5) only if it complies with all of the requirements of §1026.43(e)(5) after the merger or acquisition. For example, assume a creditor that originates 250 covered transactions each year and originates qualified mortgages under §1026.43(e)(5) is acquired by a larger creditor that originates 10,000 covered transactions each year. Following the acquisition, the small creditor would no longer be able to originate §1026.43(e)(5) qualified mortgages because, together with its affiliates, it would originate more than 500 covered transactions each year. However, the §1026.43(e)(5) qualified mortgages originated by the small creditor before the acquisition would retain their qualified mortgage status.

43(e)(7) Seasoned loans.

Paragraph 43(e)(7)(i)(A)

1. *Fixed-rate mortgage.* Section 1026.43(e)(7)(i)(A) provides that, for a covered transaction to become a qualified mortgage under §1026.43(e)(7), the covered transaction must be a fixed-rate mortgage, as defined in §1026.18(s)(7)(iii). Under §1026.18(s)(7)(iii), the term ''fixed-rate mortgage'' means a transaction secured by real property or a dwelling that is not an adjustable-rate mortgage or a

step-rate mortgage. Thus, a covered transaction that is an adjustable-rate mortgage or step-rate mortgage is not eligible to become a qualified mortgage under §1026.43(e)(7).

2. *Fully amortizing payments.* Section 1026.43(e)(7)(i)(A) provides that for a covered transaction to become a qualified mortgage as a seasoned loan under §1026.43(e)(7), a mortgage must meet certain product requirements and be a fixed-rate mortgage with fully amortizing payments. Only loans for which the scheduled periodic payments do not require a balloon payment, as defined in §1026.18(s), to fully amortize the loan within the loan term can become seasoned loans for the purposes of §1026.43(e)(7). However, §1026.43(e)(7)(i)(A) does not prohibit a qualifying change as defined in §1026.43(e)(7)(iv)(B) that is entered into during or after a temporary payment accommodation in connection with a disaster or pandemic-related national emergency, even if such a qualifying change involves a balloon payment or lengthened loan term.

Paragraph 43(e)(7)(iii)

1. *Requirement to hold in portfolio.* For a covered transaction to become a qualified mortgage under §1026.43(e)(7), a creditor generally must hold the transaction in portfolio until the end of the seasoning period, subject to the exceptions set forth in §1026.43(e)(7)(iii)(B)(*1*) through (*3*). Unless one of these exceptions applies, a covered transaction cannot become a qualified mortgage as a seasoned loan under §1026.43(e)(7) if legal title to the debt obligation is sold, assigned, or otherwise transferred to another person before the end of the seasoning period.

2. *Application to subsequent transferees.* The exception contained in §1026.43(e)(7)(iii)(B)*(3)* may be used only one time for a covered transaction. The exceptions contained in §1026.43(e)(7)(iii)(B)(*1*) and (*2*) apply not only to an initial sale, assignment, or other transfer by the originating creditor but to subsequent sales, assignments, and other transfers as well. For example, assume Creditor A originates a covered transaction that is not a qualified mortgage at origination. Six months after consummation, the covered transaction is transferred to Creditor B pursuant to §1026.43(e)(7)(iii)(B)(*3*). The transfer does not fail to comply with the requirements in §1026.43(e)(7)(iii) because the loan is not securitized as part of the transfer or at any other time before the end of the seasoning period. If Creditor B sells the covered transaction before the end of the seasoning period, the covered transaction is not eligible to season into a qualified mortgage under §1026.43(e)(7) unless the sale falls within an exception set forth in §1026.43(e)(7)(iii)(B)(*1*) or (*2*) (*i.e.*, the transfer is required by supervisory action or pursuant to a merger or acquisition).

3. *Supervisory sales.* Section 1026.43(e)(7)(iii)(B)(*1*) facilitates sales that are deemed necessary by supervisory agencies to revive troubled creditors and resolve failed creditors. A covered transaction does not violate the requirements in §1026.43(e)(7)(iii) if it is sold, assigned, or otherwise transferred to another person before the end of the seasoning period pursuant to: A capital restoration plan or other action under 12 U.S.C. 1831o; the actions or instructions of any person acting as conservator, receiver or bankruptcy trustee; an order of a State or Federal government agency with jurisdiction to examine the creditor pursuant to State or Federal law; or an agreement between the creditor and such an agency. Section 1026.43(e)(7)(iii)(B)(*1*) does not apply to transfers done to comply with a generally applicable regulation with future effect designed to implement, interpret, or prescribe law or policy in the absence of a specific order by or a specific agreement with a governmental agency described in §1026.43(e)(7)(iii)(B)(*1*) directing the sale of one or more covered transactions held by the creditor or one of the other circumstances listed in §1026.43(e)(7)(iii)(B)(*1*). For example, a covered transaction does not violate the requirements in §1026.43(e)(7)(iii) if the covered transaction is sold pursuant to a capital restoration plan under 12 U.S.C. 1831o before the end of seasoning period. However, if the creditor simply chose to sell the same covered transaction as one way to comply with general regulatory capital requirements in the absence of supervisory action or agreement, then the covered transaction cannot become a qualified mortgage as a seasoned loan under §1026.43(e)(7), unless the sale met the requirements of §1026.43(e)(7)(iii)(B)(*3*) or the covered transaction qualifies under another definition of qualified mortgage.

Paragraph 43(e)(7)(iv)(A)

1. *Due date.* In determining whether a scheduled periodic payment is delinquent for purposes of §1026.43(e)(7), the due date is the date the payment is due under the terms of the legal obligation, without regard to whether the consumer is afforded a period after the due date to pay before the servicer assesses a late fee.

Paragraph 43(e)(7)(iv)(A)(2)

1. *60 days delinquent.* The following example illustrates the meaning of 60 days delinquent for purposes of §1026.43(e)(7). Assume a loan is consummated on October 15, 2022, that the consumer's periodic payment is due on the 1st of each month, and that the consumer timely made the first periodic payment due on December 1, 2022. For purposes of

§1026.43(e)(7), the consumer is 30 days delinquent if the consumer fails to make a payment (sufficient to cover the scheduled January 1, 2023 periodic payment of principal, interest, and escrow (if applicable)) before February 1, 2023. For purposes of §1026.43(e)(7), the consumer is 60 days delinquent if the consumer then fails to make two payments (sufficient to cover the scheduled January 1, 2023 and February 1, 2023 periodic payments of principal, interest, and escrow (if applicable)) before March 1, 2023.

Paragraph 43(e)(7)(iv)(B)

1. *Qualifying change*. An agreement that meets the conditions specified in §1026.43(e)(7)(iv)(B) is a qualifying change even if it is not in writing.

Paragraph 43(e)(7)(iv)(C)(2)

1. *Suspension of seasoning period during certain temporary payment accommodations*. Section 1026.43(e)(7)(iv)(C)(*2*) provides that the seasoning period does not include any period during which the consumer is in a temporary payment accommodation extended in connection with a disaster or pandemic-related national emergency, provided that during or at the end of the temporary payment accommodation there is a qualifying change as defined in §1026.43(e)(7)(iv)(B) or the consumer cures the loan's delinquency under its original terms. Section 1026.43(e)(7)(iv)(C)(*2*) further explains that, under these circumstances, the seasoning period consists of the period from the date on which the first periodic payment was due after origination of the covered transaction to the beginning of the temporary payment accommodation and an additional period immediately after the temporary payment accommodation ends, which together must equal at least 36 months. For example, assume the consumer enters into a covered transaction for which the first periodic payment is due on March 1, 2022, and the consumer enters a three-month temporary payment accommodation in connection with a disaster or pandemic-related national emergency, effective March 1, 2023. Assume further that the consumer misses the March 1, April 1, and May 1, 2023 periodic payments during the temporary payment accommodation period, but enters into a qualifying change as defined in §1026.43(e)(7)(iv)(B) on June 1, 2023, and is not delinquent on June 1, 2023. Under these circumstances, the seasoning period consists of the period from March 1, 2022 to February 28, 2023 and the period from June 1, 2023 to May 31, 2025, assuming the consumer is not 30 days or more delinquent on May 31, 2025.

Paragraph 43(e)(7)(iv)(D)

1. *Temporary payment accommodation in connection with a disaster or pandemic-related national emergency*. For purposes of §1026.43(e)(7), examples of temporary payment accommodations in connection with a disaster or pandemic-related national emergency include, but are not limited to a trial loan modification plan, a temporary payment forbearance program, or a temporary repayment plan.

43(f) Balloon-Payment qualified mortgages made by certain creditors.

43(f)(1) Exemption.

Paragraph 43(f)(1)(i)

1. *Satisfaction of qualified mortgage requirements*. Under §1026.43(f)(1)(i), for a mortgage that provides for a balloon payment to be a qualified mortgage, the mortgage must satisfy the requirements for a qualified mortgage in paragraphs (e)(2)(i)(A), (e)(2)(ii), and (e)(2)(iii). Therefore, a covered transaction with balloon payment terms must provide for regular periodic payments that do not result in an increase of the principal balance, pursuant to §1026.43(e)(2)(i)(A); must have a loan term that does not exceed 30 years, pursuant to §1026.43(e)(2)(ii); and must have total points and fees that do not exceed specified thresholds pursuant to §1026.43(e)(2)(iii).

Paragraph 43(f)(1)(ii)

1. *Example*. Under §1026.43(f)(1)(ii), if a qualified mortgage provides for a balloon payment, the creditor must determine that the consumer is able to make all scheduled payments under the legal obligation other than the balloon payment. For example, assume a loan in an amount of $200,000 that has a five-year loan term, but is amortized over 30 years. The loan agreement provides for a fixed interest rate of 6 percent. The loan consummates on March 3, 2014, and the monthly payment of principal and interest scheduled for the first five years is $1,199, with the first monthly payment due on April 1, 2014. The balloon payment of $187,308 is required on the due date of the 60th monthly payment, which is April 1, 2019. The loan can be a qualified mortgage if the creditor underwrites the loan using the scheduled principal and interest payment of $1,199, plus the consumer's monthly payment for all mortgage-related obligations, and satisfies the other criteria set forth in §1026.43(f).

2. *Creditor's determination*. A creditor must determine that the consumer is able to make all scheduled payments other than the balloon payment to satisfy §1026.43(f)(1)(ii), in accordance with the legal obligation, together with the consumer's monthly payments for all mortgage-related obligations and excluding the balloon payment, to meet the repayment ability requirements of §1026.43(f)(1)(ii). A creditor satisfies §1026.43(f)(1)(ii) if it uses the maximum payment in the payment schedule, excluding any balloon payment, to determine if the

consumer has the ability to make the scheduled payments.

Paragraph 43(f)(1)(iii)

1. *Debt-to-income or residual income.* A creditor must consider and verify the consumer's monthly debt-to-income ratio or residual income to meet the requirements of §1026.43(f)(1)(iii)(C). To calculate the consumer's monthly debt-to-income or residual income for purposes of §1026.43(f)(1)(iii)(C), the creditor may rely on the definitions and calculation rules in §1026.43(c)(7) and its accompanying commentary, except for the calculation rules for a consumer's total monthly debt obligations (which is a component of debt-to-income and residual income under §1026.43(c)(7)). For purposes of calculating the consumer's total monthly debt obligations under §1026.43(f)(1)(iii), the creditor must calculate the monthly payment on the covered transaction using the payment calculation rules in §1026.43(f)(1)(iv)(A), together with all mortgage-related obligations and excluding the balloon payment.

Paragraph 43(f)(1)(iv)

1. *Scheduled payments.* Under §1026.43(f)(1)(iv)(A), the legal obligation must provide that scheduled payments must be substantially equal and determined using an amortization period that does not exceed 30 years. Balloon payments often result when the periodic payment would fully repay the loan amount only if made over some period that is longer than the loan term. For example, a loan term of 10 years with periodic payments based on an amortization period of 20 years would result in a balloon payment being due at the end of the loan term. Whatever the loan term, the amortization period used to determine the scheduled periodic payments that the consumer must pay under the terms of the legal obligation may not exceed 30 years.

2. *Substantially equal.* The calculation of payments scheduled by the legal obligation under §1026.43(f)(1)(iv)(A) are required to result in substantially equal amounts. This means that the scheduled payments need to be similar, but need not be equal. For further guidance on substantially equal payments, see comment 43(c)(5)(i)–4.

3. *Interest-only payments.* A mortgage that only requires the payment of accrued interest each month does not meet the requirements of §1026.43(f)(1)(iv)(A).

Paragraph 43(f)(1)(v)

1. *Forward commitments.* A creditor may make a mortgage loan that will be transferred or sold to a purchaser pursuant to an agreement that has been entered into at or before the time the transaction is consummated. Such an agreement is sometimes known as a ''forward commitment.'' A balloon-payment mortgage that will be acquired by a purchaser pursuant to a forward commitment does not satisfy the requirements of §1026.43(f)(1)(v), whether the forward commitment provides for the purchase and sale of the specific transaction or for the purchase and sale of transactions with certain prescribed criteria that the transaction meets. However, a purchase and sale of a balloon-payment qualified mortgage to another person that separately meets the requirements of §1026.43(f)(1)(vi) is permitted. For example: Assume a creditor that meets the requirements of §1026.43(f)(1)(vi) makes a balloon-payment mortgage that meets the requirements of §1026.43(f)(1)(i) through (iv); if the balloon-payment mortgage meets the purchase criteria of an investor with which the creditor has an agreement to sell such loans after consummation, then the balloon-payment mortgage does not meet the definition of a qualified mortgage in accordance with §1026.43(f)(1)(v). However, if the investor meets the requirement of §1026.43(f)(1)(vi), the balloon-payment qualified mortgage retains its qualified mortgage status.

Paragraph 43(f)(1)(vi).

1. *Creditor qualifications.* Under §1026.43(f)(1)(vi), to make a qualified mortgage that provides for a balloon payment, the creditor must satisfy three criteria that are also required under §1026.35(b)(2)(iii)(A), (B) and (C), which require:

i. During the preceding calendar year or during either of the two preceding calendar years if the application for the transaction was received before April 1 of the current calendar year, the creditor extended a first-lien covered transaction, as defined in §1026.43(b)(1), on a property that is located in an area that is designated either ''rural'' or ''underserved,'' as defined in §1026.35(b)(2)(iv), to satisfy the requirement of §1026.35(b)(2)(iii)(A) (the rural-or-underserved test). Pursuant to §1026.35(b)(2)(iv), an area is considered to be rural if it is: A county that is neither in a metropolitan statistical area, nor a micropolitan statistical area adjacent to a metropolitan statistical area, as those terms are defined by the U.S. Office of Management and Budget; or a census block that is not in an urban area, as defined by the U.S. Census Bureau using the latest decennial census of the United States. An area is considered to be underserved during a calendar year if, according to HMDA data for the preceding calendar year, it is a county in which no more than two creditors extended covered transactions secured by first liens on properties in the county five or more times.

A. The Bureau determines annually which counties in the United States are rural or underserved as defined by §1026.35(b)(2)(iv)(A)(*1*) or §1026.35(b)(2)(iv)(B) and publishes on its public website lists of those counties to assist creditors in determining whether they meet the criterion at §1026.35(b)(2)(iii)(A). Creditors may also use an automated tool provided on the Bureau's public website to determine whether specific properties are located in areas that qualify as "rural" or "underserved" according to the definitions in §1026.35(b)(2)(iv) for a particular calendar year. In addition, the U.S. Census Bureau may also provide on its public website an automated address search tool that specifically indicates if a property address is located in an urban area for purposes of the Census Bureau's most recent delineation of urban areas. For any calendar year that begins after the date on which the Census Bureau announced its most recent delineation of urban areas, a property is located in an area that qualifies as "rural" according to the definitions in §1026.35(b)(2)(iv) if the search results provided for the property by any such automated address search tool available on the Census Bureau's public website do not identify the property as being in an urban area.

B. For example, if a creditor extended during 2017 a first-lien covered transaction that is secured by a property that is located in an area that meets the definition of rural or underserved under §1026.35(b)(2)(iv), the creditor meets this element of the exception for any transaction consummated during 2018.

C. Alternatively, if the creditor did not extend in 2017 a transaction that meets the definition of rural or underserved test under §1026.35(b)(2)(iv), the creditor satisfies this criterion for any transaction consummated during 2018 for which it received the application before April 1, 2018, if it extended during 2016 a first-lien covered transaction that is secured by a property that is located in an area that meets the definition of rural or underserved under §1026.35(b)(2)(iv).

ii. During the preceding calendar year, or, if the application for the transaction was received before April 1 of the current calendar year, during either of the two preceding calendar years, the creditor together with its affiliates extended no more than 2,000 covered transactions, as defined by §1026.43(b)(1), secured by first liens, that were sold, assigned, or otherwise transferred to another person, or that were subject at the time of consummation to a commitment to be acquired by another person, to satisfy the requirement of §1026.35(b)(2)(iii)(B).

iii. As of the preceding December 31st, or, if the application for the transaction was received before April 1 of the current calendar year, as of either of the two preceding December 31sts, the creditor and its affiliates that regularly extended covered transactions secured by first liens, together, had total assets that do not exceed the applicable asset threshold established by the Bureau, to satisfy the requirement of §1026.35(b)(2)(iii)(C). The Bureau publishes notice of the asset threshold each year by amending comment 35(b)(2)(iii)–1.iii.

43(f)(2) Post-consummation transfer of balloon-payment qualified mortgage.

1. *Requirement to hold in portfolio.* Creditors generally must hold a balloon-payment qualified mortgage in portfolio to maintain the transaction's status as a qualified mortgage under §1026.43(f)(1), subject to four exceptions. Unless one of these exceptions applies, a balloon-payment qualified mortgage is no longer a qualified mortgage under §1026.43(f)(1) once legal title to the debt obligation is sold, assigned, or otherwise transferred to another person. Accordingly, unless one of the exceptions applies, the transferee could not benefit from the presumption of compliance for qualified mortgages under §1026.43(f)(1) unless the loan also met the requirements of another qualified mortgage definition.

2. *Application to subsequent transferees.* The exceptions contained in §1026.43(f)(2) apply not only to an initial sale, assignment, or other transfer by the originating creditor but to subsequent sales, assignments, and other transfers as well. For example, assume Creditor A originates a qualified mortgage under §1026.43(f)(1). Six months after consummation, Creditor A sells the qualified mortgage to Creditor B pursuant to §1026.43(f)(2)(ii) and the loan retains its qualified mortgage status because Creditor B complies with the conditions relating to operating in rural or underserved areas, asset size, and number of transactions. If Creditor B sells the qualified mortgage, it will lose its qualified mortgage status under §1026.43(f)(1) unless the sale qualifies for one of the §1026.43(f)(2) exceptions for sales three or more years after consummation, to another qualifying institution, as required by supervisory action, or pursuant to a merger or acquisition.

Paragraph 43(f)(2)(i).

1. *Transfer three years after consummation.* Under §1026.43(f)(2)(i), if a balloon-payment qualified mortgage under §1026.43(f)(1) is sold, assigned, or otherwise transferred three years or more after consummation, the balloon-payment qualified mortgage retains its status as a qualified mortgage under §1026.43(f)(1) following the sale. The transferee need not be eligible to originate qualified mortgages under §1026.43(f)(1)(vi). The balloon-payment qualified mortgage will continue to be a qualified mortgage throughout its life, and the transferee, and any subsequent transferees, may invoke the presumption of compliance for qualified mortgages under §1026.43(f)(1).

Paragraph 43(f)(2)(ii).

1. *Transfer to another qualifying creditor.* Under §1026.43(f)(2)(ii), a balloon-payment qualified mortgage under §1026.43(f)(1) may be sold, assigned, or otherwise transferred at any time to another creditor that meets the

requirements of §1026.43(f)(1)(vi). That section requires that a creditor: (1) Extended a first-lien covered transaction, as defined in §1026.43(b)(1), on a property located in a rural or underserved area; (2) together with all affiliates, extended no more than 2,000 first-lien covered transactions that were sold, assigned, or otherwise transferred by the creditor or its affiliates to another person, or that were subject at the time of consummation to a commitment to be acquired by another person; and (3) have, together with its affiliates that regularly extended covered transactions secured by first liens, total assets less than $2 billion (as adjusted for inflation). These tests are assessed based on transactions and assets from the calendar year preceding the current calendar year or from either of the two calendar years preceding the current calendar year if the application for the transaction was received before April 1 of the current calendar year. A balloon-payment qualified mortgage under §1026.43(f)(1) transferred to a creditor that meets these criteria would retain its qualified mortgage status even if it is transferred less than three years after consummation.

Paragraph 43(f)(2)(iii).

1. *Supervisory sales.* Section 1026.43(f)(2)(iii) facilitates sales that are deemed necessary by supervisory agencies to revive troubled creditors and resolve failed creditors. A balloon-payment qualified mortgage under §1026.43(f)(1) retains its qualified mortgage status if it is sold, assigned, or otherwise transferred to another person pursuant to: (1) A capital restoration plan or other action under 12 U.S.C. 1831o; (2) the actions or instructions of any person acting as conservator, receiver, or bankruptcy trustee; (3) an order of a State or Federal government agency with jurisdiction to examine the creditor pursuant to State or Federal law; or (4) an agreement between the creditor and such an agency. A balloon-payment qualified mortgage under §1026.43(f)(1) that is sold, assigned, or otherwise transferred under these circumstances retains its qualified mortgage status regardless of how long after consummation it is sold and regardless of the size or other characteristics of the transferee. Section 1026.43(f)(2)(iii) does not apply to transfers done to comply with a generally applicable regulation with future effect designed to implement, interpret, or prescribe law or policy in the absence of a specific order by or a specific agreement with a governmental agency described in §1026.43(f)(2)(iii) directing the sale of one or more qualified mortgages under §1026.43(f)(1) held by the creditor or one of the other circumstances listed in §1026.43(f)(2)(iii). For example, a balloon-payment qualified mortgage under §1026.43(f)(1) that is sold pursuant to a capital restoration plan under 12 U.S.C. 1831o would retain its status as a qualified mortgage following the sale. However, if the creditor simply chose to sell the same qualified mortgage as one way to comply with general regulatory capital requirements in the absence of supervisory action or agreement the transaction would lose its status as a qualified mortgage following the sale unless it qualifies under another definition of qualified mortgage.

Paragraph 43(f)(2)(iv).

1. *Mergers and acquisitions.* A qualified mortgage under §1026.43(f)(1) retains its qualified mortgage status if a creditor merges with, is acquired by another person, or acquires another person regardless of whether the creditor or its successor is eligible to originate new balloon-payment qualified mortgages under §1026.43(f)(1) after the merger or acquisition. However, the creditor or its successor can originate new balloon-payment qualified mortgages under §1026.43(f)(1) only if it complies with all of the requirements of §1026.43(f)(1) after the merger or acquisition. For example, assume a small creditor that originates 250 first-lien covered transactions each year and originates balloon-payment qualified mortgages under §1026.43(f)(1) is acquired by a larger creditor that originates 10,000 first-lien covered transactions each year. Following the acquisition, the small creditor would no longer be able to originate balloon-payment qualified mortgages because, together with its affiliates, it would originate more than 500 first-lien covered transactions each year. However, the balloon-payment qualified mortgages originated by the small creditor before the acquisition would retain their qualified mortgage status.

43(g) Prepayment penalties.

43(g)(2) Limits on prepayment penalties.

1. *Maximum period and amount.* Section 1026.43(g)(2) establishes the maximum period during which a prepayment penalty may be imposed and the maximum amount of the prepayment penalty. A covered transaction may include a prepayment penalty that may be imposed during a shorter period or in a lower amount than provided under §1026.43(g)(2). For example, a covered transaction may include a prepayment penalty that may be imposed for two years after consummation and that equals 1 percent of the amount prepaid in each of those two years.

43(g)(3) Alternative offer required.

Paragraph 43(g)(3)(i).

1. *Same type of interest rate.* Under §1026.43(g)(3)(i), if a creditor offers a consumer a covered transaction with a prepayment penalty, the creditor must offer the consumer an alternative covered transaction without a prepayment penalty and with an annual percentage rate that cannot increase after consummation. Under §1026.43(g)(3)(i), if the covered transaction with a prepayment penalty is a fixed-rate mortgage, as defined

in § 1026.18(s)(7)(iii), then the alternative covered transaction without a prepayment penalty must also be a fixed-rate mortgage. Likewise, if the covered transaction with a prepayment penalty is a step-rate mortgage, as defined in § 1026.18(s)(7)(ii), then the alternative covered transaction without a prepayment penalty must also be a step-rate mortgage.

Paragraph 43(g)(3)(iv).

1. *Points and fees.* Whether or not an alternative covered transaction without a prepayment penalty satisfies the points and fees conditions for a qualified mortgage is determined based on the information known to the creditor at the time the creditor offers the consumer the transaction. At the time a creditor offers a consumer an alternative covered transaction without a prepayment penalty under § 1026.43(g)(3), the creditor may know the amount of some, but not all, of the points and fees that will be charged for the transaction. For example, a creditor may not know that a consumer intends to buy single-premium credit unemployment insurance, which would be included in the points and fees for the covered transaction. The points and fees condition under § 1026.43(g)(3)(iv) is satisfied if a creditor reasonably believes, based on information known to the creditor at the time the offer is made, that the amount of points and fees to be charged for an alternative covered transaction without a prepayment penalty will be less than or equal to the amount of points and fees allowed for a qualified mortgage under § 1026.43(e)(2)(iii).

Paragraph 43(g)(3)(v).

1. *Transactions for which the consumer likely qualifies.* Under § 1026.43(g)(3)(v), the alternative covered transaction without a prepayment penalty the creditor must offer under § 1026.43(g)(3) must be a transaction for which the creditor has a good faith belief the consumer likely qualifies. For example, assume the creditor has a good faith belief the consumer can afford monthly payments of up to $800. If the creditor offers the consumer a fixed-rate mortgage with a prepayment penalty for which monthly payments are $700 and an alternative covered transaction without a prepayment penalty for which monthly payments are $900, the requirements of § 1026.43(g)(3)(v) are not met. The creditor's belief that the consumer likely qualifies for the covered transaction without a prepayment penalty should be based on the information known to the creditor at the time the creditor offers the transaction. In making this determination, the creditor may rely on information provided by the consumer, even if the information subsequently is determined to be inaccurate.

43(g)(4) Offer through a mortgage broker.

1. *Rate sheet.* Under § 1026.43(g)(4), where the creditor offers covered transactions with a prepayment penalty to consumers through a mortgage broker, as defined in § 1026.36(a)(2), the creditor must present the mortgage broker an alternative covered transaction that satisfies the requirements of § 1026.43(g)(3). Creditors may comply with this requirement by providing a rate sheet to the mortgage broker that states the terms of such an alternative covered transaction without a prepayment penalty.

2. *Alternative to creditor's offer.* Section 1026.43(g)(4)(ii) requires that the creditor provide, by agreement, for the mortgage broker to present the consumer an alternative covered transaction that satisfies the requirements of § 1026.43(g)(3) offered by either the creditor or by another creditor, if the other creditor offers a covered transaction with a lower interest rate or a lower total dollar amount of discount points and origination points or fees. The agreement may provide for the mortgage broker to present both the creditor's covered transaction and an alternative covered transaction offered by another creditor with a lower interest rate or a lower total dollar amount of origination discount points and points or fees. See comment 36(e)(3)–3 for guidance in determining which step-rate mortgage has a lower interest rate.

3. *Agreement.* The creditor's agreement with a mortgage broker for purposes of § 1026.43(g)(4) may be part of another agreement with the mortgage broker, for example, a compensation agreement. Thus, the creditor need not enter into a separate agreement with the mortgage broker with respect to each covered transaction with a prepayment penalty.

43(g)(5) Creditor that is a loan originator.

1. *Loan originator.* The definition of ''loan originator'' in § 1026.36(a)(1) applies for purposes of § 1026.43(g)(5). Thus, a loan originator includes any creditor that satisfies the definition of loan originator but makes use of ''table-funding'' by a third party. *See* comment 36(a)–1.i and ii.

2. *Lower interest rate.* Under § 1026.43(g)(5), a creditor that is a loan originator must present an alternative covered transaction without a prepayment penalty that satisfies the requirements of § 1026.43(g)(3) offered by either the assignee for the covered transaction or another person, if that other person offers a transaction with a lower interest rate or a lower total dollar amount of origination points or fees or discount points. See comment 36(e)(3)–3 for guidance in determining which step-rate mortgage has a lower interest rate.

43(h) Evasion; open-end credit.

1. *Subject to closed-end credit rules.* Where a creditor documents a loan as open-end credit but the features and terms, or other circumstances, demonstrate that the loan does not meet the definition of open-end credit in § 1026.2(a)(20), the loan is subject to the rules for closed-end credit, including § 1026.43.

SUBPART F—SPECIAL RULES FOR PRIVATE EDUCATION LOANS

Section 1026.46—Special Disclosure Requirements for Private Education Loans

46(a) Coverage

1. *Coverage.* This subpart applies to all private education loans as defined in §1026.46(b)(5). Coverage under this subpart is optional for certain extensions of credit that do not meet the definition of "private education loan" because the credit is not extended, in whole or in part, for "postsecondary educational expenses" defined in §1026.46(b)(3). If a transaction is not covered and a creditor opts to comply with any section of this subpart, the creditor must comply with all applicable sections of this subpart. If a transaction is not covered and a creditor opts not to comply with this subpart, the creditor must comply with all applicable requirements under §§1026.17 and 1026.18. Compliance with this subpart is optional for an extension of credit for expenses incurred after graduation from a law, medical, dental, veterinary, or other graduate school and related to relocation, study for a bar or other examination, participation in an internship or residency program, or similar purposes. However, if any part of such loan is used for postsecondary educational expenses as defined in §1026.46(b)(3), then compliance with Subpart F is mandatory not optional.

46(b) Definitions

46(b)(1) Covered Educational Institution

1. *General.* A covered educational institution includes any educational institution that meets the definition of an institution of higher education in §1026.46(b)(2). An institution is also a covered educational institution if it otherwise meets the definition of an institution of higher education, except for its lack of accreditation. Such an institution may include, for example, a university or community college. It may also include an institution, whether accredited or unaccredited, offering instruction to prepare students for gainful employment in a recognized profession, such as flying, culinary arts, or dental assistance. A covered educational institution does not include elementary or secondary schools.

2. *Agent.* For purposes of §1026.46(b)(1), the term agent means an institution-affiliated organization as defined by Section 151 of the Higher Education Act of 1965 (20 U.S.C 1019) or an officer or employee of an institution-affiliated organization. Under Section 151 of the Higher Education Act, an institution-affiliated organization means any organization that is directly or indirectly related to a covered institution and is engaged in the practice of recommending, promoting, or endorsing education loans for students attending the covered institution or the families of such students. An institution-affiliated organization may include an alumni organization, athletic organization, foundation, or social, academic, or professional organization, of a covered institution, but does not include any creditor with respect to any private education loan made by that creditor.

46(b)(2) Institution of Higher Education

1. *General.* An institution of higher education includes any institution that meets the definitions contained in sections 101 and 102 of the Higher Education Act of 1965 (20 U.S.C. 1001–1002) and implementing Department of Education regulations (34 CFR 600). Such an institution may include, for example, a university or community college. It may also include an institution offering instruction to prepare students for gainful employment in a recognized profession, such as flying, culinary arts, or dental assistance. An institution of higher education does not include elementary or secondary schools.

46(b)(3) Postsecondary Educational Expenses

1. *General.* The examples listed in §1026.46(b)(3) are illustrative only. The full list of postsecondary educational expenses is contained in section 472 of the Higher Education Act of 1965 (20 U.S.C. 1087ll).

46(b)(4) Preferred Lender Arrangement

1. *General.* The term "preferred lender arrangement" is defined in section 151 of the Higher Education Act of 1965 (20 U.S.C. 1019). The term refers to an arrangement or agreement between a creditor and a covered educational institution (or an institution-affiliated organization as defined by section 151 of the Higher Education Act of 1965 (20 U.S.C 1019)) under which a creditor provides private education loans to consumers for students attending the covered educational institution and the covered educational institution recommends, promotes, or endorses the private education loan products of the creditor. It does not include arrangements or agreements with respect to Federal Direct Stafford/Ford loans, or Federal PLUS loans made under the Federal PLUS auction pilot program.

46(b)(5) Private Education Loan

1. *Extended expressly for postsecondary educational expenses.* A private education loan is one that is extended expressly for postsecondary educational expenses. The term includes loans extended for postsecondary educational expenses incurred while a student is enrolled in a covered educational institution as well as loans extended to consolidate a consumer's pre-existing private education loans.

2. *Multiple-purpose loans.* i. *Definition.* A private education loan may include an extension of credit not excluded under §1026.46(b)(5) that the consumer may use for multiple purposes including, but not limited to, postsecondary educational expenses. If the consumer expressly indicates that the proceeds of the loan will be used to pay for postsecondary educational expenses by indicating the loan's purpose on an application, the loan is a private education loan.

ii. *Coverage.* A creditor generally will not know before an application is received whether the consumer intends to use the loan for postsecondary educational expenses. For this reason, the creditor need not provide the disclosures required by §1026.47(a) on or with the application or solicitation for a loan that may be used for multiple purposes. *See* §1026.47(d)(1)(i). However, if the consumer expressly indicates that the proceeds of the loan will be used to pay for postsecondary educational expenses, the creditor must comply with §§1026.47(b) and (c) and §1026.48. For purposes of the required disclosures, the creditor must calculate the disclosures based on the entire amount of the loan, even if only a part of the proceeds is intended for postsecondary educational expenses. The creditor may rely solely on a check-box, or a purpose line, on a loan application to determine whether or not the applicant intends to use loan proceeds for postsecondary educational expenses.

iii. *Examples.* The creditor must comply only if the extension of credit also meets the other parts of the definition of private education loan. For example, if the creditor uses a single application form for both open-end and closed-end credit, and the consumer applies for open-end credit to be used for postsecondary educational expenses, the extension of credit is not covered. Similarly, if the consumer indicates the extension of credit will be used for educational expenses that are not postsecondary educational expenses, such as elementary or secondary educational expenses, the extension of credit is not covered. These examples are only illustrative, not exhaustive.

3. *Short-term loans.* Some covered educational institutions offer loans to students with terms of 90 days or less to assist the student in paying for educational expenses, usually while the student waits for other funds to be disbursed. Under §1026.46(b)(5)(iv)(A) such loans are not considered private education loans, even if interest is charged on the credit balance. (Because these loans charge interest, they are not covered by the exception under §1026.46(b)(5)(iv)(B).) However, these loans are extensions of credit subject to the requirements of §§1026.17 and 18. The legal agreement may provide that repayment is required when the consumer or the educational institution receives certain funds. If, under the terms of the legal obligation, repayment of the loan is required when the certain funds are received by the consumer or the educational institution (such as by deposit into the consumer's or educational institution's account), the disclosures should be based on the creditor's estimate of the time the funds will be delivered.

4. *Billing plans.* Some covered educational institutions offer billing plans that permit a consumer to make payments in installments. Such plans are not considered private education loans, if an interest rate will not be applied to the credit balance and the term of the extension of credit is one year or less, even if the plan is payable in more than four installments. However, such plans may be extensions of credit subject to the requirements of §§1026.17 and 1026.18.

46(c) Form of Disclosures

1. *Form of disclosures—relation to other sections.* Creditors must make the disclosures required under this subpart in accordance with §1026.46(c). Section 1026.46(c)(2) requires that the disclosures be grouped together and segregated from everything else. In complying with this requirement, creditors may follow the rules in §1026.17, except where specifically provided otherwise. For example, although §1026.17(b) requires creditors to provide only one set of disclosures before consummation of the transaction, §§1026.47(b) and (c) require that the creditor provide the disclosures under §1026.18 both upon approval and after the consumer accepts the loan.

46(c)(3) Electronic Disclosures

1. *Application and solicitation disclosures—electronic disclosures.* If the disclosures required under §1026.47(a) are provided electronically, they must be provided on or with the application or solicitation reply form. Electronic disclosures are deemed to be on or with an application or solicitation if they meet one of the following conditions:

i. They automatically appear on the screen when the application or solicitation reply form appears;

ii. They are located on the same Web "page" as the application or solicitation reply form without necessarily appearing 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; or

iii. They are posted on a Web site and the application or solicitation reply form is linked to the disclosures in a manner that prevents the consumer from by passing the disclosures before submitting the application or reply form.

46(d) Timing of Disclosures

1. *Receipt of disclosures.* Under § 1026.46(d)(4), if the creditor places the disclosures in the mail, the consumer is considered to have received them three business days after they are mailed. For purposes of § 1026.46(d)(4), ''business day'' means all calendar days except Sundays and the legal public holidays referred to in § 1026.2(a)(6). *See* comment 2(a)(6)–2. For example, if the creditor places the disclosures in the mail on Thursday, June 4, the disclosures are considered received on Monday, June 8.

46(d)(1) Application or Solicitation Disclosures

1. *Invitations to apply.* A creditor may contact a consumer who has not been pre-selected for a private education loan about taking out a loan (whether by direct mail, telephone, or other means) and invite the consumer to complete an application. Such a contact does not meet the definition of solicitation, nor is it covered by this subpart, unless the contact itself includes the following:

i. An application form in a direct mailing, electronic communication or a single application form as a ''take-one'' (in racks in public locations, for example);

ii. An oral application in a telephone contact; or

iii. An application in an in-person contact.

46(d)(2) Approval Disclosures

1. *Timing.* The creditor must provide the disclosures required by § 1026.47(b) at the time the creditor provides to the consumer any notice that the loan has been approved. However, nothing in this section prevents the creditor from communicating to the consumer that additional information is required from the consumer before approval may be granted. In such a case, a creditor is not required to provide the disclosures at that time. If the creditor communicates notice of approval to the consumer by mail, the disclosures must be mailed at the same time as the notice of approval. If the creditor communicates notice of approval by telephone, the creditor must place the disclosures in the mail within three business days of the telephone call. If the creditor communicates notice of approval in electronic form, the creditor may provide the disclosures in electronic form. If the creditor has complied with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*) the creditor may provide the disclosures solely in electronic form; otherwise, the creditor must place the disclosures in the mail within three business days of the communication.

46(g) Effect of Subsequent Events

1. *Approval disclosures.* Inaccuracies in the disclosures required under § 1026.47(b) are not violations if attributable to events occurring after disclosures are made, although creditors are restricted under § 1026.48(c)(2) from making certain changes to the loan's rate or terms after the creditor provides an approval disclosure to a consumer. Since creditors are required provide the final disclosures under § 1026.47(c), they need not make new approval disclosures in response to an event that occurs after the creditor delivers the required approval disclosures, except as specified under § 1026.48(c)(4). For example, at the time the approval disclosures are provided, the creditor may not know the precise disbursement date of the loan funds and must provide estimated disclosures based on the best information reasonably available and labeled as an estimate. If, after the approval disclosures are provided, the creditor learns from the educational institution the precise disbursement date, new approval disclosures would not be required, unless specifically required under § 1026.48(c)(4) if other changes are made. Similarly, the creditor may not know the precise amounts of each loan to be consolidated in a consolidation loan transaction and information about the precise amounts would not require new approval disclosures, unless specifically required under § 1026.48(c)(4) if other changes are made.

2. *Final disclosures.* Inaccuracies in the disclosures required under § 1026.47(c) are not violations if attributable to events occurring after disclosures are made. For example, if the consumer initially chooses to defer payment of principal and interest while enrolled in a covered educational institution, but later chooses to make payments while enrolled, such a change does not make the original disclosures inaccurate.

Section 1026.47—Content of Disclosures

1. *As applicable.* The disclosures required by this subpart need be made only as applicable, unless specifically required otherwise. The creditor need not provide any disclosure that is not applicable to a particular transaction. For example, in a transaction consolidating private education loans, or in transactions under § 1026.46(a) for which compliance with this subpart is optional, the creditor need not disclose the information under §§ 1026.47(a)(6), and (b)(4), and any other information otherwise required to be disclosed under this subpart that is not applicable to the transaction. Similarly, creditors making loans to consumers where the student is not attending an institution of higher education, as defined in § 1026.46(b)(2), need not provide the disclosures regarding the self-certification form in § 1026.47(a)(8).

47(a) Application or Solicitation Disclosures

Paragraph 47(a)(1)(i)

1. *Rates actually offered.* The disclosure may state only those rates that the creditor is actually prepared to offer. For example, a creditor may not disclose a very low interest rate that will not in fact be offered at any time. For a loan with variable interest rates, the ranges of rates will be considered actually offered if:

i. For disclosures in applications or solicitations sent by direct mail, the rates were in effect within 60 days before mailing;

ii. For disclosures in applications or solicitations in electronic form, the rates were in effect within 30 days before the disclosures are sent to a consumer, or for disclosures made on an Internet Web site, within 30 days before being viewed by the public;

iii. For disclosures in printed applications or solicitations made available to the general public, the rates were in effect within 30 days before printing; or

iv. For disclosures provided orally in telephone applications or solicitations, the rates are currently available at the time the disclosures are provided.

2. *Creditworthiness and other factors.* If the rate will depend, at least in part, on a later determination of the consumer's creditworthiness or other factors, the disclosure must include a statement that the rate for which the consumer may qualify at approval will depend on the consumer's creditworthiness and other factors. The creditor may, but is not required to, specify any additional factors that it will use to determine the interest rate. For example, if the creditor will determine the interest rate based on information in the consumer's or cosigner's credit report and the type of school the consumer attends, the creditor may state, "Your interest rate will be based on your credit history and other factors (cosigner credit and school type)."

3. *Rates applicable to the loan.* For a variable-rate private education loan, the disclosure of the interest rate or range of rates must reflect the rate or rates calculated based on the index and margin that will be used to make interest rate adjustments for the loan. The creditor may provide a description of the index and margin or range of margins used to make interest rate adjustments, including a reference to a source, such as a newspaper, where the consumer may look up the index.

Paragraph 47(a)(1)(iii)

1. *Coverage.* The interest rate is considered variable if the terms of the legal obligation allow the creditor to increase the interest rate originally disclosed to the consumer and the requirements of §1026.47(a)(1)(iii) apply to all such transactions. The provisions do not apply to increases resulting from delinquency (including late payment), default, assumption, or acceleration.

2. *Limitations.* The creditor must disclose how often the rate may change and any limit on the amount that the rate may increase at any one time. The creditor must also disclose any maximum rate over the life of the transaction. If the legal obligation between the parties does specify a maximum rate, the creditor must disclose any legal limits in the nature of usury or rate ceilings under state or Federal statutes or regulations. However, if the applicable maximum rate is in the form of a legal limit, such as a state's usury cap (rather than a maximum rate specified in the legal obligation between the parties), the creditor must disclose that the maximum rate is determined by applicable law. The creditor must also disclose that the consumer's actual rate may be higher or lower than the initial rates disclosed under §1026.47(a)(1)(i), if applicable.

Paragraph 47(a)(1)(iv)

1. *Cosigner or guarantor—changes in applicable interest rate.* The creditor must state whether the interest rate typically will be higher if the loan is not co-signed or guaranteed by a third party. The creditor is required to provide a statement of the effect on the interest rate and is not required to provide a numerical estimate of the effect on the interest rate. For example, a creditor may state: "Rates are typically higher without a cosigner."

47(a)(2) Fees and Default or Late Payment Costs

1. *Fees or range of fees.* The creditor must itemize fees required to obtain the private education loan. The creditor must give a single dollar amount for each fee, unless the fee is based on a percentage, in which case a percentage must be stated. If the exact amount of the fee is not known at the time of disclosure, the creditor may disclose the dollar amount or percentage for each fee as an estimated range.

2. *Fees required to obtain the private education loan.* The creditor must itemize the fees that the consumer must pay to obtain the private education loan. Fees disclosed include all finance charges under §1026.4, such as loan origination fees, credit report fees, and fees charged upon entering repayment, as well as fees not considered finance charges but required to obtain credit, such as application fees that are charged whether or not credit is extended. Fees disclosed include those paid by the consumer directly to the creditor and fees paid to third parties by the creditor on the consumer's behalf. Creditors are not required to disclose fees that apply if the consumer exercises an option under the loan agreement after consummation, such as

fees for deferment, forbearance, or loan modification.

47(a)(3) Repayment Terms

1. *Loan term.* The term of the loan is the maximum period of time during which regularly scheduled payments of principal and interest will be due on the loan.

2. *Payment deferral options—general.* The creditor must describe the options that the consumer has under the loan agreement to defer payment on the loan. When there is no deferment option provided for the loan, the creditor must disclose that fact. Payment deferral options required to be disclosed include options for immediate deferral of payments, such as when the student is currently enrolled at a covered educational institution. The description may include of the length of the maximum initial in-school deferment period, the types of payments that may be deferred, and a description of any payments that are required during the deferment period. The creditor may, but need not, disclose any conditions applicable to the deferment option, such as that deferment is permitted only while the student is continuously enrolled in school. If payment deferral is not an option while the student is enrolled in school, the creditor may disclose that the consumer must begin repayment upon disbursement of the loan and that the consumer may not defer repayment while enrolled in school. If the creditor offers payment deferral options that may apply during the repayment period, such as an option to defer payments if the student returns to school to pursue an additional degree, the creditor must include a statement referring the consumer to the contract document or promissory note for more information.

3. *Payment deferral options—in school deferment.* For each payment deferral option applicable while the student is enrolled at a covered educational institution the creditor must disclose whether interest will accrue while the student is enrolled at a covered educational institution and, if interest does accrue, whether payment of interest may be deferred and added to the principal balance.

4. *Combination with cost estimate disclosure.* The disclosures of the loan term under §1026.47(a)(3)(i) and of the payment deferral options applicable while the student is enrolled at a covered educational institution under §§1026.47(a)(3)(ii) and (iii) may be combined with the disclosure of cost estimates required in §1026.47(a)(4). For example, the creditor may describe each payment deferral option in the same chart or table that provides the cost estimates for each payment deferral option. *See* appendix H–21.

5. *Bankruptcy limitations.* The creditor may comply with §1026.47(a)(3)(iv) by disclosing the following statement: ''If you file for bankruptcy you may still be required to pay back this loan.''

47(a)(4) Cost Estimates

1. *Total cost of the loan.* For purposes of §1026.47(a)(4), the creditor must calculate the example of the total cost of the loan in accordance with the rules in §1026.18(h) for calculating the loan's total of payments.

2. *Basis for estimates.* i. The creditor must calculate the total cost estimate by determining all finance charges that would be applicable to loans with the highest rate of interest required to be disclosed under §1026.47(a)(1)(i). For example, if a creditor charges a range of origination fees from 0% to 3%, but the 3% origination fee would apply to loans with the highest initial rate, the lender must assume the 3% origination fee is charged. The creditor must base the total cost estimate on a total loan amount that includes all prepaid finance charges and results in a $10,000 amount financed. For example, if the prepaid finance charges are $600, the creditor must base the estimate on a $10,600 total loan amount and an amount financed of $10,000. The example must reflect an amount provided of $10,000. If the creditor only offers a particular private education loan for less than $10,000, the creditor may assume a loan amount that results in a $5,000 amount financed for that loan.

ii. If a prepaid finance charge is determined as a percentage of the amount financed, for purposes of the example, the creditor should assume that the fee is determined as a percentage of the total loan amount, even if this is not the creditor's usual practice. For example, suppose the consumer requires a disbursement of $10,000 and the creditor charges a 3% origination fee. In order to calculate the total cost example, the creditor must determine the loan amount that will result in a $10,000 amount financed after the 3% fee is assessed. In this example, the resulting loan amount would be $10,309.28. Assessing the 3% origination fee on the loan amount of $10,309.28 results in an origination fee of $309.28, which is withheld from the loan funds disbursed to the consumer. The principal loan amount of $10,309.28 minus the prepaid finance charge of $309.28 results in an amount financed of $10,000.

3. *Calculated for each option to defer interest payments.* The example must include an estimate of the total cost of the loan for each in-school deferral option disclosed in §1026.47(a)(3)(iii). For example, if the creditor provides the consumer with the option to begin making principal and interest payments immediately, to defer principal payments but begin making interest-only payments immediately, or to defer all principal and interest payments while in school, the creditor is required to disclose three estimates of the total cost of the loan, one for

each deferral option. If the creditor adds accrued interest to the loan balance (*i.e.*, interest is capitalized), the estimate of the total loan cost should be based on the capitalization method that the creditor actually uses for the loan. For instance, for each deferred payment option where the creditor would capitalize interest on a quarterly basis, the total loan cost must be calculated assuming interest capitalizes on a quarterly basis.

4. *Deferment period assumptions.* Creditors may use either of the following two methods for estimating the duration of in-school deferment periods:

i. For loan programs intended for educational expenses of undergraduate students, the creditor may assume that the consumer defers payments for a four-year matriculation period, plus the loan's maximum applicable grace period, if any. For all other loans, the creditor may assume that the consumer defers for a two-year matriculation period, plus the maximum applicable grace period, if any, or the maximum time the consumer may defer payments under the loan program, whichever is shorter.

ii. Alternatively, if the creditor knows that the student will be enrolled in a program with a standard duration, the creditor may assume that the consumer defers payments for the full duration of the program (plus any grace period). For example, if a creditor makes loans intended for students enrolled in a four-year medical school degree program, the creditor may assume that the consumer defers payments for four years plus the loan's maximum applicable grace period, if any. However, the creditor may not modify the disclosure to correspond to a particular student's situation. For example, even if the creditor knows that a student will be a second-year medical school student, the creditor must assume a four-year deferral period.

Paragraph 47(a)(6)(ii)

1. *Terms of Federal student loans.* The creditor must disclose the interest rates available under each program under title IV of the Higher Education Act of 1965 and whether the rates are fixed or variable, as prescribed in the Higher Education Act of 1965 (20 U.S.C. 1077a). Where the fixed interest rate for a loan varies by statute depending on the date of disbursement or receipt of application, the creditor must disclose only the interest rate as of the time the disclosure is provided.

Paragraph 47(a)(6)(iii)

1. *Web site address.* The creditor must include with this disclosure an appropriate U.S. Department of Education Web site address such as ''federalstudentaid.ed.gov.''

47(b) Approval Disclosures

47(b)(1) Interest Rate

1. *Variable rate disclosures.* The interest rate is considered variable if the terms of the legal obligation allow the creditor to increase the interest rate originally disclosed to the consumer. The provisions do not apply to increases resulting from delinquency (including late payment), default, assumption, or acceleration. In addition to disclosing the information required under §§1026.47(b)(ii) and (iii), the creditor must disclose the information required under §§1026.18(f)(1)(i) and (iii)—the circumstances under which the rate may increase and the effect of an increase, respectively. The creditor is required to disclose the maximum monthly payment based on the maximum possible rate in §1026.47(b)(3)(viii), and the creditor need not disclose a separate example of the payment terms that would result from an increase under §1026.18(f)(1)(iv).

2. *Limitations on rate adjustments.* The creditor must disclose how often the rate may change and any limit on the amount that the rate may increase at any one time. The creditor must also disclose any maximum rate over the life of the transaction. If the legal obligation between the parties does provide a maximum rate, the creditor must disclose any legal limits in the nature of usury or rate ceilings under state or Federal statutes or regulations. However, if the applicable maximum rate is in the form of a legal limit, such as a state's usury cap (rather than a maximum rate specified in the legal obligation between the parties), the creditor must disclose that the maximum rate is determined by applicable law. Compliance with §1026.18(f)(1)(ii) (requiring disclosure of any limitations on the increase of the interest rate) does not necessarily constitute compliance with this section. Specifically, this section requires that if there are no limitations on interest rate increases, the creditor must disclose that fact. By contrast, comment 18(f)(1)(ii)–1 states that if there are no limitations the creditor need not disclose that fact. In addition, under this section, limitations on rate increases include, rather than exclude, legal limits in the nature of usury or rate ceilings under state or Federal statutes or regulations.

3. *Rates applicable to the loan.* For a variable-rate loan, the disclosure of the interest rate must reflect the index and margin that will be used to make interest rate adjustments for the loan. The creditor may provide a description of the index and margin or range of margins used to make interest rate adjustments, including a reference to a source, such as a newspaper, where the consumer may look up the index.

47(b)(2) Fees and Default or Late Payment Costs

1. *Fees and default or late payment costs.* Creditors may follow the commentary for §1026.47(a)(2) in complying with §1026.47(b)(2). Creditors must disclose the late payment fees required to be disclosed under §1026.18(l) as part of the disclosure required under §1026.47(b)(2)(ii). If the creditor includes the itemization of the amount financed under §1026.18(c)(1), any fees disclosed as part of the itemization need not be separately disclosed elsewhere.

47(b)(3) Repayment Terms

1. *Principal amount.* The principal amount must equal what the face amount of the note would be as of the time of approval, and it must be labeled ''Total Loan Amount.'' *See* appendix H–18. This amount may be different from the ''principal loan amount'' used to calculate the amount financed under comment 18(b)(3)–1, because the creditor has the option under that comment of using a ''principal loan amount'' that is different from the face amount of the note. If the creditor elects to provide an itemization of the amount financed under §1026.18(c)(1) the creditor need not disclose the amount financed elsewhere.

2. *Loan term.* The term of the loan is the maximum period of time during which regularly scheduled payments of principal and interest are due on the loan.

3. *Payment deferral options applicable to the consumer*. Creditors may follow the commentary for §1026.47(a)(3)(ii) in complying with §1026.47(b)(3)(iii).

4. *Payments required during enrollment.* Required payments that must be disclosed include payments of interest and principal, interest only, or other payments that the consumer must make during the time that the student is enrolled. Compliance with §1026.18(g) constitutes compliance with §1026.47(b)(3)(iv).

5. *Bankruptcy limitations.* The creditor may comply with §1026.47(b)(3)(vi) by disclosing the following statement: ''If you file for bankruptcy you may still be required to pay back this loan.''

6. *An estimate of the total amount for repayment.* The creditor must disclose an estimate of the total amount for repayment at two interest rates:

i. The interest rate in effect on the date of approval. Compliance with the total of payments disclosure requirement of §1026.18(h) constitutes compliance with this requirement.

ii. The maximum possible rate of interest applicable to the loan or, if the maximum rate cannot be determined, a rate of 25%. If the legal obligation between the parties specifies a maximum rate of interest, the creditor must calculate the total amount for repayment based on that rate. If the legal obligation does not specify a maximum rate but a usury or rate ceiling under state or Federal statutes or regulations applies, the creditor must use that rate. If a there is no maximum rate in the legal obligation or under a usury or rate ceiling, the creditor must base the disclosure on a rate of 25% and must disclose that there is no maximum rate and that the total amount for repayment disclosed under §1026.47(b)(3)(vii)(B) is an estimate and will be higher if the applicable interest rate increases.

iii. If terms of the legal obligation provide a limitation on the amount that the interest rate may increase at any one time, the creditor may reflect the effect of the interest rate limitation in calculating the total cost example. For example, if the legal obligation provides that the interest rate may not increase by more than three percentage points each year, the creditor may assume that the rate increases by three percentage points each year until it reaches that maximum possible rate, or if a maximum rate cannot be determined, an interest rate of 25%.

7. *The maximum monthly payment.* The creditor must disclose the maximum payment that the consumer could be required to make under the loan agreement, calculated using the maximum rate of interest applicable to the loan, or if the maximum rate cannot be determined, a rate of 25%. The creditor must determine and disclose the maximum rate of interest in accordance with comments 47(b)(3)–6.ii and 47(b)(3)–6.iii. In addition, if a maximum rate cannot be determined, the creditor must state that there is no maximum rate and that the monthly payment amounts disclosed under §1026.47(b)(3)(viii) are estimates and will be higher if the applicable interest rate increases.

47(b)(4) Alternatives to Private Education Loans

1. *General.* Creditors may use the guidance provided in the commentary for §1026.47(a)(6) in complying with §1026.47(b)(4).

47(b)(5) Rights of the Consumer

1. *Notice of acceptance period.* The disclosure that the consumer may accept the terms of the loan until the acceptance period under §1026.48(c)(1) has expired must include the specific date on which the acceptance period expires and state that the consumer may accept the terms of the loan until that date. Under §1026.48(c)(1), the date on which the acceptance period expires is based on when the consumer receives the disclosures. If the creditor mails the disclosures, the consumer is considered to have received them three business days after the creditor places the disclosures in the mail *See* §1026.46(d)(4). If the creditor provides an acceptance period longer than the minimum 30 calendar days,

the disclosure must reflect the later date. The disclosure must also specify the method or methods by which the consumer may communicate acceptance.

47(c) Final Disclosures

1. *Notice of right to cancel.* The disclosure of the right to cancel must include the specific date on which the three-day cancellation period expires and state that the consumer has a right to cancel by that date. *See* comments 48(d)–1 and –2. For example, if the disclosures were mailed to the consumer on Friday, June 1, and the consumer is deemed to receive them on Tuesday, June 5, the creditor could state: ''You have a right to cancel this transaction, without penalty, by midnight on June 8, 2009. No funds will be disbursed to you or to your school until after this time. You may cancel by calling us at 800–XXX–XXXX.'' If the creditor permits cancellation by mail, the statement must specify that the consumer's mailed request will be deemed timely if placed in the mail not later than the cancellation date specified on the disclosure. The disclosure must also specify the method or methods by which the consumer may cancel.

2. *More conspicuous.* The statement of the right to cancel must be more conspicuous than any other disclosure required under this section except for the finance charge, the interest rate, and the creditor's identity. *See* §1026.46(c)(2)(iii). The statement will be deemed to be made more conspicuous if it is segregated from other disclosures, placed near or at the top of the disclosure document, and highlighted in relation to other required disclosures. For example, the statement may be outlined with a prominent, noticeable box; printed in contrasting color; printed in larger type, bold print, or different type face; underlined; or set off with asterisks.

Section 1026.48—Limitations on Private Education Loans

1. *Co-branding—definition of marketing.* The prohibition on co-branding in §§1026.48(a) and (b) applies to the marketing of private education loans. The term marketing includes any advertisement under §1026.2(a)(2). In addition, the term marketing includes any document provided by the creditor to the consumer related to a specific transaction, such as an application or solicitation, a promissory note or a contract provided to the consumer. For example, prominently displaying the name of the educational institution at the top of the application form or promissory note without mentioning the name of the creditor, such as by naming the loan product the ''University of ABC Loan,'' would be prohibited.2. *Implied endorsement.* A suggestion that a private education loan is offered or made by the covered educational institution instead of by the creditor is included in the prohibition on implying that the covered educational institution endorses the private education loan under §1026.48(a)(1). For example, naming the loan the ''University of ABC Loan,'' suggests that the loan is offered by the educational institution. However, the use of a creditor's full name, even if that name includes the name of a covered educational institution, does not imply endorsement. For example, a credit union whose name includes the name of a covered educational institution is not prohibited from using its own name. In addition, the authorized use of a state seal by a state or an institution of higher education in the marketing of state education loan products does not imply endorsement.

3. *Disclosure.* i. A creditor is considered to have complied with §1026.48(a)(2) if the creditor's marketing contains a clear and conspicuous statement, equally prominent and closely proximate to the reference to the covered educational institution, using the name of the creditor and the name of the covered educational institution that the covered educational institution does not endorse the creditor's loans and that the creditor is not affiliated with the covered educational institution. For example, ''[Name of creditor]'s loans are not endorsed by [name of school] and [name of creditor] is not affiliated with [name of school].'' The statement is considered to be equally prominent and closely proximate if it is the same type size and is located immediately next to or directly above or below the reference to the educational institution, without any intervening text or graphical displays.

ii. A creditor is considered to have complied with §1026.48(b) if the creditor's marketing contains a clear and conspicuous statement, equally prominent and closely proximate to the reference to the covered educational institution, using the name of the creditor's loan or loan program, the name of the covered educational institution, and the name of the creditor, that the creditor's loans are not offered or made by the covered educational institution, but are made by the creditor. For example, ''[Name of loan or loan program] is not being offered or made by [name of school], but by [name of creditor].'' The statement is considered to be equally prominent and closely proximate if it is the same type size and is located immediately next to or directly above or below the reference to the educational institution, without any intervening text or graphical displays.

48(c) Consumer's Right to Accept

1. *30 day acceptance period.* The creditor must provide the consumer with at least 30 calendar days from the date the consumer receives the disclosures required under

§1026.47(b) to accept the terms of the loan. The creditor may provide the consumer with a longer period of time. If the creditor places the disclosures in the mail, the consumer is considered to have received them three business days after they are mailed under §1026.46(d)(4). For purposes of determining when a consumer receives mailed disclosures, ''business day'' means all calendar days except Sundays and the legal public holidays referred to in §1026.2(a)(6). *See* comment 46(d)–1. The consumer may accept the loan at any time before the end of the 30-day period.

2. *Method of acceptance.* The creditor must specify a method or methods by which the consumer can accept the loan at any time within the 30-day acceptance period. The creditor may require the consumer to communicate acceptance orally or in writing. Acceptance may also be communicated electronically, but electronic communication must not be the only means provided for the consumer to communicate acceptance unless the creditor has provided the approval disclosure electronically in compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*). If acceptance by mail is allowed, the consumer's communication of acceptance is considered timely if placed in the mail within the 30-day period.

3. *Prohibition on changes to rates and terms.* The prohibition on changes to the rates and terms of the loan applies to changes that affect those terms that are required to be disclosed under §§1026.47(b) and (c). The creditor is permitted to make changes that do not affect any of the terms disclosed to the consumer under those sections.

4. *Permissible changes to rates and terms—redisclosure not required.* Creditors are not required to consummate a loan where the extension of credit would be prohibited by law or where the creditor has reason to believe that the consumer has committed fraud. A creditor may make changes to the rate based on adjustments to the index used for the loan and changes that will unequivocally benefit the consumer. For example, a creditor is permitted to reduce the interest rate or lower the amount of a fee. A creditor may also reduce the loan amount based on a certification or other information received from a covered educational institution or from the consumer indicating that the student's cost of attendance has decreased or the amount of other financial aid has increased. A creditor may also withdraw the loan approval based on a certification or other information received from a covered educational institution or from the consumer indicating that the student is not enrolled in the institution. For these changes permitted by §1026.48(c)(3), the creditor is not required to provide a new set of approval disclosures required under §1026.47(b) or provide the consumer with a new 30-day acceptance period under §1026.48(c)(1). The creditor must provide the final disclosures under §1026.47(c).

5. *Permissible changes to rates and terms—school certification.* If the creditor reduces the loan amount based on information that the student's cost of attendance has decreased or the amount of other financial aid has increased, the creditor may make certain corresponding changes to the rate and terms. The creditor may change the rate or terms to those that the consumer would have received if the consumer had applied for the reduced loan amount. For example, assume a consumer applies for, and is approved for, a $10,000 loan at a 7% interest rate. However, after the consumer receives the approval disclosures, the consumer's school certifies that the consumer's financial need is only $8,000. The creditor may reduce the loan amount for which the consumer is approved to $8,000. The creditor may also, for example, increase the interest rate on the loan to 7.125%, but only if the consumer would have received a rate of 7.125% if the consumer had originally applied for an $8,000 loan.

6. *Permissible changes to rates and terms—redisclosure required.* A creditor may make changes to the interest rate or terms to accommodate a request from a consumer. For example, assume a consumer applies for a $10,000 loan and is approved for the $10,000 amount at an interest rate of 6%. After the creditor has provided the approval disclosures, the consumer's financial need increases, and the consumer requests to a loan amount of $15,000. In this situation, the creditor is permitted to offer a $15,000 loan, and to make any other changes such as raising the interest rate to 7%, in response to the consumer's request. The creditor must provide a new set of disclosures under §1026.47(b) and provide the consumer with 30 days to accept the offer under §1026.48(c) for the $15,000 loan offered in response to the consumer's request. However, because the consumer may choose not to accept the offer for the $15,000 loan at the higher interest rate, the creditor may not withdraw or change the rate or terms of the offer for the $10,000 loan, except as permitted under §1026.48(c)(3), unless the consumer accepts the $15,000 loan.

48(d) Consumer's Right to Cancel

1. *Right to cancel.* If the creditor mails the disclosures, the disclosures are considered received by the consumer three business days after the disclosures were mailed. For purposes of determining when the consumer receives the disclosures, the term ''business day'' is defined as all calendar days except Sunday and the legal public holidays referred to in §1026.2(a)(6). *See* §1026.46(d)(4). The consumer has three business days from the date on which the disclosures are deemed

received to cancel the loan. For example, if the creditor places the disclosures in the mail on Thursday, June 4, the disclosures are considered received on Monday, June 8. The consumer may cancel any time before midnight Thursday, June 11. The creditor may provide the consumer with more time to cancel the loan than the minimum three business days required under this section. If the creditor provides the consumer with a longer period of time in which to cancel the loan, the creditor may disburse the funds three business days after the consumer has received the disclosures required under this section, but the creditor must honor the consumer's later timely cancellation request.

2. *Method of cancellation*. The creditor must specify a method or methods by which the consumer may cancel. For example, the creditor may require the consumer to communicate cancellation orally or in writing. Cancellation may also be communicated electronically, but electronic communication must not be the only means by which the consumer may cancel unless the creditor provided the final disclosure electronically in compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq*.). If the creditor allows cancellation by mail, the creditor must specify an address or the name and address of an agent of the creditor to receive notice of cancellation. The creditor must wait to disburse funds until it is reasonably satisfied that the consumer has not canceled. For example, the creditor may satisfy itself by waiting a reasonable time after expiration of the cancellation period to allow for delivery of a mailed notice. The creditor may also satisfy itself by obtaining a written statement from the consumer, which must be provided to and signed by the consumer only at the end of the three-day period, that the right has not been exercised.

3. *Cancellation without penalty*. The creditor may not charge the consumer a fee for exercising the right to cancel under §1026.48(d). The prohibition extends only to fees charged specifically for canceling the loan. The creditor is not required to refund fees, such as an application fee, that are charged to all consumers whether or not the consumer cancels the loan.

48(e) Self-Certification Form

1. *General*. Section 1026.48(e) requires that the creditor obtain the self-certification form, signed by the consumer, before consummating the private education loan. The rule applies only to private education loans that will be used for the postsecondary educational expenses of a student while that student is attending an institution of higher education as defined in §1026.46(b)(2). It does not apply to all covered educational institutions. The requirement applies even if the student is not currently attending an institution of higher education, but will use the loan proceeds for postsecondary educational expenses while attending such institution. For example, a creditor is required to obtain the form before consummating a private education loan provided to a high school senior for expenses to be incurred during the consumer's first year of college. This provision does not require that the creditor obtain the self-certification form in instances where the loan is not intended for a student attending an institution of higher education, such as when the consumer is consolidating loans after graduation. Section 155(a)(2) of the Higher Education Act of 1965 provides that the form shall be made available to the consumer by the relevant institution of higher education. However, §1026.48(e) provides flexibility to institutions of higher education and creditors as to how the completed self-certification form is provided to the lender. The creditor may receive the form directly from the consumer, or the creditor may receive the form from the consumer through the institution of higher education. In addition, the creditor may provide the form, and the information the consumer will require to complete the form, directly to the consumer.

2. *Electronic signature*. Under section 155(a)(2) of the Higher Education Act of 1965, the institution of higher education may provide the self-certification form to the consumer in written or electronic form. Under section 155(a)(5) of the Higher Education Act of 1965, the form may be signed electronically by the consumer. A creditor may accept the self-certification form from the consumer in electronic form. A consumer's electronic signature is considered valid if it meets the requirements issued by the Department of Education under section 155(a)(5) of the Higher Education Act of 1965.

48(f) Provision of Information by Preferred Lenders

1. *General*. Section 1026.48(f) does not specify the format in which creditors must provide the required information to the covered educational institution. Creditors may choose to provide only the required information or may provide copies of the form or forms the lender uses to comply with §1026.47(a). A creditor is only required to provide the required information if the creditor is aware that it is a party to a preferred lender arrangement. For example, if a creditor is placed on a covered educational institution's preferred lender list without the creditor's knowledge, the creditor is not required to comply with §1026.48(f).

SUBPART G—SPECIAL RULES APPLICABLE TO CREDIT CARD ACCOUNTS AND OPEN-END CREDIT OFFERED TO COLLEGE STUDENTS

Section 1026.51 Ability To Pay

51(a) General Rule

51(a)(1)(i) Consideration of Ability to Pay

1. *Consideration of additional factors.* Section 1026.51(a) requires a card issuer to consider a consumer's ability to make the required minimum periodic payments under the terms of an account based on the consumer's income or assets and current obligations. The card issuer may also consider consumer reports, credit scores, and other factors, consistent with Regulation B (12 CFR part 1002).

2. *Ability to pay as of application or consideration of increase.* A card issuer complies with §1026.51(a) if it bases its consideration of a consumer's ability to make the required minimum periodic payments on the facts and circumstances known to the card issuer at the time the consumer applies to open the credit card account or when the card issuer considers increasing the credit line on an existing account.

3. *Credit line increase.* When a card issuer considers increasing the credit line on an existing account, §1026.51(a) applies whether the consideration is based upon a request of the consumer or is initiated by the card issuer.

4. *Consideration of income and assets.* For purposes of §1026.51(a):

i. A card issuer may consider any current or reasonably expected income or assets of the consumer or consumers who are applying for a new account or will be liable for debts incurred on that account, including a cosigner or guarantor. Similarly, when a card issuer is considering whether to increase the credit limit on an existing account, the card issuer may consider any current or reasonably expected income or assets of the consumer or consumers who are accountholders, cosigners, or guarantors, and are liable for debts incurred on that account. In both of these circumstances, a card issuer may treat any income and assets to which an applicant, accountholder, joint applicant, cosigner, or guarantor who is or will be liable for debts incurred on the account has a reasonable expectation of access as the applicant's current or reasonably expected income—but is not required to do so. A card issuer may instead limit its consideration of a consumer's current or reasonably expected income or assets to the consumer's independent income or assets as discussed in comments 51(b)(1)(i)–1 and 51(b)(2)–2. Although these comments clarify the independent ability-to-pay requirement that governs applications from consumers under 21, they provide guidance regarding the use of ''independent income and assets'' as an underwriting criterion under §1026.51(a). For example, comment 51(b)(1)(i)–1 explains that card issuers may not consider income or assets to which applicants under 21 have only a reasonable expectation of access. An issuer who chooses to comply with §1026.51(a) by limiting its consideration to applicants' independent income and assets likewise would not consider income or assets to which applicants 21 or older have only a reasonable expectation of access.

ii. Current or reasonably expected income includes, for example, current or expected salary, wages, bonus pay, tips, and commissions. Employment may be full-time, part-time, seasonal, irregular, military, or self-employment. Other sources of income include interest or dividends, retirement benefits, public assistance, alimony, child support, and separate maintenance payments. Proceeds from student loans may be considered as current or reasonably expected income only to the extent that those proceeds exceed the amount disbursed or owed to an educational institution for tuition and other expenses. Current or reasonably expected income also includes income that is being deposited regularly into an account on which the consumer is an accountholder (*e.g.,* an individual deposit account or joint account). Assets include, for example, savings accounts and investments.

iii. Consideration of the income or assets of authorized users, household members, or other persons who are not liable for debts incurred on the account does not satisfy the requirement to consider the consumer's current or reasonably expected income or assets, unless a Federal or State statute or regulation grants a consumer who is liable for debts incurred on the account an ownership interest in such income and assets (*e.g.,* joint ownership granted under State community property laws), such income is being deposited regularly into an account on which the consumer is an accountholder (*e.g.,* an individual deposit account or a joint account), or the consumer has a reasonable expectation of access to such income or assets even though the consumer does not have a current or expected ownership interest in the income or assets. See comment 51(a)(1)-6 for examples of non-applicant income to which a consumer has a reasonable expectation of access.

5. *Information regarding income and assets.* For purposes of §1026.51(a), a card issuer may consider the consumer's current or reasonably expected income and assets based on the following information:

i. Information provided by the consumer in connection with the account, including information provided by the consumer through the application process. For example, card issuers may rely without further inquiry on information provided by applicants in response to a request for ''salary,'' ''income,'' ''assets,'' ''available income,'' ''accessible income,'' or other language requesting that the applicant provide information regarding current or reasonably expected income or assets or any income or assets to which the applicant has a reasonable expectation of access. However, card issuers may not rely solely on information provided in response to a request for ''household income.'' In that case, the card issuer would need to obtain additional information about an applicant's current or reasonably expected income, including income and assets to which the applicant has a reasonable expectation of access (such as by contacting the applicant). See comments 51(a)(1)–4, –5, and –6 for additional guidance on determining the consumer's current or reasonably expected income under §1026.51(a)(1). See comment 51(a)(1)–9 for guidance regarding the use of a single, common application form or process for all credit card applicants, regardless of age.

ii. Information provided by the consumer in connection with any other financial relationship the card issuer or its affiliates have with the consumer (subject to any applicable information-sharing rules).

iii. Information obtained through third parties (subject to any applicable information-sharing rules).

iv. Information obtained through any empirically derived, demonstrably and statistically sound model that reasonably estimates a consumer's income or assets, including any income or assets to which the consumer has a reasonable expectation of access.

6. *Examples of considering income.* Assume that an applicant is not employed and that the applicant is age 21 or older so §1026.51(b) does not apply.

i. If a non-applicant's salary or other income is deposited regularly into a joint account shared with the applicant, a card issuer is permitted to consider the amount of the non-applicant's income that is being deposited regularly into the account to be the applicant's current or reasonably expected income for purposes of §1026.51(a).

ii. The non-applicant's salary or other income is deposited into an account to which the applicant does not have access. However, the non-applicant regularly transfers a portion of that income into the applicant's individual deposit account. A card issuer is permitted to consider the amount of the non-applicant's income that is being transferred regularly into the applicant's account to be the applicant's current or reasonably expected income for purposes of §1026.51(a).

iii. The non-applicant's salary or other income is deposited into an account to which the applicant does not have access. However, the non-applicant regularly uses a portion of that income to pay for the applicant's expenses. A card issuer is permitted to consider the amount of the non-applicant's income that is used regularly to pay for the applicant's expenses to be the applicant's current or reasonably expected income for purposes of §1026.51(a) because the applicant has a reasonable expectation of access to that income.

iv. The non-applicant's salary or other income is deposited into an account to which the applicant does not have access, the non-applicant does not regularly use that income to pay for the applicant's expenses, and no Federal or State statute or regulation grants the applicant an ownership interest in that income. A card issuer is not permitted to consider the non-applicant's income as the applicant's current or reasonably expected income for purposes of §1026.51(a) because the applicant does not have a reasonable expectation of access to the non-applicant's income.

7. *Current obligations.* A card issuer may consider the consumer's current obligations based on information provided by the consumer or in a consumer report. In evaluating a consumer's current obligations, a card issuer need not assume that credit lines for other obligations are fully utilized.

8. *Joint applicants and joint accountholders.* With respect to the opening of a joint account for two or more consumers or a credit line increase on such an account, the card issuer may consider the collective ability of all persons who are or will be liable for debts incurred on the account to make the required payments.

9. *Single application.* A card issuer may use a single, common application form or process for all credit card applicants, regardless of age. A card issuer may rely without further verification on income and asset information provided by applicants through such an application, so long as the application questions gather sufficient information to allow the card issuer to satisfy the requirements of both §1026.51(a) and (b), depending on whether a particular applicant has reached the age of 21. For example, a card issuer might provide two separate line items on its application form, one prompting applicants to provide their ''personal income,'' and the other prompting applicants for ''available income.'' A card issuer might also prompt applicants, regardless of age, using only the term ''income'' and satisfy the requirements of both §1026.51(a) and (b).

51(a)(2) Minimum Periodic Payments

1. *Applicable minimum payment formula.* For purposes of estimating required minimum periodic payments under the safe harbor set forth in §1026.51(a)(2)(ii), if the account has or may have a promotional program, such as a deferred payment or similar program,

where there is no applicable minimum payment formula during the promotional period, the issuer must estimate the required minimum periodic payment based on the minimum payment formula that will apply when the promotion ends.

2. *Interest rate for purchases*. For purposes of estimating required minimum periodic payments under the safe harbor set forth in §1026.51(a)(2)(ii), if the interest rate for purchases is or may be a promotional rate, the issuer must use the post-promotional rate to estimate interest charges.

3. *Mandatory fees*. For purposes of estimating required minimum periodic payments under the safe harbor set forth in §1026.51(a)(2)(ii), mandatory fees that must be assumed to be charged include those fees the card issuer knows the consumer will be required to pay under the terms of the account if the account is opened, such as an annual fee. If a mandatory fee is a promotional fee (as defined in §1026.16(g)), the issuer must use the post-promotional fee amount for purposes of §1026.51(a)(2)(ii).

51(b) Rules Affecting Young Consumers

1. *Age as of date of application or consideration of credit line increase*. Sections 1026.51(b)(1) and (b)(2) apply only to a consumer who has not attained the age of 21 as of the date of submission of the application under §1026.51(b)(1) or the date the credit line increase is requested by the consumer (or if no request has been made, the date the credit line increase is considered by the card issuer) under §1026.51(b)(2).

2. *Liability of cosigner, guarantor, or joint accountholder*. Sections 1026.51(b)(1)(ii) and (b)(2) require the signature or written consent of a cosigner, guarantor, or joint accountholder agreeing either to be secondarily liable for any debt on the account incurred by the consumer before the consumer has attained the age of 21 or to be jointly liable with the consumer for any debt on the account. Sections 1026.51(b)(1)(ii) and (b)(2) do not prohibit a card issuer from also requiring the cosigner, guarantor, or joint accountholder to assume liability for debts incurred after the consumer has attained the age of 21, consistent with any agreement made between the parties.

3. *Authorized users exempt*. If a consumer who has not attained the age of 21 is being added to another person's account as an authorized user and has no liability for debts incurred on the account, §1026.51(b)(1) and (b)(2) do not apply.

4. *Electronic application*. Consistent with §1026.5(a)(1)(iii), an application may be provided to the consumer in electronic form without regard to the consumer consent or other provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*) in the circumstances set forth in §1026.60. The electronic submission of an application from a consumer or a consent to a credit line increase from a cosigner, guarantor, or joint accountholder to a card issuer would constitute a written application or consent for purposes of §1026.51(b) and would not be considered a consumer disclosure for purposes of the E-Sign Act.

5. *Current obligations*. A card issuer may consider the consumer's current obligations under §1026.51(b)(1) and (b)(2)(i) based on information provided by the consumer or in a consumer report. In evaluating a consumer's current obligations, a card issuer need not assume that credit lines for other obligations are fully utilized.

6. *Joint applicants or joint accountholders*. With respect to the opening of a joint account for two or more consumers under §1026.51(b)(1) or a credit line increase on such an account under §1026.51(b)(2)(i), the card issuer may consider the collective ability of all persons who are or will be liable for debts incurred on the account to make the required payments. See commentary to §1026.51(b)(1)(i) and (b)(2) for information on income and assets that may be considered for joint applicants, joint accountholders, cosigners, or guarantors who are under the age of 21, and commentary to §1026.51(b)(1)(ii) for information on income and assets that may be considered for joint applicants, joint accountholders, cosigners, or guarantors who are at least 21 years old.

7. *Relation to Regulation B*. In considering an application or credit line increase on the credit card account of a consumer who is less than 21 years old, card issuers must comply with the applicable rules in Regulation B (12 CFR part 1026). A card issuer does not violate Regulation B by complying with the requirements in §1026.51(b).

51(b)(1) Applications from young consumers

Paragraph 51(b)(1)(i).

1. *Consideration of income and assets for young consumers*. For purposes of §1026.51(b)(1)(i):

i. A card issuer may consider any current or reasonably expected income or assets of the consumer or consumers who are applying for a new account or will be liable for debts incurred on that account, including a cosigner or guarantor. However, because §1026.51(b)(1)(i) requires that the consumer who has not attained the age of 21 have an independent ability to make the required minimum periodic payments, the card issuer may only consider the applicant's current or reasonably expected income or assets under §1026.51(b)(1)(i). The card issuer may not consider income or assets to which an applicant, joint applicant, cosigner, or guarantor, in each case who is under the age of 21 and is or will be liable for debts incurred on the account, has only a reasonable expectation of access.

ii. Current or reasonably expected income includes, for example, current or expected salary, wages, bonus pay, tips, and commissions. Employment may be full-time, part-time, seasonal, irregular, military, or self-employment. Other sources of income include interest or dividends, retirement benefits, public assistance, alimony, child support, and separate maintenance payments. Proceeds from student loans may be considered as current or reasonably expected income only to the extent that those proceeds exceed the amount disbursed or owed to an educational institution for tuition and other expenses. Current or reasonably expected income includes income that is being deposited regularly into an account on which the consumer is an accountholder (*e.g.*, an individual deposit account or a joint account). Assets include, for example, savings accounts and investments. Current or reasonably expected income and assets does not include income and assets to which the consumer only has a reasonable expectation of access.

iii. Consideration of the income and assets of authorized users, household members, or other persons who are not liable for debts incurred on the account does not satisfy the requirement to consider the consumer's current or reasonably expected income or assets, unless a Federal or State statute or regulation grants a consumer who is liable for debts incurred on the account an ownership interest in such income or assets (*e.g.*, joint ownership granted under State community property laws), or the income is being deposited regularly into an account on which the consumer is an accountholder (*e.g.*, an individual deposit account or a joint account). See comment 51(b)(1)(i)–3 for examples of income that may be relied upon as a consumer's current or reasonably expected income.

2. *Information regarding income and assets for young consumers.* For purposes of §1026.51(b)(1)(i), a card issuer may consider the consumer's current or reasonably expected income and assets based on the following information:

i. Information provided by the consumer in connection with the account, including information provided by the consumer through the application process. For example, card issuers may rely without further inquiry on information provided by applicants in response to a request for "salary," "income," "personal income," "individual income," "assets," or other language requesting that the applicant provide information regarding his or her current or reasonably expected income or assets. However, card issuers may not rely solely on information provided in response to a request for "household income." Nor may they rely solely on information provided in response to a request for "available income," "accessible income," or other language requesting that the applicant provide any income or assets to which the applicant has a reasonable expectation of access. In such cases, the card issuer would need to obtain additional information about an applicant's current or reasonably expected income (such as by contacting the applicant). See comments 51(b)(1)(i)–1, –2, and –3 for additional guidance on determining the consumer's current or reasonably expected income under §1026.51(b)(1)(i). See comment 51(a)(1)–9 for guidance regarding the use of a single, common application for all credit card applicants, regardless of age.

ii. Information provided by the consumer in connection with any other financial relationship the card issuer or its affiliates have with the consumer (subject to any applicable information-sharing rules).

iii. Information obtained through third parties (subject to any applicable information-sharing rules).

iv. Information obtained through any empirically derived, demonstrably and statistically sound model that reasonably estimates a consumer's income or assets.

3. *Examples of considering income for young consumers.* Assume that an applicant is not employed and the applicant is under the age of 21 so §1026.51(b) applies.

i. If a non-applicant's salary or other income is deposited regularly into a joint account shared with the applicant, a card issuer is permitted to consider the amount of the non-applicant's income that is being deposited regularly into the account to be the applicant's current or reasonably expected income for purposes of §1026.51(b)(1)(i).

ii. The non-applicant's salary or other income is deposited into an account to which the applicant does not have access. However, the non-applicant regularly transfers a portion of that income into the applicant's individual deposit account. A card issuer is permitted to consider the amount of the non-applicant's income that is being transferred regularly into the applicant's account to be the applicant's current or reasonably expected income for purposes of §1026.51(b)(1)(i).

iii. The non-applicant's salary or other income is deposited into an account to which the applicant does not have access. However, the non-applicant regularly uses that income to pay for the applicant's expenses. A card issuer is not permitted to consider the non-applicant's income that is used regularly to pay for the applicant's expenses as the applicant's current or reasonably expected income for purposes of §1026.51(b)(1)(i), unless a Federal or State statute or regulation grants the applicant an ownership interest in such income.

iv. The non-applicant's salary or other income is deposited into an account to which the applicant does not have access, the non-applicant does not regularly use that income to pay for the applicant's expenses, and no Federal or State statute or regulation grants the applicant an ownership interest in that income. The card issuer is not permitted to consider the non-applicant's income to be the applicant's current or reasonably expected income for purposes of §1026.51(b)(1)(i).

Paragraph 51(b)(1)(ii).

1. *Financial information.* Information regarding income and assets that satisfies the requirements of §1026.51(a) also satisfies the requirements of §1026.51(b)(1)(ii)(B) and card issuers may rely on the guidance in comments 51(a)(1)–4, –5, and –6 for purposes of determining whether a cosigner, guarantor, or joint applicant who is at least 21 years old has the ability to make the required minimum periodic payments in accordance with §1026.51(b)(1)(ii)(B).

51(b)(2) Credit line increases for young consumers

1. *Credit line request by joint accountholder aged 21 or older.* The requirement under §1026.51(b)(2) that a cosigner, guarantor, or joint accountholder for a credit card account opened pursuant to §1026.51(b)(1)(ii) must agree in writing to assume liability for the increase before a credit line is increased, does not apply if the cosigner, guarantor or joint accountholder who is at least 21 years old initiates the request for the increase.

2. *Independent ability-to-pay standard.* Under §1026.51(b)(2), if a credit card account has been opened pursuant to §1026.51(b)(1)(i), no increase in the credit limit may be made on such account before the consumer attains the age of 21 unless, at the time of the contemplated increase, the consumer has an independent ability to make the required minimum periodic payments on the increased limit, consistent with §1026.51(b)(1)(i), or a cosigner, guarantor, or joint applicant who is at least 21 years old assumes liability for any debt incurred on the account, consistent with §1026.51(b)(1)(ii). Thus, when a card issuer is considering whether to increase the credit limit on an existing account, §1026.51(b)(2)(i)(A) requires that consumers who have not attained the age of 21 and do not have a cosigner, guarantor, or joint applicant who is 21 years or older must have an independent ability to make the required minimum periodic payments as of the time of the contemplated increase. Thus, the card issuer may not consider income or assets to which an accountholder, cosigner, or guarantor, in each case who is under the age of 21 and is or will be liable for debts incurred on the account, has only a reasonable expectation of access under §1026.51(b)(2)(i)(A). The card issuer, however, may consider income or assets to which an accountholder, cosigner, or guarantor, in each case who is age 21 or older and is or will be liable for debts incurred on the account, has a reasonable expectation of access under §1026.51(b)(2)(i)(B). Information regarding income and assets that satisfies the requirements of §1026.51(b)(1)(i) also satisfies the requirements of §1026.51(b)(2)(i)(A) and card issuers may rely on the guidance in the commentary to §1026.51(b)(1)(i) for purposes of determining whether an accountholder who is less than 21 years old has the independent ability to make the required minimum periodic payments in accordance with §1026.51(b)(2)(i)(A). Information regarding income and assets that satisfies the requirements of §1026.51(a) also satisfies the requirements of §1026.51(b)(2)(i)(B) and card issuers may rely on the guidance in comments 51(a)(1)–4, –5, and –6 for purposes of determining whether a cosigner, guarantor, or joint applicant who is at least 21 years old has the ability to make the required minimum periodic payments in accordance with §1026.51(b)(2)(i)(B).

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 $15 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 $15 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 $15 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 $15 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 $15 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(a)(2) Fees Not Subject to Limitations

1. *Covered fees.* Except as provided in §1026.52(a)(2) and except as provided in comments 52(a)(2)–2 and–3, §1026.52(a) applies to any fees or other charges that a card issuer will or may require the consumer to pay with respect to a credit card account during the first year after account opening, other than charges attributable to periodic interest rates. For example, §1026.52(a) applies to:

i. Fees that the consumer is required to pay for the issuance or availability of credit described in §1026.60(b)(2), including any fee based on account activity or inactivity and any fee that a consumer is required to pay in order to receive a particular credit limit;

ii. 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, if the insurance or debt cancellation or debt suspension coverage is required by the terms of the account;

iii. Fees that the consumer is required to pay in order to engage in transactions using the account (such as cash advance fees, balance transfer fees, foreign transaction fees, and fees for using the account for purchases);

iv. Fees that the consumer is required to pay for violating the terms of the account (except to the extent specifically excluded by §1026.52(a)(2)(i));

v. Fixed finance charges; and

vi. Minimum charges imposed if a charge would otherwise have been determined by applying a periodic interest rate to a balance except for the fact that such charge is smaller than the minimum.

2. *Fees in connection with a covered separate credit feature and an asset feature of the prepaid account that are both accessible by a hybrid prepaid-credit card.* 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(a) applies to the following fees:

i. Except as provided in §1026.52(a)(2), any fee or charge imposed on the covered separate credit feature, other than a charge attributable to a periodic interest rate, during the first year after account opening that the card issuer will or may require the consumer to pay in connection with the credit feature, and

ii. Except as provided in §1026.52(a)(2), any fee or charge imposed on the asset feature of the prepaid account, other than a charge attributable to a periodic interest rate, during the first year after account opening that the card issuer will or may require the consumer to pay where that fee or charge is a charge imposed as part of the plan under §1026.6(b)(3).

3. *Fees imposed on the asset feature of a prepaid account that are not charges imposed as part of the plan.* Section 1026.52(a) 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 of the 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.

4. *Fees the consumer is not required to pay.* Section 1026.52(a)(2)(ii) provides that §1026.52(a) does not apply to fees that the consumer is not required to pay with respect to the account. For example, §1026.52(a) generally does not apply to fees for making an expedited payment (to the extent permitted by §1026.10(e)), fees for optional services (such as travel insurance), fees for reissuing a lost or stolen card, or statement reproduction fees.

5. *Security deposits.* A security deposit that is charged to a credit card account is a fee for purposes of §1026.52(a). In contrast, however, a security deposit is not subject to the 25 percent limit in §1026.52(a)(1) if it is not charged to the account. For example, §1026.52(a)(1) does not prohibit a card issuer from requiring a consumer to provide funds at account opening pledged as security for the account that exceed 25 percent of the credit limit at account opening so long as those funds are not obtained from the account.

52(a)(3) Rule of Construction

1. *Fees or charges otherwise prohibited by law.* Section 1026.52(a) does not authorize the imposition or payment of fees or charges otherwise prohibited by law. For example, see 16 CFR 310.4(a)(4).

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.

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 $21.50, the card issuer may round that amount up to the nearest whole dollar and impose a late payment fee of $22. However, if the late payment fee permitted by §1026.52(b) were $21.49, the card issuer would not be permitted to round that amount up to $22, although the card issuer could round that amount down and impose a late payment fee of $21.

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.

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 $30 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 a late payment occurs on January 15 and that, based on a cost determination pursuant to §1026.52(b)(1)(i), the card issuer imposes a $30 late payment fee. Another late payment occurs on July 15. The card issuer may impose another $30 late payment fee pursuant to §1026.52(b)(1)(i) or may impose a $25 late payment fee pursuant to §1026.52(b)(1)(ii)(A). However, the card issuer may not impose a $35 late payment 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 late payment and another late payment occurs on September 15, the card issuer may impose a

$35 fee for the September 15 late payment 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 $15, §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 and the cost of funding delinquent accounts).

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 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)(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 (late payments).* A required minimum periodic payment of $50 is due on March 25. On March 26, a late payment has occurred because no payment has been received. Accordingly, consistent with §1026.52(b)(1)(ii)(A), the card issuer imposes a $25 late payment fee on March 26. In order for the card issuer to impose a $35 late payment fee pursuant to §1026.52(b)(1)(ii)(B), a second late payment must occur during the April, May, June, July, August, or September billing cycles.

1. The card issuer does not receive any payment during the March billing cycle. A required minimum periodic payment of $100 is due on April 25. On April 20, the card issuer receives a $50 payment. No further payment is received during the April billing cycle. Accordingly, consistent with §1026.52(b)(1)(ii)(B), the card issuer may impose a $35 late payment fee on April 26. Furthermore, the card issuer may impose a $35 late payment fee for any late payment that occurs during the May, June, July, August, September, or October billing cycles.

2. Same facts as in paragraph A above. On March 30, the card issuer receives a $50 payment and the required minimum periodic payments for the April, May, June, July, August, and September billing cycles are received on or before the payment due date. A required minimum periodic payment of $60 is due on October 25. On October 26, a late payment has occurred because the required minimum periodic payment due on October 25 has not been received. However, because this late payment 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 a late payment 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 $30 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)(A), the card issuer imposes a $25 late payment fee on August 26. On August 30, the card issuer receives a $30 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)(B), the card issuer imposes a $35 late payment fee on October 26.

C. *Violations of different types (late payment and returned payment).* A required minimum periodic payment of $50 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)(A), the card issuer imposes a $25 late payment fee on July 26. On July 30, the card issuer receives a $50 payment. A required minimum periodic payment of $50 is due on August 25. On August 24, a $50 payment is received. On August 27, the $50 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)(B) permits the issuer to impose a fee of $35 because the late payment occurred during the six billing cycles following the July billing cycle. In contrast, 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 purposes of §1026.52(b)(1)(ii)(A) and (b)(1)(ii)(B), the Bureau shall calculate each year price level adjusted amounts 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 $300 in transactions, increasing the balance to $1,300. At the end of the July billing cycle, no payment has been received and the card issuer imposes a $25 late payment fee consistent with §1026.52(b)(1)(ii)(A). On August 5, the card issuer provides a periodic statement disclosing the $1,325 balance consistent with §1026.7. During the August billing cycle, the account is used for $200 in transactions, increasing the balance to $1,525. 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 $40, which is 3% of the $1,325 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 $37, which is 3% of the unpaid portion of the $1,325 balance that was due at the end of the August billing cycle ($1,225).

iii. Same facts as in paragraph A 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 $34, which is 3% of the unpaid portion of the $1,325 balance that was due at the end of the August billing cycle ($1,125). In the alternative, the card issuer may impose a late payment fee of $35 consistent with §1026.52(b)(1)(ii)(B). 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) Fees That Exceed Dollar Amount Associated With Violation

1. *Late payment fees.* For purposes of §1026.52(b)(2)(i), the dollar amount associated with a late payment is the amount of the required minimum periodic payment due immediately prior to assessment of the late payment fee. Thus, §1026.52(b)(2)(i)(A) prohibits a card issuer from imposing a late payment fee that exceeds the amount of that required minimum periodic payment. For example:

i. Assume that a $15 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 the amount of the required minimum periodic payment due on September 25 ($15). Thus, under §1026.52(b)(2)(i)(A), the amount of that fee cannot exceed $15 (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 the full amount of the required minimum periodic payment due on September 25 ($15), rather than the unpaid portion of that payment ($5). Thus, under §1026.52(b)(2)(i)(A), the amount of the late payment fee cannot exceed $15 (even if a higher fee would be permitted under §1026.52(b)(1)).

iii. Assume that a $15 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 the amount of the required minimum periodic payment due on October 28 ($15), 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 $15 (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)(*1*) 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)(*1*).

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 $20. On March 26, the card issuer has not received any payment and imposes a late payment fee. Consistent with §§1026.52(b)(1)(ii)(A) and (b)(2)(i), the card issuer may impose a $20 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 $20 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 $20 minimum payment due on March 25 and the $20 late payment fee imposed on March 26. On April 20, the card issuer receives a $20 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)(B) and (b)(2)(i), the card issuer may impose a $35 late payment fee on April 26.

B. On April 3, the card issuer provides a periodic statement disclosing that a $20 required minimum periodic payment is due on April 25. This minimum payment does not include the $20 minimum payment due on March 25 or the $20 late payment fee imposed on March 26. On April 20, the card issuer receives a $20 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 $20 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 $30.

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)(A) and (b)(2)(i)(A), the card issuer may impose a late payment fee of $25 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)(A) and (b)(2)(i)(A), the card issuer may impose a late payment fee of $25 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)(A) and (b)(2)(i)(A), the card issuer may impose a late payment fee of $25 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)(A), (b)(1)(ii)(B), and (b)(2)(i)(A), the card issuer may impose a late payment fee of $25 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)(A) and (b)(2)(i)(A), the card issuer may impose a late payment fee of $25 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.

Section 1026.53—Allocation of Payments

1. *Required minimum periodic payment.* Section 1026.53 addresses the allocation of amounts paid by the consumer in excess of the minimum periodic payment required by the card issuer. Section 1026.53 does not limit or otherwise address the card issuer's ability to determine, consistent with applicable law and regulatory guidance, the amount of the required minimum periodic payment or how that payment is allocated. A card issuer may, but is not required to, allocate the required minimum periodic payment consistent with the requirements in §1026.53 to the extent consistent with other applicable law or regulatory guidance.

2. *Applicable rates and balances.* Section 1026.53 permits a card issuer to allocate an amount paid by the consumer in excess of the required minimum periodic payment based on the annual percentage rates and balances on the day the preceding billing cycle ends, on the day the payment is credited to the account, or on any day in between those two dates. The day used by the card issuer to determine the applicable annual percentage rates and balances for purposes of §1026.53 generally must be consistent from billing cycle to billing cycle, although the card issuer may adjust this day from time to time. For example:

i. Assume that the billing cycles for a credit card account start on the first day of the month and end on the last day of the month. On the date the March billing cycle ends (March 31), the account has a purchase balance of $500 at a promotional annual percentage rate of 5% and another purchase balance of $200 at a non-promotional annual percentage rate of 15%. On April 5, a $100 purchase to which the 15% rate applies is charged to the account. On April 15, the promotional rate expires and §1026.55(b)(1) permits the card issuer to increase the rate that applies to the $500 balance from 5% to 18%. On April 25, the card issuer credits to the account $400 paid by the consumer in excess of the required minimum periodic payment. If the card issuer's practice is to allocate payments based on the rates and balances on the last day of the prior billing cycle, the card issuer would allocate the $400 payment to pay in full the $200 balance to which the 15% rate applied on March 31 and then allocate the remaining $200 to the $500 balance to which the 5% rate applied on March 31. In the alternative, if the card issuer's practice is to allocate payments based on the rates and balances on the day a payment is credited to the account, the card issuer would allocate the $400 payment to the $500 balance to which the 18% rate applied on April 25.

ii. Same facts as above except that, on April 25, the card issuer credits to the account $750 paid by the consumer in excess of the required minimum periodic payment. If the card issuer's practice is to allocate payments based on the rates and balances on the last day of the prior billing cycle, the card issuer would allocate the $750 payment to pay in full the $200 balance to which the 15% rate applied on March 31 and the $500 balance to which the 5% rate applied on March 31 and then allocate the remaining $50 to the $100 purchase made on April 5. In the alternative, if the card issuer's practice is to allocate payments based on the rates and balances on the day a payment is credited to the account, the card issuer would allocate the $750 payment to pay in full the $500 balance to which the 18% rate applied on April 25 and then allocate the remaining $250 to the $300 balance to which the 15% rate applied on April 25.

3. *Claims or defenses under §1026.12(c) and billing error disputes under §1026.13.* When a consumer has asserted a claim or defense against the card issuer pursuant to §1026.12(c) or alleged a billing error under §1026.13, the card issuer must apply the consumer's payment in a manner that avoids or minimizes any reduction in the amount subject to that claim, defense, or dispute. For example:

i. Assume that a credit card account has a $500 cash advance balance at an annual percentage rate of 25% and a $1,000 purchase balance at an annual percentage rate of 17%. Assume also that $200 of the cash advance balance is subject to a claim or defense under §1026.12(c) or a billing error dispute under §1026.13. If the consumer pays $900 in excess of the required minimum periodic payment, the card issuer must allocate $300 of the excess payment to pay in full the portion of the cash advance balance that is not subject to the claim, defense, or dispute and then allocate the remaining $600 to the $1,000 purchase balance.

ii. Same facts as above except that the consumer pays $1,400 in excess of the required minimum periodic payment. The card issuer must allocate $1,300 of the excess payment to pay in full the $300 cash advance balance that is not subject to the claim, defense, or dispute and the $1,000 purchase balance. If there are no new transactions or other amounts to which the remaining $100 can be allocated, the card issuer may apply that amount to the $200 cash advance balance that is subject to the claim, defense, or dispute. However, if the card issuer subsequently determines that a billing error occurred as asserted by the consumer, the card issuer must credit the account for the disputed amount and any related finance or other charges and send a correction notice consistent with §1026.13(e).

4. *Balances with the same rate*. When the same annual percentage rate applies to more than one balance on an account and a different annual percentage rate applies to at least one other balance on that account, §1026.53 generally does not require that any particular method be used when allocating among the balances with the same annual percentage rate. Under these circumstances, a card issuer may treat the balances with the same rate as a single balance or separate balances. *See* example in comment 53–5.iv. However, when a balance on a credit card account is subject to a deferred interest or similar program that provides that a consumer will not be obligated to pay interest that accrues on the balance if the balance is paid in full prior to the expiration of a specified period of time, that balance must be treated as a balance with an annual percentage rate of zero for purposes of §1026.53 during that period of time. For example, if an account has a $1,000 purchase balance and a $2,000 balance that is subject to a deferred interest program that expires on July 1 and a 15% annual percentage rate applies to both, the balances must be treated as balances with different rates for purposes of §1026.53 until July 1. In addition, unless the card issuer allocates amounts paid by the consumer in excess of the required minimum periodic payment in the manner requested by the consumer pursuant to §1026.53(b)(1)(ii), §1026.53(b)(1)(i) requires the card issuer to apply any excess payments first to the $1,000 purchase balance except during the last two billing cycles of the deferred interest period (when it must be applied first to any remaining portion of the $2,000 balance). *See* example in comment 53–5.v.

5. *Examples*. For purposes of the following examples, assume that none of the required minimum periodic payment is allocated to the balances discussed (unless otherwise stated).

i. Assume that a credit card account has a cash advance balance of $500 at an annual percentage rate of 20% and a purchase balance of $1,500 at an annual percentage rate of 15% and that the consumer pays $800 in excess of the required minimum periodic payment. Under §1026.53(a), the card issuer must allocate $500 to pay off the cash advance balance and then allocate the remaining $300 to the purchase balance.

ii. Assume that a credit card account has a cash advance balance of $500 at an annual percentage rate of 20% and a purchase balance of $1,500 at an annual percentage rate of 15% and that the consumer pays $400 in excess of the required minimum periodic payment. Under §1026.53(a), the card issuer must allocate the entire $400 to the cash advance balance.

iii. Assume that a credit card account has a cash advance balance of $100 at an annual percentage rate of 20%, a purchase balance of $300 at an annual percentage rate of 18%, and a $600 protected balance on which the 12% annual percentage rate cannot be increased pursuant to §1026.55. If the consumer pays $500 in excess of the required minimum periodic payment, §1026.53(a) requires the card issuer to allocate $100 to pay off the cash advance balance, $300 to pay off the purchase balance, and $100 to the protected balance.

iv. Assume that a credit card account has a cash advance balance of $500 at an annual percentage rate of 20%, a purchase balance of $1,000 at an annual percentage rate of 15%, and a transferred balance of $2,000 that was previously at a discounted annual percentage rate of 5% but is now at an annual percentage rate of 15%. Assume also that the consumer pays $800 in excess of the required minimum periodic payment. Under §1026.53(a), the card issuer must allocate $500 to pay off the cash advance balance and allocate the remaining $300 among the purchase balance and the transferred balance in the manner the card issuer deems appropriate.

v. Assume that on January 1 a consumer uses a credit card account to make a $1,200 purchase subject to a deferred interest program under which interest accrues at an annual percentage rate of 15% but the consumer will not be obligated to pay that interest if the balance is paid in full on or before June 30. The billing cycles for this account begin on the first day of the month and end on the last day of the month. Each month from January through June, the consumer uses the account to make $200 in purchases that are not subject to the deferred interest program but are subject to the 15% rate.

A. Each month from February through June, the consumer pays $400 in excess of the required minimum periodic payment on the payment due date, which is the twenty-fifth of the month. Any interest that accrues on the purchases not subject to the deferred interest program is paid by the required minimum periodic payment. The card issuer does not accept requests from consumers regarding the allocation of excess payments pursuant to §1026.53(b)(1)(ii). Thus,

§1026.53(b)(1)(i) requires the card issuer to allocate the $400 excess payments received on February 25, March 25, and April 25 consistent with §1026.53(a). In other words, the card issuer must allocate those payments as follows: $200 to pay off the balance not subject to the deferred interest program (which is subject to the 15% rate) and the remaining $200 to the deferred interest balance (which is treated as a balance with a rate of zero). However, §1026.53(b)(1)(i) requires the card issuer to allocate the entire $400 excess payment received on May 25 to the deferred interest balance. Similarly, §1026.53(b)(1)(i) requires the card issuer to allocate the $400 excess payment received on June 25 as follows: $200 to the deferred interest balance (which pays that balance in full) and the remaining $200 to the balance not subject to the deferred interest program.

B. Same facts as above, except that the card issuer does accept requests from consumers regarding the allocation of excess payments pursuant to §1026.53(b)(1)(ii). In addition, on April 25, the card issuer receives an excess payment of $800, which the consumer requests be allocated to pay off the $800 balance subject to the deferred interest program. Section 1026.53(b)(1)(ii) permits the card issuer to allocate the $800 excess payment in the manner requested by the consumer.

53(b) Special Rules

1. *Deferred interest and similar programs.* Section 1026.53(b)(1) applies to deferred interest or similar programs under which the consumer is not obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time. For purposes of §1026.53(b)(1), ''deferred interest'' has the same meaning as in §1026.16(h)(2) and associated commentary. Section 1026.53(b)(1) applies regardless of whether the consumer is required to make payments with respect to that balance during the specified period. However, a grace period during which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate is not a deferred interest or similar program for purposes of §1026.53(b)(1). Similarly, a temporary annual percentage rate of zero percent that applies for a specified period of time consistent with §1026.55(b)(1) is not a deferred interest or similar program for purposes of §1026.53(b)(1) unless the consumer may be obligated to pay interest that accrues during the period if a balance is not paid in full prior to expiration of the period.

2. *Expiration of deferred interest or similar program during billing cycle.* For purposes of §1026.53(b)(1)(i), a billing cycle does not constitute one of the two billing cycles immediately preceding expiration of a deferred interest or similar program if the expiration date for the program precedes the payment due date in that billing cycle. For example, assume that a credit card account has a balance subject to a deferred interest program that expires on June 15. Assume also 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 required minimum periodic payment is due on the twenty-fifth day of the month. The card issuer does not accept requests from consumers regarding the allocation of excess payments pursuant to §1026.53(b)(1)(ii). Because the expiration date for the deferred interest program (June 15) precedes the due date in the June billing cycle (June 25), §1026.53(b)(1)(i) requires the card issuer to allocate first to the deferred interest balance any amount paid by the consumer in excess of the required minimum periodic payment during the April and May billing cycles (as well as any amount paid by the consumer before June 15). However, if the deferred interest program expired on June 25 or on June 30 (or on any day in between), §1026.53(b)(1)(i) would apply only to the May and June billing cycles.

3. *Consumer requests.* i. *Generally.* Section 1026.53(b) does not require a card issuer to allocate amounts paid by the consumer in excess of the required minimum periodic payment in the manner requested by the consumer, provided that the card issuer instead allocates such amounts consistent with §1026.53(a) or (b)(1)(i), as applicable. For example, a card issuer may decline consumer requests regarding payment allocation as a general matter or may decline such requests when a consumer does not comply with requirements set by the card issuer (such as submitting the request in writing or submitting the request prior to or contemporaneously with submission of the payment), provided that amounts paid by the consumer in excess of the required minimum periodic payment are allocated consistent with §1026.53(a) or (b)(1)(i), as applicable. Similarly, a card issuer that accepts requests pursuant to §1026.53(b)(1)(ii) or (b)(2) must allocate amounts paid by a consumer in excess of the required minimum periodic payment consistent with §1026.53(a) or (b)(1)(i), as applicable, if the consumer does not submit a request. Furthermore, a card issuer that accepts requests pursuant to §1026.53(b)(1)(ii) or (b)(2) must allocate consistent with §1026.53(a) or (b)(1)(i), as applicable, if the consumer submits a request with which the card issuer cannot comply (such as a request that contains a mathematical error), unless the consumer submits an additional request with which the card issuer can comply.

ii. *Examples of consumer requests that satisfy §1026.53(b)(1)(ii) or (b)(2).* A consumer has made a request for purposes of §1026.53(b)(1)(ii) or (b)(2) if:

A. The consumer contacts the card issuer orally, electronically, or in writing and specifically requests that a payment or payments be allocated in a particular manner during the period of time that the deferred interest or similar program applies to a balance on the account or the period of time that a balance on the account is secured.

B. The consumer completes and submits to the card issuer a form or payment coupon provided by the card issuer for the purpose of requesting that a payment or payments be allocated in a particular manner during the period of time that the deferred interest or similar program applies to a balance on the account or the period of time that a balance on the account is secured.

C. The consumer contacts the card issuer orally, electronically, or in writing and specifically requests that a payment that the card issuer has previously allocated consistent with §1026.53(a) or (b)(1)(i), as applicable, instead be allocated in a different manner.

iii. *Examples of consumer requests that do not satisfy §1026.53(b)(1)(ii) or (b)(2).* A consumer has not made a request for purposes of §1026.53(b)(1)(ii) or (b)(2) if:

A. The terms and conditions of the account agreement contain preprinted language stating that by applying to open an account, by using that account for transactions subject to a deferred interest or similar program, or by using the account to purchase property in which the card issuer holds a security interest the consumer requests that payments be allocated in a particular manner.

B. The card issuer's online application contains a preselected check box indicating that the consumer requests that payments be allocated in a particular manner and the consumer does not deselect the box.

C. The payment coupon provided by the card issuer contains preprinted language or a preselected check box stating that by submitting a payment the consumer requests that the payment be allocated in a particular manner.

D. The card issuer requires a consumer to accept a particular payment allocation method as a condition of using a deferred interest or similar program, purchasing property in which the card issuer holds a security interest, making a payment, or receiving account services or features.

Section 1026.54—Limitations on the Imposition of Finance Charges

54(a) Limitations on imposing finance charges as a result of the loss of a grace period

54(a)(1) General Rule

1. *Eligibility for grace period.* Section 1026.54 prohibits the imposition of finance charges as a result of the loss of a grace period in certain specified circumstances. Section 1026.54 does not require the card issuer to provide a grace period. Furthermore, §1026.54 does not prohibit the card issuer from placing limitations and conditions on a grace period (such as limiting application of the grace period to certain types of transactions or conditioning eligibility for the grace period on certain transactions being paid in full by a particular date), provided that such limitations and conditions are consistent with §1026.5(b)(2)(ii)(B) and §1026.54. Finally, §1026.54 does not limit the imposition of finance charges with respect to a transaction when the consumer is not eligible for a grace period on that transaction at the end of the billing cycle in which the transaction occurred. For example:

i. Assume 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 is the twenty-fifth day of the month. Assume also that, for purchases made during the current billing cycle (for purposes of this example, the June billing cycle), the grace period applies from the date of the purchase until the payment due date in the following billing cycle (July 25), subject to two conditions. First, the purchase balance at the end of the preceding billing cycle (the May billing cycle) must have been paid in full by the payment due date in the current billing cycle (June 25). Second, the purchase balance at the end of the current billing cycle (the June billing cycle) must be paid in full by the following payment due date (July 25). Finally, assume that the consumer was eligible for a grace period at the start of the June billing cycle (in other words, assume that the purchase balance for the April billing cycle was paid in full by May 25).

A. If the consumer pays the purchase balance for the May billing cycle in full by June 25, then at the end of the June billing cycle the consumer is eligible for a grace period with respect to purchases made during that billing cycle. Therefore, §1026.54 limits the imposition of finance charges with respect to purchases made during the June billing cycle if the consumer does not pay the purchase balance for the June billing cycle in full by July 25. Specifically, §1026.54(a)(1)(i) prohibits the card issuer from imposing finance charges based on the purchase balance at the end of the June billing cycle for days that precede the July billing cycle. Furthermore, §1026.54(a)(1)(ii) prohibits the card issuer from imposing finance charges based on any portion of the balance at the end of the June billing cycle that was paid on or before July 25.

B. If the consumer does not pay the purchase balance for the May billing cycle in full by June 25, then the consumer is not eligible for a grace period with respect to purchases made during the June billing cycle at the end of that cycle. Therefore, §1026.54 does not limit the imposition of finance charges with respect to purchases made during the June billing cycle regardless of whether the consumer pays the purchase balance for the June billing cycle in full by July 25.

ii. Same facts as above except that the card issuer places only one condition on the provision of a grace period for purchases made during the current billing cycle (the June billing cycle): that the purchase balance at the end of the current billing cycle (the June billing cycle) be paid in full by the following payment due date (July 25). In these circumstances, §1026.54 applies to the same extent as discussed in paragraphs i.A and i.B above regardless of whether the purchase balance for the April billing cycle was paid in full by May 25.

2. *Definition of grace period.* For purposes of §§1026.5(b)(2)(ii)(B) and 1026.54, a grace period is a period within which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate. The following are not grace periods for purposes of §1026.54:

i. *Deferred interest and similar programs.* A deferred interest or similar promotional program under which a consumer will not be obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time is not a grace period for purposes of §1026.54. Thus, §1026.54 does not prohibit the card issuer from charging accrued interest to an account upon expiration of a deferred interest or similar program if the balance was not paid in full prior to expiration (to the extent consistent with §1026.55 and other applicable law and regulatory guidance).

ii. *Waivers or rebates of interest.* As a general matter, a card issuer has not provided a grace period with respect to transactions for purposes of §1026.54 if, on an individualized basis (such as in response to a consumer's request), the card issuer waives or rebates finance charges that have accrued on transactions. In addition, when a balance at the end of the preceding billing cycle is paid in full on or before the payment due date in the current billing cycle, a card issuer that waives or rebates trailing or residual interest accrued on that balance or any other transactions during the current billing cycle has not provided a grace period with respect to that balance or any other transactions for purposes of §1026.54. However, if the terms of the account provide that all interest accrued on transactions will be waived or rebated if the balance for those transactions at the end of the billing cycle during which the transactions occurred is paid in full by the following payment due date, the card issuer is providing a grace period with respect to those transactions for purposes of §1026.54. For example:

A. Assume 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 is the twenty-fifth day of the month. On March 31, the balance on the account is $1,000 and the consumer is not eligible for a grace period with respect to that balance because the balance at the end of the prior billing cycle was not paid in full on March 25. On April 15, the consumer uses the account for a $500 purchase. On April 25, the card issuer receives a payment of $1,000. On May 3, the card issuer mails or delivers a periodic statement reflecting trailing or residual interest that accrued on the $1,000 balance from April 1 through April 24 as well as interest that accrued on the $500 purchase from April 15 through April 30. On May 10, the consumer requests that the trailing or residual interest charges be waived and the card issuer complies. By waiving these interest charges, the card issuer has not provided a grace period with respect to the $1,000 balance or the $500 purchase.

B. Same facts as in paragraph ii.A above except that the terms of the account state that trailing or residual interest will be waived in these circumstances or it is the card issuer's practice to waive trailing or residual interest in these circumstances. By waiving these interest charges, the card issuer has not provided a grace period with respect to the $1,000 balance or the $500 purchase.

C. Assume 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 is the twenty-fifth day of the month. Assume also that, for purchases made during the current billing cycle (for purposes of this example, the June billing cycle), the terms of the account provide that interest accrued on those purchases from the date of the purchase until the payment due date in the following billing cycle (July 25) will be waived or rebated, subject to two conditions. First, the purchase balance at the end of the preceding billing cycle (the May billing cycle) must have been paid in full by the payment due date in the current billing cycle (June 25). Second, the purchase balance at the end of the current billing cycle (the June billing cycle) must be paid in full by the following payment due date (July 25). Under these circumstances, the card issuer is providing a grace period on purchases for purposes of §1026.54. Therefore, assuming that the consumer was eligible for this grace period at the start of the June billing cycle (in other words, assuming that the purchase balance for the April billing cycle was paid in full by May 25) and assuming that the consumer pays the purchase balance for the May billing cycle in full by June 25, §1026.54 applies to the imposition of finance charges with respect to purchases made during the June billing cycle. Specifically, §1026.54(a)(1)(i) prohibits the card issuer from imposing finance charges based on the purchase balance at the end of the June billing cycle for days that precede the July billing cycle. Furthermore, §1026.54(a)(1)(ii) prohibits the card issuer from imposing finance charges based on any portion of the balance at the end of the June billing cycle that was paid on or before July 25.

3. *Relationship to payment allocation requirements in §1026.53.* Card issuers must comply with the payment allocation requirements in §1026.53 even if doing so will result in the loss of a grace period.

4. *Prohibition on two-cycle balance computation method.* When a consumer ceases to be eligible for a grace period, §1026.54(a)(1)(i) prohibits the card issuer from computing the finance charge using the two-cycle average daily balance computation method. This method calculates the finance charge using a balance that is the sum of the average daily balances for two billing cycles. The first balance is for the current billing cycle, and is calculated by adding the total balance (including or excluding new purchases and deducting payments and credits) for each day in the billing cycle, and then dividing by the number of days in the billing cycle. The second balance is for the preceding billing cycle.

5. *Prohibition on imposing finance charges on amounts paid within grace period.* When a balance on a credit card account is eligible for a grace period and the card issuer receives payment for some but not all of that balance prior to the expiration of the grace period, §1026.54(a)(1)(ii) prohibits the card issuer from imposing finance charges on the portion of the balance paid. Card issuers are not required to use a particular method to comply with §1026.54(a)(1)(ii). However, when §1026.54(a)(1)(ii) applies, a card issuer is in compliance if, for example, it applies the consumer's payment to the balance subject to the grace period at the end of the preceding billing cycle (in a manner consistent with the payment allocation requirements in §1026.53) and then calculates interest charges based on the amount of the balance that remains unpaid.

6. *Examples.* Assume that the annual percentage rate for purchases on a credit card account is 15%. The billing cycle starts on the first day of the month and ends on the last day of the month. The payment due date for the account is the twenty-fifth day of the month. For purchases made during the current billing cycle, the card issuer provides a grace period from the date of the purchase until the payment due date in the following billing cycle, provided that the purchase balance at the end of the current billing cycle is paid in full by the following payment due date. For purposes of this example, assume that none of the required minimum periodic payment is allocated to the balances discussed. During the March billing cycle, the following transactions are charged to the account: A $100 purchase on March 10, a $200 purchase on March 15, and a $300 purchase on March 20. On March 25, the purchase balance for the February billing cycle is paid in full. Thus, for purposes of §1026.54, the consumer is eligible for a grace period on the March purchases. At the end of the March billing cycle (March 31), the consumer's total purchase balance is $600 and the consumer will not be charged interest on that balance if it is paid in full by the following due date (April 25).

i. On April 10, a $150 purchase is charged to the account. On April 25, the card issuer receives $500 in excess of the required minimum periodic payment. Section 1026.54(a)(1)(i) prohibits the card issuer from reaching back and charging interest on any of the March transactions from the date of the transaction through the end of the March billing cycle (March 31). In these circumstances, the card issuer may comply with §1026.54(a)(1)(ii) by applying the $500 excess payment to the $600 purchase balance and then charging interest only on the portion of the $600 purchase balance that remains unpaid ($100) from the start of the April billing cycle (April 1) through the end of the April billing cycle (April 30). In addition, the card issuer may charge interest on the $150 purchase from the date of the transaction (April 10) through the end of the April billing cycle (April 31).

ii. Same facts as in paragraph 6 above except that, on March 18, a $250 cash advance is charged to the account at an annual percentage rate of 25%. The card issuer's grace period does not apply to cash advances, but the card issuer does provide a grace period on the March purchases because the purchase balance for the February billing cycle is paid in full on March 25. On April 25, the card issuer receives $600 in excess of the required minimum periodic payment. As required by §1026.53, the card issuer allocates the $600 excess payment first to the balance with the highest annual percentage rate (the $250 cash advance balance). Although §1026.54(a)(1)(i) prohibits the card issuer from charging interest on the March purchases based on days in the March billing cycle, the card issuer may charge interest on the $250 cash advance from the date of the transaction (March 18) through April 24. In these circumstances, the card issuer may comply with §1026.54(a)(1)(ii) by applying the remainder of the excess payment ($350) to the $600 purchase balance and then charging interest only on the portion of the $600 purchase balance that remains unpaid ($250) from the start of the April billing cycle (April 1) through the end of the April billing cycle (April 30).

iii. Same facts as in paragraph 6 above except that the consumer does not pay the balance for the February billing cycle in full on March 25 and therefore is not eligible for a grace period on the March purchases. Under these circumstances, §1026.54 does not apply and the card issuer may charge interest from the date of each transaction through April 24 and interest on the remaining $100 from April 25 through the end of the April billing cycle (April 25).

Section 1026.55—Limitations on Increasing Annual Percentage Rates, Fees, and Charges

55(a) General Rule

1. *Increase in rate, fee, or charge.* Section 1026.55(a) prohibits card issuers from increasing an annual percentage rate or any fee or charge required to be disclosed under §1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) on a credit card account unless specifically permitted by one of the exceptions in §1026.55(b). Except as specifically provided in §1026.55(b), this prohibition applies even if the circumstances under which an increase will occur are disclosed in advance. The following examples illustrate the general application of §1026.55(a) and (b). Additional examples illustrating specific aspects of the exceptions in §1026.55(b) are provided in the commentary to those exceptions.

i. *Account-opening disclosure of non-variable rate for six months, then variable rate.* Assume that, at account opening on January 1 of year one, a card issuer discloses that the annual percentage rate for purchases is a non-variable rate of 15% and will apply for six months. The card issuer also discloses that, after six months, the annual percentage rate for purchases will be a variable rate that is currently 18% and will be adjusted quarterly by adding a margin of 8 percentage points to a publicly-available index not under the card issuer's control. Furthermore, the card issuer discloses that the annual percentage rate for cash advances is the same variable rate that will apply to purchases after six months. Finally, the card issuer discloses that, to the extent consistent with §1026.55 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer makes a late payment. The payment due date for the account is the twenty-fifth day of the month and the required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase and cash advance balances.

A. *Change-in-terms rate increase for new transactions after first year.* On January 15 of year one, the consumer uses the account to make a $2,000 purchase and a $500 cash advance. No other transactions are made on the account. At the start of each quarter, the card issuer may adjust the variable rate that applies to the $500 cash advance consistent with changes in the index (pursuant to §1026.55(b)(2)). All required minimum periodic payments are received on or before the payment due date until May of year one, when the payment due on May 25 is received by the creditor on May 28. At this time, the card issuer is prohibited by §1026.55 from increasing the rates that apply to the $2,000 purchase, the $500 cash advance, or future purchases and cash advances. Six months after account opening (July 1), the card issuer may begin to accrue interest on the $2,000 purchase at the previously-disclosed variable rate determined using an 8-point margin (pursuant to §1026.55(b)(1)). Because no other increases in rate were disclosed at account opening, the card issuer may not subsequently increase the variable rate that applies to the $2,000 purchase and the $500 cash advance (except due to increases in the index pursuant to §1026.55(b)(2)). On November 16, the card issuer provides a notice pursuant to §1026.9(c) informing the consumer of a new variable rate that will apply on January 1 of year two (calculated using the same index and an increased margin of 12 percentage points). On December 15, the consumer makes a $100 purchase. On January 1 of year two, the card issuer may increase the margin used to determine the variable rate that applies to new purchases to 12 percentage points (pursuant to §1026.55(b)(3)). However, §1026.55(b)(3)(ii) does not permit the card issuer to apply the variable rate determined using the 12-point margin to the $2,000 purchase balance. Furthermore, although the $100 purchase occurred more than 14 days after provision of the §1026.9(c) notice, §1026.55(b)(3)(iii) does not permit the card issuer to apply the variable rate determined using the 12-point margin to that purchase because it occurred during the first year after account opening. On January 15 of year two, the consumer makes a $300 purchase. The card issuer may apply the variable rate determined using the 12-point margin to the $300 purchase.

B. *Account becomes more than 60 days delinquent during first year.* Same facts as above except that the required minimum periodic payment due on May 25 of year one is not received by the card issuer until July 30 of year one. Because the card issuer received the required minimum periodic payment more than 60 days after the payment due date, §1026.55(b)(4) permits the card issuer to increase the annual percentage rate applicable to the $2,000 purchase, the $500 cash advance, and future purchases and cash advances. However, §1026.55(b)(4)(i) requires the card issuer to first comply with the notice requirements in §1026.9(g). Thus, if the card issuer provided a §1026.9(g) notice on July 25 stating that all rates on the account would be increased to the 30% penalty rate, the card issuer could apply that rate beginning on September 8 to all balances and to future transactions.

ii. *Account-opening disclosure of non-variable rate for six months, then increased non-variable rate for six months, then variable rate; change-in-terms rate increase for new transactions after first year*. Assume that, at account opening on January 1 of year one, a card issuer discloses that the annual percentage rate for purchases will increase as follows: A non-variable rate of 5% for six months; a non-variable rate of 10% for an additional six months; and thereafter a variable rate that is currently 15% and will be adjusted monthly by adding a margin of 5 percentage points to a publicly-available index not under the card issuer's control. The payment due date for the account is the fifteenth day of the month and the required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase balance. On January 15 of year one, the consumer uses the account to make a $1,500 purchase. Six months after account opening (July 1), the card issuer may begin to accrue interest on the $1,500 purchase at the previously-disclosed 10% non-variable rate (pursuant to §1026.55(b)(1)). On September 15, the consumer uses the account for a $700 purchase. On November 16, the card issuer provides a notice pursuant to §1026.9(c) informing the consumer of a new variable rate that will apply on January 1 of year two (calculated using the same index and an increased margin of 8 percentage points). One year after account opening (January 1 of year two), the card issuer may begin accruing interest on the $2,200 purchase balance at the previously-disclosed variable rate determined using a 5-point margin (pursuant to §1026.55(b)(1)). Section 1026.55 does not permit the card issuer to apply the variable rate determined using the 8-point margin to the $2,200 purchase balance. Furthermore, §1026.55 does not permit the card issuer to subsequently increase the variable rate determined using the 5-point margin that applies to the $2,200 purchase balance (except due to increases in the index pursuant to §1026.55(b)(2)). The card issuer may, however, apply the variable rate determined using the 8-point margin to purchases made on or after January 1 of year two (pursuant to §1026.55(b)(3)).

iii. *Change-in-terms rate increase for new transactions after first year; penalty rate increase after first year*. Assume that, at account opening on January 1 of year one, a card issuer discloses that the annual percentage rate for purchases is a variable rate determined by adding a margin of 6 percentage points to a publicly-available index outside of the card issuer's control. The card issuer also discloses that, to the extent consistent with §1026.55 and other applicable law, a non-variable penalty rate of 28% may apply if the consumer makes a late payment. The due date for the account is the fifteenth of the month. On May 30 of year two, the account has a purchase balance of $1,000. On May 31, the card issuer provides a notice pursuant to §1026.9(c) informing the consumer of a new variable rate that will apply on July 16 for all purchases made on or after June 15 (calculated by using the same index and an increased margin of 8 percentage points). On June 14, the consumer makes a $500 purchase. On June 15, the consumer makes a $200 purchase. On July 1, the card issuer has not received the payment due on June 15 and provides the consumer with a notice pursuant to §1026.9(g) stating that the 28% penalty rate will apply as of August 15 to all transactions made on or after July 16 and that, if the consumer becomes more than 60 days late, the penalty rate will apply to all balances on the account. On July 17, the consumer makes a $300 purchase.

A. *Account does not become more than 60 days delinquent*. The payment due on June 15 of year two is received on July 2. On July 16, §1026.55(b)(3)(ii) permits the card issuer to apply the variable rate determined using the 8-point margin disclosed in the §1026.9(c) notice to the $200 purchase made on June 15 but does not permit the card issuer to apply this rate to the $1,500 purchase balance. On August 15, §1026.55(b)(3)(ii) permits the card issuer to apply the 28% penalty rate disclosed at account opening and in the §1026.9(g) notice to the $300 purchase made on July 17 but does not permit the card issuer to apply this rate to the $1,500 purchase balance (which remains at the variable rate determined using the 6-point margin) or the $200 purchase (which remains at the variable rate determined using the 8-point margin).

B. *Account becomes more than 60 days delinquent after provision of §1026.9(g) notice*. Same facts as above except the payment due on June 15 of year two has not been received by August 15. Section 1026.55(b)(4) permits the card issuer to apply the 28% penalty rate to the $1,500 purchase balance and the $200 purchase because it has not received the June 15 payment within 60 days after the due date. However, in order to do so, §1026.55(b)(4)(i) requires the card issuer to first provide an additional notice pursuant to §1026.9(g). This notice must be sent no earlier than August 15, which is the first day the account became more than 60 days' delinquent. If the notice is sent on August 15, the card issuer may begin accruing interest on the $1,500 purchase balance and the $200 purchase at the 28% penalty rate beginning on September 29.

2. *Relationship to grace period*. Nothing in §1026.55 prohibits a card issuer from assessing interest due to the loss of a grace period to the extent consistent with §1026.5(b)(2)(ii)(B) and §1026.54. In addition, a card issuer has not reduced an annual percentage rate on a credit card account for purposes of §1026.55 if the card issuer does not charge interest on a balance or a portion

thereof based on a payment received prior to the expiration of a grace period. For example, if the annual percentage rate for purchases on an account is 15% but the card issuer does not charge any interest on a $500 purchase balance because that balance was paid in full prior to the expiration of the grace period, the card issuer has not reduced the 15% purchase rate to 0% for purposes of § 1026.55.

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, § 1026.55(a) prohibits card issuers from increasing an annual percentage rate or any fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (iii), or (xii) on a credit card account unless specifically permitted by one of the exceptions in § 1026.55(b). This is true regardless of whether these fees or annual percentage rates are imposed on the asset feature of the prepaid account or on the credit feature.

4. *Fees imposed on the asset feature of a prepaid account that are not charges imposed as part of the plan.* Section 1026.55(a) 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 of the 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.

55(b) Exceptions

1. *Exceptions not mutually exclusive.* A card issuer generally may increase an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) pursuant to an exception set forth in § 1026.55(b) even if that increase would not be permitted under a different exception. For example, although a card issuer cannot increase an annual percentage rate pursuant to § 1026.55(b)(1) unless that rate is provided for a specified period of at least six months, the card issuer may increase an annual percentage rate during a specified period due to an increase in an index consistent with § 1026.55(b)(2). Similarly, although § 1026.55(b)(3) does not permit a card issuer to increase an annual percentage rate during the first year after account opening, the card issuer may increase the rate during the first year after account opening pursuant to § 1026.55(b)(4) if the required minimum periodic payment is not received within 60 days after the due date. However, if § 1026.55(b)(4)(ii) requires a card issuer to decrease the rate, fee, or charge that applies to a balance while the account is subject to a workout or temporary hardship arrangement or subject to 50 U.S.C. app. 527 or a similar Federal or state statute or regulation, the card issuer may not impose a higher rate, fee, or charge on that balance pursuant to § 1026.55(b)(5) or (b)(6) upon completion or failure of the arrangement or once 50 U.S.C. app. 527 or the similar Federal or state statute or regulation no longer applies. For example, assume that, on January 1, the annual percentage rate that applies to a $1,000 balance is increased from 12% to 30% pursuant to § 1026.55(b)(4). On February 1, the rate on that balance is decreased from 30% to 15% consistent with § 1026.55(b)(5) as a part of a workout or temporary hardship arrangement. On July 1, § 1026.55(b)(4)(ii) requires the card issuer to reduce the rate that applies to any remaining portion of the $1,000 balance from 15% to 12%. If the consumer subsequently completes or fails to comply with the terms of the workout or temporary hardship arrangement, the card issuer may not increase the 12% rate that applies to any remaining portion of the $1,000 balance pursuant to § 1026.55(b)(5).

2. *Relationship between exceptions in § 1026.55(b) and notice requirements in § 1026.9.* Nothing in § 1026.55 alters the requirements in § 1026.9(c) and (g) that creditors provide written notice at least 45 days prior to the effective date of certain increases in annual percentage rates, fees, and charges.

i. *14-day rule in § 1026.55(b)(3)(ii).* Although § 1026.55(b)(3)(ii) permits a card issuer that discloses an increased rate pursuant to § 1026.9(c) or (g) to apply that rate to transactions that occur more than 14 days after provision of the notice, the card issuer cannot begin to accrue interest at the increased rate until that increase goes into effect, consistent with § 1026.9(c) or (g). For example, if on May 1 a card issuer provides a notice pursuant to § 1026.9(c) stating that a rate will increase from 15% to 18% on June 15, § 1026.55(b)(3)(ii) permits the card issuer to apply the 18% rate to transactions that occur on or after May 16. However, neither § 1026.55 nor § 1026.9(c) permits the card issuer to begin accruing interest at the 18% rate on those transactions until June 15. See additional examples in comment 55(b)(3)–4.

ii. *Mid-cycle increases; application of balance computation methods.* Once an increased rate has gone into effect, the card issuer cannot calculate interest charges based on that increased rate for days prior to the effective date. Assume that, in the example in paragraph i above, the billing cycles for the account begin on the first day of the month and end on the last day of the month. If, for example, the card issuer uses the average daily balance computation method, it cannot apply the 18% rate to the average daily balance for the entire June billing cycle because that rate did not become effective until June 15. However, the card issuer could apply the 15% rate to the average daily balance from June 1 through June 14 and the 18% rate to the average daily balance from June 15 through June 30. Similarly, if the card issuer that uses the daily balance computation method, it could apply the 15% rate to the daily balance for each day from June 1 through June 14 and the 18% rate to the daily balance for each day from June 15 through June 30.

iii. *Mid-cycle increases; delayed implementation of increase*. If §1026.55(b) and §1026.9(b), (c), or (g) permit a card issuer to apply an increased annual percentage rate, fee, or charge on a date that is not the first day of a billing cycle, the card issuer may delay application of the increased rate, fee, or charge until the first day of the following billing cycle without relinquishing the ability to apply that rate, fee, or charge. Thus, in the example in paragraphs i and ii above, the card issuer could delay application of the 18% rate until the start of the next billing cycle (April 1) without relinquishing its ability to apply that rate under §1026.55(b)(3). Similarly, assume that, at account opening on January 1, a card issuer discloses that a non-variable annual percentage rate of 10% will apply to purchases for six months and a non-variable rate of 15% will apply thereafter. The first day of each billing cycle for the account is the fifteenth of the month. If the six-month period expires on July 1, the card issuer may delay application of the 15% rate until the start of the next billing cycle (July 15) without relinquishing its ability to apply that rate under §1026.55(b)(1).

3. *Application of a lower rate, fee, or charge*. Nothing in §1026.55 prohibits a card issuer from lowering an annual percentage rate or a fee or charge required to be disclosed under §1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii). However, a card issuer that does so cannot subsequently increase the rate, fee, or charge unless permitted by one of the exceptions in §1026.55(b). The following examples illustrate the application of the rule:

i. *Application of lower rate during first year*. Assume that a card issuer discloses at account opening on January 1 of year one that a non-variable annual percentage rate of 15% will apply to purchases. The card issuer also discloses that, to the extent consistent with §1026.55 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer's required minimum periodic payment is received after the payment due date, which is the tenth of the month. The required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase balance.

A. *Temporary rate returns to standard rate at expiration*. On September 30 of year one, the account has a purchase balance of $1,400 at the 15% rate. On October 1, the card issuer provides a notice pursuant to §1026.9(c) informing the consumer that the rate for new purchases will decrease to a non-variable rate of 5% for six months (from October 1 through March 31 of year two) and that, beginning on April 1 of year two, the rate for purchases will increase to the 15% non-variable rate disclosed at account opening. The card issuer does not apply the 5% rate to the $1,400 purchase balance. On October 14 of year one, the consumer makes a $300 purchase at the 5% rate. On January 15 of year two, the consumer makes a $150 purchase at the 5% rate. On April 1 of year two, the card issuer may begin accruing interest on the $300 purchase and the $150 purchase at 15% as disclosed in the §1026.9(c) notice (pursuant to §1026.55(b)(1)).

B. *Penalty rate increase*. Same facts as above except that the required minimum periodic payment due on November 10 of year one is not received until November 15. Section 1026.55 does not permit the card issuer to increase any annual percentage rate on the account at this time. The card issuer may apply the 30% penalty rate to new transactions beginning on April 1 of year two pursuant to §1026.55(b)(3) by providing a §1026.9(g) notice informing the consumer of this increase no later than February 14 of year two. The card issuer may not, however, apply the 30% penalty rate to the $1,400 purchase balance as of September 30 of year one, the $300 purchase on October 15 of year one, or the $150 purchase on January 15 of year two.

ii. *Application of lower rate at end of first year*. Assume that, at account opening on January 1 of year one, a card issuer discloses that a non-variable annual percentage rate of 15% will apply to purchases for one year and discloses that, after the first year, the card issuer will apply a variable rate that is currently 20% and is determined by adding a margin of 10 percentage points to a publicly-available index not under the card issuer's control. On December 31 of year one, the account has a purchase balance of $3,000.

A. *Notice of extension of existing temporary rate provided consistent with §1026.55(b)(1)(i)*. On December 15 of year one, the card issuer provides a notice pursuant to §1026.9(c) informing the consumer that the existing 15% rate will continue to apply until July 1 of year two. The notice further states that, on July 1 of year two, the variable rate disclosed at account opening will apply. On July 1 of year two, §1026.55(b)(1) permits the card issuer to apply that variable rate to any remaining portion of the $3,000 balance and to new transactions.

B. *Notice of new temporary rate provided consistent with §1026.55(b)(1)(i)*. On December 15 of year one, the card issuer provides a notice pursuant to §1026.9(c) informing the consumer of a new variable rate that will apply on January 1 of year two that is lower than the variable rate disclosed at account opening. The new variable rate is calculated using the same index and a reduced margin of 8 percentage points. The notice further states that, on July 1 of year two, the margin will increase to the margin disclosed at account opening (10 percentage points). On July 1 of year two, §1026.55(b)(1) permits the card issuer to increase the margin used to determine the variable rate that applies to new purchases to 10 percentage points and to apply that rate to any remaining portion of the $3,000 purchase balance.

C. *No notice provided.* Same facts as in paragraph ii.B above except that the card issuer does not send a notice on December 15 of year one. Instead, on January 1 of year two, the card issuer lowers the margin used to determine the variable rate to 8 percentage points and applies that rate to the $3,000 purchase balance and to new purchases. Section 1026.9 does not require advance notice in these circumstances. However, unless the account becomes more than 60 days' delinquent, §1026.55 does not permit the card issuer to subsequently increase the rate that applies to the $3,000 purchase balance except due to increases in the index (pursuant to §1026.55(b)(2)).

iii. *Application of lower rate after first year.* Assume that a card issuer discloses at account opening on January 1 of year one that a non-variable annual percentage rate of 10% will apply to purchases for one year, after which that rate will increase to a non-variable rate of 15%. The card issuer also discloses that, to the extent consistent with §1026.55 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer's required minimum periodic payment is received after the payment due date, which is the tenth of the month. The required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase balance.

A. *Effect of 14-day period.* On June 30 of year two, the account has a purchase balance of $1,000 at the 15% rate. On July 1, the card issuer provides a notice pursuant to §1026.9(c) informing the consumer that the rate for new purchases will decrease to a non-variable rate of 5% for six months (from July 1 through December 31 of year two) and that, beginning on January 1 of year three, the rate for purchases will increase to a non-variable rate of 17%. On July 15 of year two, the consumer makes a $200 purchase. On July 16, the consumer makes a $100 purchase. On January 1 of year three, the card issuer may begin accruing interest on the $100 purchase at 17% (pursuant to §1026.55(b)(1)). However, §1026.55(b)(1)(ii)(B) does not permit the card issuer to apply the 17% rate to the $200 purchase because that transaction occurred within 14 days after provision of the §1026.9(c) notice. Instead, the card issuer may apply the 15% rate that applied to purchases prior to provision of the §1026.9(c) notice. In addition, if the card issuer applied the 5% rate to the $1,000 purchase balance, §1026.55(b)(ii)(A) would not permit the card issuer to increase the rate that applies to that balance on January 1 of year three to a rate that is higher than 15% that previously applied to the balance.

B. *Penalty rate increase.* Same facts as above except that the required minimum periodic payment due on August 25 is received on August 30. At this time, §1026.55 does not permit the card issuer to increase the annual percentage rates that apply to the $1,000 purchase balance, the $200 purchase, or the $100 purchase. Instead, those rates can only be increased as discussed in paragraph iii.A above. However, if the card issuer provides a notice pursuant to §1026.9(c) or (g) on September 1, §1026.55(b)(3) permits the card issuer to apply an increased rate (such as the 17% purchase rate or the 30% penalty rate) to transactions that occur on or after September 16 beginning on October 16.

C. *Application of lower temporary rate during specified period.* Same facts as in paragraph iii above. On June 30 of year two, the account has a purchase balance of $1,000 at the 15% non-variable rate. On July 1, the card issuer provides a notice pursuant to §1026.9(c) informing the consumer that the rate for the $1,000 balance and new purchases will decrease to a non-variable rate of 12% for six months (from July 1 through December 31 of year two) and that, beginning on January 1 of year three, the rate for purchases will increase to a variable rate that is currently 20% and is determined by adding a margin of 10 percentage points to a publicly-available index not under the card issuer's control. On August 15 of year two, the consumer makes a $500 purchase. On October 1, the card issuer provides another notice pursuant to §1026.9(c) informing the consumer that the rate for the $1,000 balance, the $500 purchase, and new purchases will decrease to a non-variable rate of 5% for six months (from October 1 of year two through March 31 of year three) and that, beginning on April 1 of year three, the rate for purchases will increase to a variable rate that is currently 23% and is determined by adding a margin of 13 percentage points to the previously-disclosed index. On November 15 of year two, the consumer makes a $300 purchase. On April 1 of year three, §1026.55 permits the card issuer to begin accruing interest using the following rates for any remaining portion of the following balances: The 15% non-variable rate for the $1,000 balance; the variable rate determined using the 10-point margin for the $500 purchase; and the variable rate determined using the 13-point margin for the $300 purchase.

4. *Date on which transaction occurred.* When a transaction occurred for purposes of §1026.55 is generally determined by the date of the transaction. However, if a transaction that occurred within 14 days after provision of a §1026.9(c) or (g) notice is not charged to the account prior to the effective date of the change or increase, the card issuer may treat the transaction as occurring more than 14 days after provision of the notice for purposes of §1026.55. See example in comment 55(b)(3)–4.iii.B. In addition, when a merchant places a ''hold'' on the available credit on an account for an estimated transaction amount because the actual transaction amount will not be known until a later date, the date of the transaction for purposes of §1026.55 is the date on which the card issuer receives the actual transaction amount from the merchant. See example in comment 55(b)(3)–4.iii.A.

5. *Category of transactions.* For purposes of §1026.55, a ''category of transactions'' is a type or group of transactions to which an annual percentage rate applies that is different than the annual percentage rate that applies to other transactions. Similarly, a type or group of transactions is a ''category of transactions'' for purposes of §1026.55 if a fee or charge required to be disclosed under §1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) applies to those transactions that is different than the fee or charge that applies to other transactions. For example, purchase transactions, cash advance transactions, and balance transfer transactions are separate categories of transactions for purposes of §1026.55 if a card issuer applies different annual percentage rates to each. Furthermore, if, for example, the card issuer applies different annual percentage rates to different types of purchase transactions (such as one rate for purchases of gasoline or purchases over $100 and a different rate for all other purchases), each type constitutes a separate category of transactions for purposes of §1026.55.

55(b)(1) Temporary rate, fee, or charge exception

1. *Relationship to §1026.9(c)(2)(v)(B).* A card issuer that has complied with the disclosure requirements in §1026.9(c)(2)(v)(B) has also complied with the disclosure requirements in §1026.55(b)(1)(i).

2. *Period of six months or longer.* A temporary annual percentage rate, fee, or charge must apply for a specified period of six months or longer before a card issuer can increase that rate, fee, or charge pursuant to §1026.55(b)(1). The specified period must expire no less than six months after the date on which the card issuer provides the consumer with the disclosures required by §1026.55(b)(1)(i) or, if later, the date on which the account can be used for transactions to which the temporary rate, fee, or charge applies. Section 1026.55(b)(1) does not prohibit a card issuer from limiting the application of a temporary annual percentage rate, fee, or charge to a particular category of transactions (such as to balance transfers or to purchases over $100). However, in circumstances where the card issuer limits application of the temporary rate, fee, or charge to a single transaction, the specified period must expire no less than six months after the date on which that transaction occurred. The following examples illustrate the application of §1026.55(b)(1):

i. Assume that on January 1 a card issuer offers a consumer a 5% annual percentage rate on purchases made during the months of January through June. A 15% rate will apply thereafter. On February 15, a $500 purchase is charged to the account. On June 15, a $200 purchase is charged to the account. On July 1, the card issuer may begin accruing interest at the 15% rate on the $500 purchase and the $200 purchase (pursuant to §1026.55(b)(1)).

ii. Same facts as above except that on January 1 the card issuer offered the 5% rate on purchases beginning in the month of February. Section 1026.55(b)(1) would not permit the card issuer to begin accruing interest at the 15% rate on the $500 purchase and the $200 purchase until August 1.

iii. Assume that on October 31 of year one the annual percentage rate for purchases is 17%. On November 1, the card issuer offers the consumer a 0% rate for six months on purchases made during the months of November and December. The 17% rate will apply thereafter. On November 15, a $500 purchase is charged to the account. On December 15, a $300 purchase is charged to the account. On January 15 of year two, a $150 purchase is charged to the account. Section 1026.55(b)(1) would not permit the card issuer to begin accruing interest at the 17% rate on the $500 purchase and the $300 purchase until May 1 of year two. However, the card issuer may accrue interest at the 17% rate on the $150 purchase beginning on January 15 of year two.

iv. Assume that on June 1 of year one a card issuer offers a consumer a 0% annual percentage rate for six months on the purchase of an appliance. An 18% rate will apply thereafter. On September 1, a $5,000 transaction is charged to the account for the purchase of an appliance. Section 1026.55(b)(1) would not permit the card issuer to begin accruing interest at the 18% rate on the $5,000 transaction until March 1 of year two.

v. Assume that on May 31 of year one the annual percentage rate for purchases is 15%. On June 1, the card issuer offers the consumer a 5% rate for six months on a balance transfer of at least $1,000. The 15% rate will apply thereafter. On June 15, a $3,000 balance is transferred to the account. On July 15, a

$200 purchase is charged to the account. Section 1026.55(b)(1) would not permit the card issuer to begin accruing interest at the 15% rate on the $3,000 transferred balance until December 15. However, the card issuer may accrue interest at the 15% rate on the $200 purchase beginning on July 15.

vi. Same facts as in paragraph v above except that the card issuer offers the 5% rate for six months on all balance transfers of at least $1,000 during the month of June and a $2,000 balance is transferred to the account on June 30 (in addition to the $3,000 balance transfer on June 15). Because the 5% rate is not limited to a particular transaction, §1026.55(b)(1) permits the card issuer to begin accruing interest on the $3,000 and $2,000 transferred balances on December 1.

vii. Assume that a card issuer discloses at account opening on January 1 of year one that the annual fee for the account is $0 until January 1 of year two, when the fee will increase to $50. On January 1 of year two, the card issuer may impose the $50 annual fee. However, the issuer must also comply with the notice requirements in §1026.9(e).

viii. Assume that a card issuer discloses at account opening on January 1 of year one that the monthly maintenance fee for the account is $0 until July 1 of year one, when the fee will increase to $10. Beginning on July 1 of year one, the card issuer may impose the $10 monthly maintenance fee (to the extent consistent with §1026.52(a)).

3. *Deferred interest and similar promotional programs*. i. *Application of §1026.55*. The general prohibition in §1026.55(a) applies to the imposition of accrued interest upon the expiration of a deferred interest or similar promotional program under which the consumer is not obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time. However, the exception in §1026.55(b)(1) also applies to these programs, provided that the specified period is six months or longer and that, prior to the commencement of the period, the card issuer discloses the length of the period and the rate at which interest will accrue on the balance subject to the deferred interest or similar program if that balance is not paid in full prior to expiration of the period. See comment 9(c)(2)(v)–9. For purposes of §1026.55, ''deferred interest'' has the same meaning as in §1026.16(h)(2) and associated commentary.

ii. *Examples*. A. *Deferred interest offer at account opening*. Assume that, at account opening on January 1 of year one, the card issuer discloses the following with respect to a deferred interest program: ''No interest on purchases made in January of year one if paid in full by December 31 of year one. If the balance is not paid in full by that date, interest will be imposed from the transaction date at a rate of 20%.'' On January 15 of year one, the consumer makes a purchase of $2,000. No other transactions are made on the account. The terms of the deferred interest program require the consumer to make minimum periodic payments with respect to the deferred interest balance, and the payment due on April 1 is not received until April 10. Section 1026.55 does not permit the card issuer to charge to the account interest that has accrued on the $2,000 purchase at this time. Furthermore, if the consumer pays the $2,000 purchase in full on or before December 31 of year one, §1026.55 does not permit the card issuer to charge to the account any interest that has accrued on that purchase. If, however, the $2,000 purchase has not been paid in full by January 1 of year two, §1026.55(b)(1) permits the card issuer to charge to the account the interest accrued on that purchase at the 20% rate during year one (to the extent consistent with other applicable law).

B. *Deferred interest offer after account opening*. Assume that a card issuer discloses at account opening on January 1 of year one that the rate that applies to purchases is a variable annual percentage rate that is currently 18% and will be adjusted quarterly by adding a margin of 8 percentage points to a publicly-available index not under the card issuer's control. The card issuer also discloses that, to the extent consistent with §1026.55 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer's required minimum periodic payment is received after the payment due date, which is the first of the month. On June 30 of year two, the consumer uses the account for a $1,000 purchase in response to an offer of a deferred interest program. Under the terms of this program, interest on the purchase will accrue at the variable rate for purchases but the consumer will not be obligated to pay that interest if the purchase is paid in full by December 31 of year three. The terms of the deferred interest program require the consumer to make minimum periodic payments with respect to the deferred interest balance, and the payment due on September 1 of year two is not received until September 6. Section 1026.55 does not permit the card issuer to charge to the account interest that has accrued on the $1,000 purchase at this time. Furthermore, if the consumer pays the $1,000 purchase in full on or before December 31 of year three, §1026.55 does not permit the card issuer to charge to the account any interest that has accrued on that purchase. On December 31 of year three, the $1,000 purchase has been paid in full. Under these circumstances, the card issuer may not charge any interest accrued on the $1,000 purchase.

C. *Application of §1026.55(b)(4) to deferred interest programs*. Same facts as in paragraph ii.B above except that, on November 2 of year two, the card issuer has not received the required minimum periodic payments due on September 1, October 1, or November 1 of year two and sends a §1026.9(c) or (g) notice stating that interest accrued on the $1,000 purchase since June 30 of year two will be charged to the account on December 17 of year two and thereafter interest will be charged on the $1,000 purchase consistent with the variable rate for purchases. On December 17 of year two, §1026.55(b)(4) permits the card issuer to charge to the account interest accrued on the $1,000 purchase since June 30 of year two and §1026.55(b)(3) permits the card issuer to begin charging interest on the $1,000 purchase consistent with the variable rate for purchases. However, if the card issuer receives the required minimum periodic payments due on January 1, February 1, March 1, April 1, May 1, and June 1 of year three, §1026.55(b)(4)(ii) requires the card issuer to cease charging the account for interest on the $1,000 purchase no later than the first day of the next billing cycle. See comment 55(b)(4)–3.iii. However, §1026.55(b)(4)(ii) does not require the card issuer to waive or credit the account for interest accrued on the $1,000 purchase since June 30 of year two. If the $1,000 purchase is paid in full on December 31 of year three, the card issuer is not permitted to charge to the account interest accrued on the $1,000 purchase after June 1 of year three.

4. *Contingent or discretionary increases*. Section 1026.55(b)(1) permits a card issuer to increase a temporary annual percentage rate, fee, or charge upon the expiration of a specified period of time. However, §1026.55(b)(1) does not permit a card issuer to apply an increased rate, fee, or charge that is contingent on a particular event or occurrence or that may be applied at the card issuer's discretion. The following examples illustrate rate increases that are not permitted by §1026.55:

i. Assume that a card issuer discloses at account opening on January 1 of year one that a non-variable annual percentage rate of 15% applies to purchases but that all rates on an account may be increased to a non-variable penalty rate of 30% if a consumer's required minimum periodic payment is received after the payment due date, which is the fifteenth of the month. On March 1, the account has a $2,000 purchase balance. The payment due on March 15 is not received until March 20. Section 1026.55 does not permit the card issuer to apply the 30% penalty rate to the $2,000 purchase balance. However, pursuant to §1026.55(b)(3), the card issuer could provide a §1026.9(c) or (g) notice on or before November 16 informing the consumer that, on January 1 of year two, the 30% rate (or a different rate) will apply to new transactions.

ii. Assume that a card issuer discloses at account opening on January 1 of year one that a non-variable annual percentage rate of 5% applies to transferred balances but that this rate will increase to a non-variable rate of 18% if the consumer does not use the account for at least $200 in purchases each billing cycle. On July 1, the consumer transfers a balance of $4,000 to the account. During the October billing cycle, the consumer uses the account for $150 in purchases. Section 1026.55 does not permit the card issuer to apply the 18% rate to the $4,000 transferred balance or the $150 in purchases. However, pursuant to §1026.55(b)(3), the card issuer could provide a §1026.9(c) or (g) notice on or before November 16 informing the consumer that, on January 1 of year two, the 18% rate (or a different rate) will apply to new transactions.

iii. Assume that a card issuer discloses at account opening on January 1 of year one that the annual fee for the account is $10 but may be increased to $50 if a consumer's required minimum periodic payment is received after the payment due date, which is the fifteenth of the month. The payment due on July 15 is not received until July 23. Section 1026.55 does not permit the card issuer to impose the $50 annual fee at this time. Furthermore, §1026.55(b)(3) does not permit the card issuer to increase the $10 annual fee during the first year after account opening. However, §1026.55(b)(3) does permit the card issuer to impose the $50 fee (or a different fee) on January 1 of year two if, on or before November 16 of year one, the issuer informs the consumer of the increased fee consistent with §1026.9(c) and the consumer does not reject that increase pursuant to §1026.9(h).

iv. Assume that a card issuer discloses at account opening on January 1 of year one that the annual fee for a credit card account under an open-end (not home-secured) consumer credit plan is $0 but may be increased to $100 if the consumer's balance in a deposit account provided by the card issuer or its affiliate or subsidiary falls below $5,000. On June 1 of year one, the balance on the deposit account is $4,500. Section 1026.55 does not permit the card issuer to impose the $100 annual fee at this time. Furthermore, §1026.55(b)(3) does not permit the card issuer to increase the $0 annual fee during the first year after account opening. However, §1026.55(b)(3) does permit the card issuer to impose the $100 fee (or a different fee) on January 1 of year two if, on or before November 16 of year one, the issuer informs the consumer of the increased fee consistent with §1026.9(c) and the consumer does not reject that increase pursuant to §1026.9(h).

5. *Application of increased fees and charges*. Section 1026.55(b)(1)(ii) limits the ability of a card issuer to apply an increased fee or charge to certain transactions. However, to the extent consistent with §1026.55(b)(3), (c), and (d), a card issuer generally is not prohibited from increasing a fee or charge that applies to the account as a whole. *See* comments 55(c)(1)–3 and 55(d)–1.

55(b)(2) Variable Rate Exception

1. *Increases due to increase in index.* Section 1026.55(b)(2) provides that an annual percentage rate that varies according to an index that is not under the card issuer's control and is available to the general public may be increased due to an increase in the index. This section does not permit a card issuer to increase the rate by changing the method used to determine a rate that varies with an index (such as by increasing the margin), even if that change will not result in an immediate increase. However, from time to time, a card issuer may change the day on which index values are measured to determine changes to the rate.

2. *Index not under card issuer's control.* A card issuer may increase a variable annual percentage rate pursuant to §1026.55(b)(2) only if the increase is based on an index or indices outside the card issuer's control. For purposes of §1026.55(b)(2), an index is under the card issuer's control if:

i. The index is the card issuer's own prime rate or cost of funds. A card issuer is permitted, however, to use a published prime rate, such as that in the Wall Street Journal, even if the card issuer's own prime rate is one of several rates used to establish the published rate.

ii. The variable rate is subject to a fixed minimum rate or similar requirement that does not permit the variable rate to decrease consistent with reductions in the index. A card issuer is permitted, however, to establish a fixed maximum rate that does not permit the variable rate to increase consistent with increases in an index. For example, assume that, under the terms of an account, a variable rate will be adjusted monthly by adding a margin of 5 percentage points to a publicly-available index. When the account is opened, the index is 10% and therefore the variable rate is 15%. If the terms of the account provide that the variable rate will not decrease below 15% even if the index decreases below 10%, the card issuer cannot increase that rate pursuant to §1026.55(b)(2). However, §1026.55(b)(2) does not prohibit the card issuer from providing in the terms of the account that the variable rate will not increase above a certain amount (such as 20%).

iii. The variable rate can be calculated based on any index value during a period of time (such as the 90 days preceding the last day of a billing cycle). A card issuer is permitted, however, to provide in the terms of the account that the variable rate will be calculated based on the average index value during a specified period. In the alternative, the card issuer is permitted to provide in the terms of the account that the variable rate will be calculated based on the index value on a specific day (such as the last day of a billing cycle). For example, assume that the terms of an account provide that a variable rate will be adjusted at the beginning of each quarter by adding a margin of 7 percentage points to a publicly-available index. At account opening at the beginning of the first quarter, the variable rate is 17% (based on an index value of 10%). During the first quarter, the index varies between 9.8% and 10.5% with an average value of 10.1%. On the last day of the first quarter, the index value is 10.2%. At the beginning of the second quarter, §1026.55(b)(2) does not permit the card issuer to increase the variable rate to 17.5% based on the first quarter's maximum index value of 10.5%. However, if the terms of the account provide that the variable rate will be calculated based on the average index value during the prior quarter, §1026.55(b)(2) permits the card issuer to increase the variable rate to 17.1% (based on the average index value of 10.1% during the first quarter). In the alternative, if the terms of the account provide that the variable rate will be calculated based on the index value on the last day of the prior quarter, §1026.55(b)(2) permits the card issuer to increase the variable rate to 17.2% (based on the index value of 10.2% on the last day of the first quarter).

3. *Publicly available.* The index or indices must be available to the public. A publicly-available index need not be published in a newspaper, but it must be one the consumer can independently obtain (by telephone, for example) and use to verify the annual percentage rate applied to the account.

4. *Changing a non-variable rate to a variable rate.* Section 1026.55 generally prohibits a card issuer from changing a non-variable annual percentage rate to a variable annual percentage rate because such a change can result in an increase. However, a card issuer may change a non-variable rate to a variable rate to the extent permitted by one of the exceptions in §1026.55(b). For example, §1026.55(b)(1) permits a card issuer to change a non-variable rate to a variable rate upon expiration of a specified period of time. Similarly, following the first year after the account is opened, §1026.55(b)(3) permits a card issuer to change a non-variable rate to a variable rate with respect to new transactions (after complying with the notice requirements in §1026.9(b), (c), or (g)).

5. *Changing a variable rate to a non-variable rate.* Nothing in §1026.55 prohibits a card issuer from changing a variable annual percentage rate to an equal or lower non-variable rate. Whether the non-variable rate is equal to or lower than the variable rate is determined at the time the card issuer provides the notice required by §1026.9(c). For example, assume that on March 1 a variable annual percentage rate that is currently 15% applies to a balance of $2,000 and the card issuer sends a notice pursuant to §1026.9(c) informing the consumer that the variable rate will be converted to a non-variable rate

of 14% effective April 15. On April 15, the card issuer may apply the 14% non-variable rate to the $2,000 balance and to new transactions even if the variable rate on March 2 or a later date was less than 14%.

55(b)(3) Advance notice exception

1. *Relationship to §1026.9(h).* A card issuer may not increase a fee or charge required to be disclosed under §1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) pursuant to §1026.55(b)(3) if the consumer has rejected the increased fee or charge pursuant to §1026.9(h).

2. *Notice provided pursuant to §1026.9(b) and (c).* If an increased annual percentage rate, fee, or charge is disclosed pursuant to both §1026.9(b) and (c), that rate, fee, or charge may only be applied to transactions that occur more than 14 days after provision of the §1026.9(c) notice as provided in §1026.55(b)(3)(ii).

3. *Account opening.* i. *Multiple accounts with same card issuer.* When a consumer has a credit card account with a card issuer and the consumer opens a new credit card account with the same card issuer (or its affiliate or subsidiary), the opening of the new account constitutes the opening of a credit card account for purposes of §1026.55(b)(3)(iii) if, more than 30 days after the new account is opened, the consumer has the option to obtain additional extensions of credit on each account. For example, assume that, on January 1 of year one, a consumer opens a credit card account with a card issuer. On July 1 of year one, the consumer opens a second credit card account with that card issuer. On July 15, a $1,000 balance is transferred from the first account to the second account. The opening of the second account constitutes the opening of a credit card account for purposes of §1026.55(b)(3)(iii) so long as, on August 1, the consumer has the option to engage in transactions using either account. Under these circumstances, the card issuer could not increase an annual percentage rate or a fee or charge required to be disclosed under §1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) on the second account pursuant to §1026.55(b)(3) until July 1 of year two (which is one year after the second account was opened).

ii. *Substitution, replacement or consolidation.* A. *Generally.* A credit card account has not been opened for purposes of §1026.55(b)(3)(iii) when a credit card account issued by a card issuer is substituted, replaced, or consolidated with another credit card account issued by the same card issuer (or its affiliate or subsidiary). Circumstances in which a credit card account has not been opened for purposes of §1026.55(b)(3)(iii) include when:

1. A retail credit card account is replaced with a cobranded general purpose credit card account that can be used at a wider number of merchants;

2. A credit card account is replaced with another credit card account offering different features;

3. A credit card account is consolidated or combined with one or more other credit card accounts into a single credit card account; or

4. A credit card account acquired through merger or acquisition is replaced with a credit card account issued by the acquiring card issuer.

B. *Limitation.* A card issuer that replaces or consolidates a credit card account with another credit card account issued by the card issuer (or its affiliate or subsidiary) may not increase an annual percentage rate or a fee or charge required to be disclosed under §1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) in a manner otherwise prohibited by §1026.55. For example, assume that, on January 1 of year one, a consumer opens a credit card account with an annual percentage rate of 15% for purchases. On July 1 of year one, the account is replaced with a credit card account that offers different features (such as rewards on purchases). Under these circumstances, §1026.55(b)(3)(iii) prohibits the card issuer from increasing the annual percentage rate for new purchases to a rate that is higher than 15% pursuant to §1026.55(b)(3) until January 1 of year two (which is one year after the first account was opened).

4. *Examples.* i. *Change-in-terms rate increase; temporary rate increase; 14-day period.* Assume that an account is opened on January 1 of year one. On March 14 of year two, the account has a purchase balance of $2,000 at a non-variable annual percentage rate of 15%. On March 15, the card issuer provides a notice pursuant to §1026.9(c) informing the consumer that the rate for new purchases will increase to a non-variable rate of 18% on May 1. The notice further states that the 18% rate will apply for six months (until November 1) and that thereafter the card issuer will apply a variable rate that is currently 22% and is determined by adding a margin of 12 percentage points to a publicly-available index that is not under the card issuer's control. The fourteenth day after provision of the notice is March 29 and, on that date, the consumer makes a $200 purchase. On March 30, the consumer makes a $1,000 purchase. On May 1, the card issuer may begin accruing interest at 18% on the $1,000 purchase made on March 30 (pursuant to §1026.55(b)(3)). Section 1026.55(b)(3)(ii) does not permit the card issuer to apply the 18% rate to the $2,200 purchase balance as of March 29 because that balance reflects transactions that occurred prior to or within 14 days after the provision of the §1026.9(c) notice. After six months (November 2), the card issuer may begin accruing interest on any remaining portion of the $1,000 purchase at the previously-disclosed variable rate determined using the 12-point margin (pursuant to §1026.55(b)(1) and (b)(3)).

ii. *Checks that access an account.* Assume that a card issuer discloses at account opening on January 1 of year one that the annual percentage rate that applies to cash advances is a variable rate that is currently 24% and will be adjusted quarterly by adding a margin of 14 percentage points to a publicly available index not under the card issuer's control. On July 1 of year two, the card issuer provides checks that access the account and, pursuant to §1026.9(b)(3)(i)(A), discloses that a promotional rate of 15% will apply to credit extended by use of the checks until January 1 of year three, after which the cash advance rate determined using the 14-point margin will apply. On July 9 of year two, the consumer uses one of the checks to pay for a $500 transaction. Beginning on January 1 of year three, the card issuer may apply the cash advance rate determined using the 14-point margin to any remaining portion of the $500 transaction (pursuant to §1026.55(b)(1) and (b)(3)).

iii. *Hold on available credit; 14-day period.* Assume that an account is opened on January 1 of year one. On September 14 of year two, the account has a purchase balance of $2,000 at a non-variable annual percentage rate of 17%. On September 15, the card issuer provides a notice pursuant to §1026.9(c) informing the consumer that the rate for new purchases will increase to a non-variable rate of 20% on October 30. The fourteenth day after provision of the notice is September 29. On September 28, the consumer uses the credit card to check into a hotel and the hotel obtains authorization for a $1,000 hold on the account to ensure there is adequate available credit to cover the anticipated cost of the stay.

A. The consumer checks out of the hotel on October 2. The actual cost of the stay is $1,100 because of additional incidental costs. On October 2, the hotel charges the $1,100 transaction to the account. For purposes of §1026.55(b)(3), the transaction occurred on October 2. Therefore, on October 30, §1026.55(b)(3) permits the card issuer to apply the 20% rate to new purchases and to the $1,100 transaction. However, §1026.55(b)(3)(ii) does not permit the card issuer to apply the 20% rate to any remaining portion of the $2,000 purchase balance.

B. Same facts as above except that the consumer checks out of the hotel on September 29. The actual cost of the stay is $250, but the hotel does not charge this amount to the account until November 1. For purposes of §1026.55(b)(3), the card issuer may treat the transaction as occurring more than 14 days after provision of the §1026.9(c) notice (*i.e.*, after September 29). Accordingly, the card issuer may apply the 20% rate to the $250 transaction.

5. *Application of increased fees and charges. See* comment 55(c)(1)–3.

6. *Delayed implementation of increase.* Section 1026.55(b)(3)(iii) does not prohibit a card issuer from notifying a consumer of an increase in an annual percentage rate, fee, or charge consistent with §1026.9(b), (c), or (g). However, §1026.55(b)(3)(iii) does prohibit application of an increased rate, fee, or charge during the first year after the account is opened, while the account is closed, or while the card issuer does not permit the consumer to use the account for new transactions. If §1026.9(b), (c), or (g) permits a card issuer to apply an increased rate, fee, or charge on a particular date and the account is closed on that date or the card issuer does not permit the consumer to use the account for new transactions on that date, the card issuer may delay application of the increased rate, fee, or charge until the first day of the following billing cycle without relinquishing the ability to apply that rate, fee, or charge (assuming the increase is otherwise consistent with §1026.55). *See* examples in comment 55(b)–2.iii. However, if the account is closed or the card issuer does not permit the consumer to use the account for new transactions on the first day of the following billing cycle, then the card issuer must provide a new notice of the increased rate, fee, or charge consistent with §1026.9(b), (c), or (g).

7. *Date on which account may first be used by consumer to engage in transactions.* For purposes of §1026.55(b)(3)(iii), 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. An account is considered open for purposes of §1026.55(b)(3)(iii) on any date that the card issuer may consider the account open for purposes of §1026.52(a)(1). *See* comment 52(a)(1)–4.

55(b)(4) Delinquency exception

1. *Receipt of required minimum periodic payment within 60 days of due date.* Section 1026.55(b)(4) applies when a card issuer has not received the consumer's required minimum periodic payment within 60 days after the due date for that payment. In order to satisfy this condition, a card issuer that requires monthly minimum payments generally must not have received two consecutive required minimum periodic payments. Whether a required minimum periodic payment has been received for purposes of §1026.55(b)(4) depends on whether the amount received is equal to or more than the first outstanding required minimum periodic payment. For example, assume that the required minimum periodic payments for a credit card account are due on the fifteenth day of the month. On May 13, the card issuer has not received the $50 required minimum periodic payment due on March 15 or the $150 required minimum periodic payment due on April 15. The sixtieth day after the March 15

payment due date is May 14. If the card issuer receives a $50 payment on May 14, §1026.55(b)(4) does not apply because the payment is equal to the required minimum periodic payment due on March 15 and therefore the account is not more than 60 days delinquent. However, if the card issuer instead received a $40 payment on May 14, §1026.55(b)(4) would apply beginning on May 15 because the payment is less than the required minimum periodic payment due on March 15. Furthermore, if the card issuer received the $50 payment on May 15, §1026.55(b)(4) would apply because the card issuer did not receive the required minimum periodic payment due on March 15 within 60 days after the due date for that payment.

2. *Relationship to §1026.9(g)(3)(i)(B).* A card issuer that has complied with the disclosure requirements in §1026.9(g)(3)(i)(B) has also complied with the disclosure requirements in §1026.55(b)(4)(i).

3. *Reduction in rate pursuant to §1026.55(b)(4)(ii).* Section 1026.55(b)(4)(ii) provides that, if the card issuer receives six consecutive required minimum periodic payments on or before the payment due date beginning with the first payment due following the effective date of the increase, the card issuer must reduce any annual percentage rate, fee, or charge increased pursuant to §1026.55(b)(4) to the annual percentage rate, fee, or charge that applied prior to the increase with respect to transactions that occurred prior to or within 14 days after provision of the §1026.9(c) or (g) notice.

i. *Six consecutive payments immediately following effective date of increase.* Section 1026.55(b)(4)(ii) does not apply if the card issuer does not receive six consecutive required minimum periodic payments on or before the payment due date beginning with the payment due immediately following the effective date of the increase, even if, at some later point in time, the card issuer receives six consecutive required minimum periodic payments on or before the payment due date.

ii. *Rate, fee, or charge that does not exceed rate, fee, or charge that applied before increase.* Although §1026.55(b)(4)(ii) requires the card issuer to reduce an annual percentage rate, fee, or charge increased pursuant to §1026.55(b)(4) to the annual percentage rate, fee, or charge that applied prior to the increase, this provision does not prohibit the card issuer from applying an increased annual percentage rate, fee, or charge consistent with any of the other exceptions in §1026.55(b). For example, if a temporary rate applied prior to the §1026.55(b)(4) increase and the temporary rate expired before a reduction in rate pursuant to §1026.55(b)(4)(ii), the card issuer may apply an increased rate to the extent consistent with §1026.55(b)(1). Similarly, if a variable rate applied prior to the §1026.55(b)(4) increase, the card issuer may apply any increase in that variable rate to the extent consistent with §1026.55(b)(2).

iii. *Delayed implementation of reduction.* If §1026.55(b)(4)(ii) requires a card issuer to reduce an annual percentage rate, fee, or charge on a date that is not the first day of a billing cycle, the card issuer may delay application of the reduced rate, fee, or charge until the first day of the following billing cycle.

iv. *Examples.* The following examples illustrate the application of §1026.55(b)(4)(ii):

A. 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 required minimum periodic payments are due on the fifteenth day of the month. Assume also that the account has a $5,000 purchase balance to which a non-variable annual percentage rate of 15% applies. On May 16 of year one, the card issuer has not received the required minimum periodic payments due on the fifteenth day of March, April, or May and sends a §1026.9(c) or (g) notice stating that the annual percentage rate applicable to the $5,000 balance and to new transactions will increase to 28% effective July 1. On July 1, §1026.55(b)(4) permits the card issuer to apply the 28% rate to the $5,000 balance and to new transactions. The card issuer receives the required minimum periodic payments due on the fifteenth day of July, August, September, October, November, and December. On January 1 of year two, §1026.55(b)(4)(ii) requires the card issuer to reduce the rate that applies to any remaining portion of the $5,000 balance to 15%. The card issuer is not required to reduce the rate that applies to any transactions that occurred on or after May 31 (which is the fifteenth day after provision of the §1026.9(c) or (g) notice).

B. Same facts as paragraph iv.A above except that the 15% rate that applied to the $5,000 balance prior to the §1026.55(b)(4) increase was scheduled to increase to 20% on August 1 of year one (pursuant to §1026.55(b)(1)). On January 1 of year two, §1026.55(b)(4)(ii) requires the card issuer to reduce the rate that applies to any remaining portion of the $5,000 balance to 20%.

C. Same facts as paragraph iv.A above except that the 15% rate that applied to the $5,000 balance prior to the §1026.55(b)(4) increase was scheduled to increase to 20% on March 1 of year two (pursuant to §1026.55(b)(1)). On January 1 of year two, §1026.55(b)(4)(ii) requires the card issuer to reduce the rate that applies to any remaining portion of the $5,000 balance to 15%.

D. Same facts as paragraph iv.A above except that the 15% rate that applied to the $5,000 balance prior to the §1026.55(b)(4) increase was a variable rate that was determined by adding a margin of 10 percentage points to a publicly-available index not under the card issuer's control (consistent with §1026.55(b)(2)). On January 1 of year two, §1026.55(b)(4)(ii) requires the card issuer to reduce the rate that applies to any remaining portion of the $5,000 balance to the variable rate determined using the 10-point margin.

E. For an example of the application of §1026.55(b)(4)(ii) to deferred interest or similar programs, see comment 55(b)(1)–3.ii.C.

55(b)(5) Workout and temporary hardship arrangement exception

1. *Scope of exception.* Nothing in §1026.55(b)(5) permits a card issuer to alter the requirements of §1026.55 pursuant to a workout or temporary hardship arrangement. For example, a card issuer cannot increase an annual percentage rate or a fee or charge required to be disclosed under §1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) pursuant to a workout or temporary hardship arrangement unless otherwise permitted by §1026.55. In addition, a card issuer cannot require the consumer to make payments with respect to a protected balance that exceed the payments permitted under §1026.55(c).

2. *Relationship to §1026.9(c)(2)(v)(D).* A card issuer that has complied with the disclosure requirements in §1026.9(c)(2)(v)(D) has also complied with the disclosure requirements in §1026.55(b)(5)(i). See comment 9(c)(2)(v)–10. Thus, although the disclosures required by §1026.55(b)(5)(i) must generally be provided in writing prior to commencement of the arrangement, a card issuer may comply with §1026.55(b)(5)(i) by complying with §1026.9(c)(2)(v)(D), which states that the disclosure of the terms of the arrangement may be made orally by telephone, provided that the card issuer mails or delivers a written disclosure of the terms of the arrangement to the consumer as soon as reasonably practicable after the oral disclosure is provided.

3. *Rate, fee, or charge that does not exceed rate, fee, or charge that applied before workout or temporary hardship arrangement.* Upon the completion or failure of a workout or temporary hardship arrangement, §1026.55(b)(5)(ii) prohibits the card issuer from applying to any transactions that occurred prior to commencement of the arrangement an annual percentage rate, fee, or charge that exceeds the annual percentage rate, fee, or charge that applied to those transactions prior to commencement of the arrangement. However, this provision does not prohibit the card issuer from applying an increased annual percentage rate, fee, or charge upon completion or failure of the arrangement, to the extent consistent with any of the other exceptions in §1026.55(b). For example, if a temporary rate applied prior to the arrangement and that rate expired during the arrangement, the card issuer may apply an increased rate upon completion or failure of the arrangement to the extent consistent with §1026.55(b)(1). Similarly, if a variable rate applied prior to the arrangement, the card issuer may apply any increase in that variable rate upon completion or failure of the arrangement to the extent consistent with §1026.55(b)(2).

4. *Examples.* i. Assume that an account is subject to a $50 annual fee and that, consistent with §1026.55(b)(4), the margin used to determine a variable annual percentage rate that applies to a $5,000 balance is increased from 5 percentage points to 15 percentage points. Assume also that the card issuer and the consumer subsequently agree to a workout arrangement that reduces the annual fee to $0 and reduces the margin back to 5 points on the condition that the consumer pay a specified amount by the payment due date each month. If the consumer does not pay the agreed-upon amount by the payment due date, §1026.55(b)(5) permits the card issuer to increase the annual fee to $50 and increase the margin for the variable rate that applies to the $5,000 balance up to 15 percentage points.

ii. Assume that a consumer fails to make four consecutive monthly minimum payments totaling $480 on a consumer credit card account with a balance of $6,000 and that, consistent with §1026.55(b)(4), the annual percentage rate that applies to that balance is increased from a non-variable rate of 15% to a non-variable penalty rate of 30%. Assume also that the card issuer and the consumer subsequently agree to a temporary hardship arrangement that reduces all rates on the account to 0% on the condition that the consumer pay an amount by the payment due date each month that is sufficient to cure the $480 delinquency within six months. If the consumer pays the agreed-upon amount by the payment due date during the six-month period and cures the delinquency, §1026.55(b)(5) permits the card issuer to increase the rate that applies to any remaining portion of the $6,000 balance to 15% or any other rate up to the 30% penalty rate.

55(b)(6) Servicemembers Civil Relief Act exception

1. *Rate, fee, or charge that does not exceed rate, fee, or charge that applied before decrease.* When a rate or a fee or charge subject to §1026.55 has been decreased pursuant to 50 U.S.C. app. 527 or a similar Federal or state statute or regulation, §1026.55(b)(6) permits the card issuer to increase the rate, fee, or charge once 50 U.S.C. app. 527 or the similar statute or regulation no longer applies. However, §1026.55(b)(6) prohibits the card issuer from applying to any transactions that occurred prior to the decrease a rate, fee, or charge that exceeds the rate, fee, or charge that applied to those transactions prior to the decrease (except to the extent permitted by one of the other exceptions in §1026.55(b)). For example, if a temporary rate applied

prior to a decrease in rate pursuant to 50 U.S.C. app. 527 and the temporary rate expired during the period that 50 U.S.C. app. 527 applied to the account, the card issuer may apply an increased rate once 50 U.S.C. app. 527 no longer applies to the extent consistent with §1026.55(b)(1). Similarly, if a variable rate applied prior to a decrease in rate pursuant to 50 U.S.C. app. 527, the card issuer may apply any increase in that variable rate once 50 U.S.C. app. 527 no longer applies to the extent consistent with §1026.55(b)(2).

2. *Decreases in rates, fees, and charges to amounts consistent with 50 U.S.C. app. 527 or similar statute or regulation.* If a card issuer deceases an annual percentage rate or a fee or charge subject to §1026.55 pursuant to 50 U.S.C. app. 527 or a similar Federal or state statute or regulation and if the card issuer also decreases other rates, fees, or charges (such as the rate that applies to new transactions) to amounts that are consistent with 50 U.S.C. app. 527 or a similar Federal or state statute or regulation, the card issuer may increase those rates, fees, and charges consistent with §1026.55(b)(6).

3. *Example.* Assume that on December 31 of year one the annual percentage rate that applies to a $5,000 balance on a credit card account is a variable rate that is determined by adding a margin of 10 percentage points to a publicly-available index that is not under the card issuer's control. The account is also subject to a monthly maintenance fee of $10. On January 1 of year two, the card issuer reduces the rate that applies to the $5,000 balance to a non-variable rate of 6% and ceases to impose the $10 monthly maintenance fee and other fees (including late payment fees) pursuant to 50 U.S.C. app. 527. The card issuer also decreases the rate that applies to new transactions to 6%. During year two, the consumer uses the account for $1,000 in new transactions. On January 1 of year three, 50 U.S.C. app. 527 ceases to apply and the card issuer provides a notice pursuant to §1026.9(c) informing the consumer that on February 15 of year three the variable rate determined using the 10-point margin will apply to any remaining portion of the $5,000 balance and to any remaining portion of the $1,000 balance. The notice also states that the $10 monthly maintenance fee and other fees (including late payment fees) will resume on February 15 of year three. Consistent with §1026.9(c)(2)(iv)(B), the card issuer is not required to provide a right to reject in these circumstances. On February 15 of year three, §1026.55(b)(6) permits the card issuer to begin accruing interest on any remaining portion of the $5,000 and $1,000 balances at the variable rate determined using the 10-point margin and to resume imposing the $10 monthly maintenance fee and other fees (including late payment fees).

55(b)(7) Index Replacement and Margin Change Exception

1. *Replacing LIBOR.* A card issuer may use either the provision in §1026.55(b)(7)(i) or (ii) to replace a LIBOR index used under the plan so long as the applicable conditions are met for the provision used. Neither provision, however, excuses the card issuer from noncompliance with contractual provisions. The following examples illustrate when a card issuer may use the provisions in §1026.55(b)(7)(i) or (ii) to replace a LIBOR index on the plan.

i. Assume that LIBOR becomes unavailable after June 30, 2023, and assume a contract provides that a card issuer may not replace an index unilaterally under a plan unless the original index becomes unavailable and provides that the replacement index and replacement margin will result in an annual percentage rate substantially similar to a rate that is in effect when the original index becomes unavailable. The card issuer may use §1026.55(b)(7)(i) to replace the LIBOR index used under the plan so long as the conditions of that provision are met. Section 1026.55(b)(7)(ii) provides that a card issuer may replace the LIBOR index if, among other conditions, the replacement index value in effect on October 18, 2021, and replacement margin will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If the replacement index is not published on October 18, 2021, the card issuer generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index. The one exception is that if the replacement index is the Board-selected benchmark replacement for consumer loans to replace the 1-month, 3-month, 6-month, or 12-month U.S. Dollar LIBOR index, the card issuer must use the index value on June 30, 2023, for the LIBOR index and, for the Board-selected benchmark replacement for consumer loans, must use the index value on the first date that index is published, in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index. In this example, however, the card issuer would be contractually prohibited from replacing the LIBOR index used under the plan unless the replacement index and replacement margin also will produce an annual percentage rate substantially similar to a rate that is in effect when the LIBOR index becomes unavailable.

ii. Assume that LIBOR becomes unavailable after June 30, 2023, and assume a contract provides that a card issuer may not replace an index unilaterally under a plan unless the original index becomes unavailable but does not require that the replacement index and replacement margin will result in an annual percentage rate substantially similar to a rate that is in effect when the original index becomes unavailable. In this case, the card issuer would be contractually prohibited from unilaterally replacing the LIBOR index used under the plan until it becomes unavailable. At that time, the card issuer has the option of using §1026.55(b)(7)(i) or (ii) to replace the LIBOR index used under the plan if the conditions of the applicable provision are met.

iii. Assume that LIBOR becomes unavailable after June 30, 2023, and assume a contract provides that a card issuer may change the terms of the contract (including the index) as permitted by law. In this case, if the card issuer replaces the LIBOR index used under the plan on or after April 1, 2022, but does not wait until the LIBOR index becomes unavailable to do so, the card issuer may only use §1026.55(b)(7)(ii) to replace the LIBOR index if the conditions of that provision are met. In that case, the card issuer may not use §1026.55(b)(7)(i). If the card issuer waits until the LIBOR index used under the plan becomes unavailable to replace LIBOR, the card issuer has the option of using §1026.55(b)(7)(i) or (ii) to replace the LIBOR index if the conditions of the applicable provisions are met.

Paragraph 55(b)(7)(i)

1. *Replacing LIBOR*. For purposes of replacing a LIBOR index used under a plan, a replacement index that is not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index used under the plan. Except for the Board-selected benchmark replacement for consumer loans as defined in §1026.2(a)(28), the historical fluctuations considered are the historical fluctuations up through when the LIBOR index becomes unavailable or up through the date indicated in a Bureau determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, whichever is earlier.

i. The Bureau has determined that effective April 1, 2022, the prime rate published in the Wall Street Journal has historical fluctuations that are substantially similar to those of the 1-month and 3-month U.S. Dollar LIBOR indices, and no further determination is required. In order to use this prime rate as the replacement index for the 1-month or 3-month U.S. Dollar LIBOR index, the card issuer also must comply with the condition in §1026.55(b)(7)(i) that the prime rate and replacement margin will produce a rate substantially similar to the rate that was in effect at the time the LIBOR index became unavailable. *See also* comment 55(b)(7)(i)–2.

ii. By operation of the Adjustable Interest Rate (LIBOR) Act, Public Law 117–103, division U, codified at 12 U.S.C. 5803(e)(2), and the Board's implementing regulation, 12 CFR 253.4(b)(2), the Board-selected benchmark replacement for consumer loans to replace the 1-month, 3-month, 6-month, or 12-month U.S. Dollar LIBOR index has historical fluctuations substantially similar to those of the LIBOR index being replaced. *See* §1026.2(a)(28) for the definition of *the Board-selected benchmark replacement for consumer loans*. As a result, the Board-selected benchmark replacement for consumer loans meets the ''historical fluctuations are substantially similar'' standard for the LIBOR index it replaces, and no further determination is required. In order to use the Board-selected benchmark replacement for consumer loans as the replacement index for the applicable LIBOR index, the card issuer also must comply with the condition in §1026.55(b)(7)(i) that the Board-selected benchmark replacement for consumer loans and replacement margin will produce a rate substantially similar to the rate that was in effect at the time the LIBOR index became unavailable. *See also* comment 55(b)(7)(i)–2.

iii. Except for the Board-selected benchmark replacement for consumer loans as defined in §1026.2(a)(28), the relevant factors to be considered in determining whether a replacement index has historical fluctuations substantially similar to those of a particular LIBOR index depend on the replacement index being considered and the LIBOR index being replaced. For example, these determinations may need to consider certain aspects of the historical data itself for a particular replacement index, such as whether the replacement index is a backward-looking rate (e.g., historical average of rates) such that timing aspects of the data may need to be adjusted to match up with the particular forward-looking LIBOR term-rate being replaced. The types of relevant factors to establish if a replacement index would meet the ''historical fluctuations are substantially similar'' standard with respect to a particular LIBOR index using historical data, include but are not limited to, whether: (1) the movements over time are substantially similar; and (2) the consumers' payments using the replacement index compared to payments using the LIBOR index are substantially similar if there is sufficient historical data for this analysis. The Board-selected benchmark replacement for consumer loans is considered to meet the ''historical fluctuations are substantially similar'' standard with respect to the LIBOR tenor being replaced, and therefore, these factors need not be considered.

2. *Substantially similar rate when LIBOR becomes unavailable.* Under §1026.55(b)(7)(i), the replacement index and replacement margin must produce an annual percentage rate substantially similar to the rate that was in effect at the time the LIBOR index used under the plan became unavailable. For this comparison of the rates, a card issuer generally must use the value of the replacement index and the LIBOR index on the day that LIBOR becomes unavailable. If the replacement index is not published on the day that the LIBOR index becomes unavailable, the card issuer generally must use the previous calendar day that both indices are published as the date for selecting indices values in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index. The one exception is that if the replacement index is the Board-selected benchmark replacement for consumer loans to replace the 1-month, 3-month, 6-month, or 12-month U.S. Dollar LIBOR index, the card issuer must use the index value on June 30, 2023, for the LIBOR index and, for the Board-selected benchmark replacement for consumer loans, must use the index value on the first date that index is published, in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index. The replacement index and replacement margin are not required to produce an annual percentage rate that is substantially similar on the day that the replacement index and replacement margin become effective on the plan. For purposes of §1026.55(b)(7)(i), if a card issuer uses the Board-selected benchmark replacement for consumer loans to replace the 1-month, 3-month, 6-month, or 12-month U.S. Dollar LIBOR index as the replacement index and uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan the card issuer will be deemed to be in compliance with the condition in §1026.55(b)(7)(i) that the replacement index and replacement margin would have resulted in an annual percentage rate substantially similar to the rate in effect at the time the LIBOR index became unavailable. The following example illustrates this comment.

i. Assume that the 1-month U.S. Dollar LIBOR index used under the plan becomes unavailable on June 30, 2023, and on that day the LIBOR value is 2%, the margin is 10%, and the annual percentage rate is 12%. Also, assume that a card issuer has selected the prime index published in the Wall Street Journal as the replacement index, and the value of the prime index is 5% on June 30, 2023. The card issuer would satisfy the requirement to use a replacement index and replacement margin that will produce an annual percentage rate substantially similar to the rate that was in effect when the LIBOR index used under the plan became unavailable by selecting a 7% replacement margin. (The prime index value of 5% and the replacement margin of 7% would produce a rate of 12% on June 30, 2023.) Thus, if the card issuer provides a change-in-terms notice under §1026.9(c)(2) on July 1, 2023, disclosing the prime index as the replacement index and a replacement margin of 7%, where these changes will become effective on August 16, 2023, the card issuer satisfies the requirement to use a replacement index and replacement margin that will produce an annual percentage rate substantially similar to the rate that was in effect when the LIBOR index used under the plan became unavailable. This is true even if the prime index value changes after June 30, 2023, and the annual percentage rate calculated using the prime index value and 7% margin on August 16, 2023, is not substantially similar to the rate calculated using the LIBOR index value on June 30, 2023.

Paragraph 55(b)(7)(ii)

1. *Replacing LIBOR.* For purposes of replacing a LIBOR index used under a plan, a replacement index that is not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index used under the plan. Except for the Board-selected benchmark replacement for consumer loans as defined in §1026.2(a)(28), the historical fluctuations considered are the historical fluctuations up through the relevant date. If the Bureau has made a determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, the relevant date is the date indicated in that determination. If the Bureau has not made a determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, the relevant date is the later of April 1, 2022, or the date no more than 30 days before the card issuer makes a determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar.

i. The Bureau has determined that effective April 1, 2022, the prime rate published in the Wall Street Journal has historical fluctuations that are substantially similar to those of the 1-month and 3-month U.S. Dollar LIBOR indices, and no further determination is required. In order to use this prime rate as the replacement index for the 1-month or 3-month U.S. Dollar LIBOR index, the card issuer also must comply with the condition in §1026.55(b)(7)(ii) that the prime rate index value in effect on October 18, 2021, and replacement margin will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. *See also* comments 55(b)(7)(ii)–2 and –3.

ii. By operation of the Adjustable Interest Rate (LIBOR) Act, Public Law 117–103, division U and the Board's implementing regulation, 12 CFR part 253, the Board-selected benchmark replacement for consumer loans to replace the 1-month, 3-month, 6-month, or 12-month U.S. Dollar LIBOR index has historical fluctuations substantially similar to those of the LIBOR index being replaced. *See* §1026.2(a)(28) for the definition of *the Board-selected benchmark replacement for consumer loans*. As a result, the Board-selected benchmark replacement for consumer loans meets the "historical fluctuations are substantially similar" standard for the LIBOR index it replaces, and no further determination is required. In order to use the Board-selected benchmark replacement for consumer loans as the replacement index for the applicable LIBOR index, the card issuer also must comply with the condition in §1026.55(b)(7)(ii) that the Board-selected benchmark replacement for consumers loans and replacement margin will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. Because of the exception in §1026.55(b)(7)(ii), the card issuer must use the index value on June 30, 2023, for the LIBOR index and, for the Board-selected benchmark replacement for consumer loans, must use the index value on the first date that index is published, in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index. *See also* comments 55(b)(7)(ii)–2 and –3.

iii. Except for the Board-selected benchmark replacement for consumer loans as defined in §1026.2(a)(28), the relevant factors to be considered in determining whether a replacement index has historical fluctuations substantially similar to those of a particular LIBOR index depend on the replacement index being considered and the LIBOR index being replaced. For example, these determinations may need to consider certain aspects of the historical data itself for a particular replacement index, such as whether the replacement index is a backward-looking rate (e.g., historical average of rates) such that timing aspects of the data may need to be adjusted to match up with the particular forward-looking LIBOR term-rate being replaced. The types of relevant factors to establish if a replacement index would meet the "historical fluctuations are substantially similar" standard with respect to a particular LIBOR index using historical data, include but are not limited to, whether: (1) the movements over time are substantially similar; and (2) the consumers' payments using the replacement index compared to payments using the LIBOR index are substantially similar if there is sufficient historical data for this analysis. The Board-selected benchmark replacement for consumer loans is considered to meet the "historical fluctuations are substantially similar" standard with respect to the LIBOR tenor being replaced, and therefore, these factors need not be considered.

2. *Using index values on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan.* Under §1026.55(b)(7)(ii), if the replacement index was published on October 18, 2021, the replacement index value in effect on October 18, 2021, and replacement margin must produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. The margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan is the margin that applied to the variable rate immediately prior to when the card issuer provides the change-in-terms notice disclosing the replacement index for the variable rate. The following examples illustrate how to determine the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan.

i. Assume a variable rate used under the plan that is based on the 1-month U.S. Dollar LIBOR index, and assume that LIBOR becomes unavailable after June 30, 2023. On October 18, 2021, the LIBOR index value is 2%, the margin on that day is 10% and the annual percentage rate using that index value and margin is 12%. Assume that on November 16, 2021, pursuant to §1026.55(b)(3), a card issuer provides a change-in-terms notice under §1026.9(c)(2) disclosing a new margin of 12% for the variable rate that will apply to new transactions after November 30, 2021, and this change in the margin becomes effective on January 1, 2022. The margin for the variable rate applicable to the transactions that occurred on or prior to November 30, 2021, remains at 10%. Assume that there are no more changes in the margin used on the variable rate that applied to transactions that occurred after November 30, 2021, or to the margin used on the variable rate that applied to transactions that occurred on or prior to November 30, 2021, prior to when the card issuer provides a change-in-terms notice on April 1, 2022, disclosing the replacement index and replacement margins for both variable rates that will be effective on May 17, 2022. In this case, the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan for transactions that occurred on or prior to November 30, 2021, is 10%. The margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan for transactions that occurred after November 30, 2021, is 12%. Assume that the card issuer has selected the prime index published in the Wall Street Journal as the replacement index, and the value of the prime index is 5% on October 18, 2021. A replacement margin of 7% is permissible under §1026.55(b)(7)(ii) for transactions that occurred on or prior to November 30, 2021, because that replacement margin combined with the prime index value of 5% on October 18, 2021, will produce an annual percentage rate of 12%, which is substantially similar to the 12% annual percentage rate calculated using the LIBOR index value in effect on October 18, 2021, (which is 2%) and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan for that balance (which is 10%). A replacement margin of 9% is permissible under §1026.55(b)(7)(ii) for transactions that occurred after November 30, 2021, because that replacement margin combined with the prime index value of 5% on October 18, 2021, will produce an annual percentage rate of 14%, which is substantially similar to the 14% annual percentage rate calculated using the LIBOR index value in effect on October 18, 2021, (which is 2%) and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan for transactions that occurred after November 30, 2021, (which is 12%).

ii. Assume a variable rate used under the plan that is based on the 1-month U.S. Dollar LIBOR index, and assume that LIBOR becomes unavailable after June 30, 2023. On October 18, 2021, the LIBOR index value is 2%, the margin on that day is 10% and the annual percentage rate using that index value and margin is 12%. Assume that on November 16, 2021, pursuant to §1026.55(b)(4), a card issuer provides a penalty rate notice under §1026.9(g) increasing the margin for the variable rate to 20% that will apply to both outstanding balances and new transactions effective January 1, 2022, because the consumer was more than 60 days late in making a minimum payment. Assume that there are no more changes in the margin used on the variable rate for either the outstanding balance or new transactions prior to April 1, 2022, the date on which the card issuer provides a change-in-terms notice under §1026.9(c)(2) disclosing the replacement index and replacement margin for the variable rate that will be effective on May 17, 2022. The margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan for the outstanding balance and new transactions is 12%. Assume that the card issuer has selected the prime index published in the Wall Street Journal as the replacement index, and the value of the prime index is 5% on October 18, 2021. A replacement margin of 17% is permissible under §1026.55(b)(7)(ii) for the outstanding balance and new transactions because that replacement margin combined with the prime index value of 5% on October 18, 2021, will produce an annual percentage rate of 22%, which is substantially similar to the 22% annual percentage rate calculated using the LIBOR index value in effect on October 18, 2021, (which is 2%) and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan for the outstanding balance and new transactions (which is 20%).

3. *Substantially similar rate using index values on October 18, 2021*. Under §1026.55(b)(7)(ii), if the replacement index was published on October 18, 2021, the replacement index value in effect on October 18, 2021, and replacement margin must produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. A card issuer is not required to produce an annual percentage rate that is substantially similar on the day that the replacement index and replacement margin become effective on the plan. For purposes of §1026.55(b)(7)(ii), if a card issuer uses the Board-selected benchmark replacement for consumer loans to replace the 1-month, 3-month, 6-month, or 12-month U.S. Dollar LIBOR index as the replacement index and uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan, the card issuer will be deemed to be in compliance with the condition in §1026.55(b)(7)(ii) that the replacement index and replacement margin would have resulted in an annual percentage rate substantially similar to the rate calculated using the LIBOR index. The following example illustrates this comment.

i. Assume that the 1-month U.S. Dollar LIBOR index used under the plan has a value of 2% on October 18, 2021, the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan is 10%, and the annual percentage rate based on that LIBOR index value and that margin is 12%. Also, assume