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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 card issuer 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 card issuer provides a change-in-terms notice under § 1026.9(c)(2) 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 May 17, 2022, the card issuer 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 value change after October 18, 2021, and the annual percentage rate calculated using the prime index value and 7% margin on May 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 May 17, 2022.

55(c) Treatment of protected balances

55(c)(1) Definition of protected balance

1. *Example of protected balance.* Assume that, on March 15 of year two, an account has a purchase balance of \$1,000 at a non-variable annual percentage rate of 12% and that, on March 16, the card issuer sends a notice pursuant to § 1026.9(c) informing the consumer that the annual percentage rate for new purchases will increase to a non-variable rate of 15% on May 1. The fourteenth day after provision of the notice is March 29. On March 29, the consumer makes a \$100 purchase. On March 30, the consumer makes a \$150 purchase. On May 1, § 1026.55(b)(3)(ii) permits the card issuer to begin accruing interest at 15% on the \$150 purchase made on March 30 but does not permit the card issuer to apply that 15% rate to the \$1,100 purchase balance as of March 29. Accordingly, the protected balance for purposes of § 1026.55(c) is the \$1,100 purchase balance as of March 29. The \$150 purchase made on March 30 is not part of the protected balance.

2. *First year after account opening.* Section 1026.55(c) applies to amounts owed for a category of transactions to which an increased annual percentage rate or an increased fee or charge cannot be applied after the rate, fee, or charge for that category of transactions has been increased pursuant to § 1026.55(b)(3). Because § 1026.55(b)(3)(iii) does not permit a card issuer to 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) during the first year after account opening, § 1026.55(c) does not apply to balances during the first year after account opening.

3. *Increased fees and charges.* Except as provided in § 1026.55(b)(3)(iii), § 1026.55(b)(3) permits a card issuer to increase a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) after complying with the applicable notice requirements in § 1026.9(b) or (c), provided that the increased fee or charge is not applied to a protected balance. To the extent consistent with § 1026.55(b)(3)(iii), a card issuer is not prohibited from increasing a fee or charge that applies to the account as a whole or to balances other than the protected balance. For example, after the first year following account opening, a card issuer generally may add or increase an annual or a monthly maintenance fee for an account after complying with the notice requirements in § 1026.9(c), including notifying the consumer of the right to reject the new or increased fee under § 1026.9(h). However, except as otherwise provided in § 1026.55(b), an increased fee or charge cannot be applied to an account while the account is closed or while the card issuer does not permit the consumer to use the account for new transactions. See § 1026.55(b)(3)(iii); see also §§ 1026.52(b)(2)(i)(B)(3) and 1026.55(d)(1). Furthermore, if the consumer rejects an increase in a fee or charge pursuant to § 1026.9(h), the card issuer is prohibited from applying the increased fee or charge to the account and from imposing any other fee or charge solely as a result of the rejection. See § 1026.9(h)(2)(i) and (ii); comment 9(h)(2)(i)-2.

4. *Changing balance computation method.* Nothing in § 1026.55 prohibits a card issuer from changing the balance computation method that applies to new transactions as well as protected balances.

55(c)(2) Repayment of protected balance

1. *No less beneficial to the consumer.* A card issuer may provide a method of repaying the protected balance that is different from the methods listed in § 1026.55(c)(2) so long as the method used is no less beneficial to the consumer than one of the listed methods. A method is no less beneficial to the consumer if the method results in a required minimum periodic payment that is equal to or less

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than a minimum payment calculated using the method for the account before the effective date of the increase. Similarly, a method is no less beneficial to the consumer if the method amortizes the balance in five years or longer or if the method results in a required minimum periodic payment that is equal to or less than a minimum payment calculated consistent with § 1026.55(c)(2)(iii). For example:

i. If at account opening the cardholder agreement stated that the required minimum periodic payment would be either the total of fees and interest charges plus 1% of the total amount owed or \$20 (whichever is greater), the card issuer may require the consumer to make a minimum payment of \$20 even if doing so would pay off the balance in less than five years or constitute more than 2% of the balance plus fees and interest charges.

ii. A card issuer could increase the percentage of the balance included in the required minimum periodic payment from 2% to 5% so long as doing so would not result in amortization of the balance in less than five years.

iii. A card issuer could require the consumer to make a required minimum periodic payment that amortizes the balance in four years so long as doing so would not more than double the percentage of the balance included in the minimum payment prior to the date on which the increased annual percentage rate, fee, or charge became effective.

Paragraph 55(c)(2)(ii)

1. *Amortization period starting from effective date of increase.* Section 1026.55(c)(2)(ii) provides for an amortization period for the protected balance of no less than five years, starting from the date on which the increased annual percentage rate or fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) became effective. A card issuer is not required to recalculate the required minimum periodic payment for the protected balance if, during the amortization period, that balance is reduced as a result of the allocation of payments by the consumer in excess of that minimum payment consistent with § 1026.53 or any other practice permitted by these rules and other applicable law.

2. *Amortization when applicable rate is variable.* If the annual percentage rate that applies to the protected balance varies with an index, the card issuer may adjust the interest charges included in the required minimum periodic payment for that balance accordingly in order to ensure that the balance is amortized in five years. For example, assume that a variable rate that is currently 15% applies to a protected balance and that, in order to amortize that balance in five years, the required minimum periodic payment must include a specific amount of prin-

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cipal plus all accrued interest charges. If the 15% variable rate increases due to an increase in the index, the creditor may increase the required minimum periodic payment to include the additional interest charges.

Paragraph 55(c)(2)(iii)

1. *Portion of required minimum periodic payment on other balances.* Section 1026.55(c)(2)(iii) addresses the portion of the required minimum periodic payment based on the protected balance. Section 1026.55(c)(2)(iii) does not limit or otherwise address the card issuer's ability to determine the portion of the required minimum periodic payment based on other balances on the account or the card issuer's ability to apply that portion of the minimum payment to the balances on the account.

2. *Example.* Assume that the method used by a card issuer to calculate the required minimum periodic payment for a credit card account requires the consumer to pay either the total of fees and accrued interest charges plus 2% of the total amount owed or \$50, whichever is greater. Assume also that the account has a purchase balance of \$2,000 at an annual percentage rate of 15% and a cash advance balance of \$500 at an annual percentage rate of 20% and that the card issuer increases the rate for purchases to 18% but does not increase the rate for cash advances. Under § 1026.55(c)(2)(iii), the card issuer may require the consumer to pay fees and interest plus 4% of the \$2,000 purchase balance. Section 1026.55(c)(2)(iii) does not limit the card issuer's ability to increase the portion of the required minimum periodic payment that is based on the cash advance balance.

55(d) Continuing application

1. *Closed accounts.* If a credit card account under an open-end (not home-secured) consumer credit plan with a balance is closed, § 1026.55 continues to apply to that balance. For example, if a card issuer or a consumer closes a credit card account with a balance, § 1026.55(d)(1) prohibits the card issuer from increasing the annual percentage rate that applies to that balance or imposing a periodic fee based solely on that balance that was not charged before the account was closed (such as a closed account fee) unless permitted by one of the exceptions in § 1026.55(b).

2. *Acquired accounts.* If, through merger or acquisition (for example), a card issuer acquires a credit card account under an open-end (not home-secured) consumer credit plan with a balance, § 1026.55 continues to apply to that balance. For example, if a credit card account has a \$1,000 purchase balance with an annual percentage rate of 15% and the card issuer that acquires that account applies an 18% rate to purchases, § 1026.55(d)(1)

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prohibits the card issuer from applying the 18% rate to the \$1,000 balance unless permitted by one of the exceptions in §1026.55(b).

3. *Balance transfers.* i. *Between accounts issued by the same creditor.* If a balance is transferred from a credit card account under an open-end (not home-secured) consumer credit plan issued by a creditor to another credit account issued by the same creditor or its affiliate or subsidiary, §1026.55 continues to apply to that balance. For example, if a credit card account has a \$2,000 purchase balance with an annual percentage rate of 15% and that balance is transferred to another credit card account issued by the same creditor that applies an 18% rate to purchases, §1026.55(d)(2) prohibits the creditor from applying the 18% rate to the \$2,000 balance unless permitted by one of the exceptions in §1026.55(b). However, the creditor would not generally be prohibited from charging a new periodic fee (such as an annual fee) on the second account so long as the fee is not based solely on the \$2,000 balance and the creditor has notified the consumer of the fee either by providing written notice 45 days before imposing the fee pursuant to §1026.9(c) or by providing account-opening disclosures pursuant to §1026.6(b). See also §1026.55(b)(3)(iii); comment 55(b)(3)-3; comment 5(b)(1)(i)-6. Additional circumstances in which a balance is considered transferred for purposes of §1026.55(d)(2) include when:

A. A retail credit card account with a balance is replaced or substituted with a co-branded general purpose credit card account that can be used with a broader merchant base;

B. A credit card account with a balance is replaced or substituted with another credit card account offering different features;

C. A credit card account with a balance is consolidated or combined with one or more other credit card accounts into a single credit card account; and

D. A credit card account is replaced or substituted with a line of credit that can be accessed solely by an account number.

ii. *Between accounts issued by different creditors.* If a balance is transferred to a credit card account under an open-end (not home-secured) consumer credit plan issued by a creditor from a credit card account issued by a different creditor or an institution that is not an affiliate or subsidiary of the creditor that issued the account to which the balance is transferred, §1026.55(d)(2) does not prohibit the creditor to which the balance is transferred from applying its account terms to that balance, provided that those terms comply with this part. For example, if a credit card account issued by creditor A has a \$1,000 purchase balance at an annual percentage rate of 15% and the consumer transfers that balance to a credit card account with a purchase rate of 17% issued by creditor B, cred-

itor B may apply the 17% rate to the \$1,000 balance. However, creditor B may not subsequently increase the rate on that balance unless permitted by one of the exceptions in §1026.55(b).

55(e) Promotional waivers or rebates of interest, fees, and other charges

1. *Generally.* Nothing in §1026.55 prohibits a card issuer from waiving or rebating finance charges due to a periodic interest rate or a fee or charge required to be disclosed under §1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii). However, if a card issuer promotes and applies the waiver or rebate to an account, the card issuer cannot temporarily or permanently cease or terminate any portion of the waiver or rebate on that account unless permitted by one of the exceptions in §1026.55(b). For example:

i. A card issuer applies an annual percentage rate of 15% to balance transfers but promotes a program under which all of the interest accrued on transferred balances will be waived or rebated for one year. If, prior to the commencement of the one-year period, the card issuer discloses the length of the period and the annual percentage rate that will apply to transferred balances after expiration of that period consistent with §1026.55(b)(1)(i), §1026.55(b)(1) permits the card issuer to begin imposing interest charges on transferred balances after one year. Furthermore, if, during the one-year period, a required minimum periodic payment is not received within 60 days of the payment due date, §1026.55(b)(4) permits the card issuer to begin imposing interest charges on transferred balances (after providing a notice consistent with §1026.9(g) and §1026.55(b)(4)(i)). However, if a required minimum periodic payment is not more than 60 days delinquent or if the consumer otherwise violates the terms or other requirements of the account, §1026.55 does not permit the card issuer to begin imposing interest charges on transferred balances until the expiration of the one-year period.

ii. A card issuer imposes a monthly maintenance fee of \$10 but promotes a program under which the fee will be waived or rebated for the six months following account opening. If, prior to account opening, the card issuer discloses the length of the period and the monthly maintenance fee that will be imposed after expiration of that period consistent with §1026.55(b)(1)(i), §1026.55(b)(1) permits the card issuer to begin imposing the monthly maintenance fee six months after account opening. Furthermore, if, during the six-month period, a required minimum periodic payment is not received within 60 days of the payment due date, §1026.55(b)(4) permits the card issuer to begin imposing the monthly maintenance fee (after providing a notice consistent with

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§ 1026.9(c) and § 1026.55(b)(4)(i)). However, if a required minimum periodic payment is not more than 60 days delinquent or if the consumer otherwise violates the terms or other requirements of the account, § 1026.55 does not permit the card issuer to begin imposing the monthly maintenance fee until the expiration of the six-month period.

2. *Promotion of waiver or rebate.* For purposes of § 1026.55(e), a card issuer generally promotes a waiver or rebate if the card issuer discloses the waiver or rebate in an advertisement (as defined in § 1026.2(a)(2)). See comment 2(a)(2)-1. In addition, a card issuer generally promotes a waiver or rebate for purposes of § 1026.55(e) if the card issuer discloses the waiver or rebate in communications regarding existing accounts (such as communications regarding a promotion that encourages additional or different uses of an existing account). However, a card issuer does not promote a waiver or rebate for purposes of § 1026.55(e) if the advertisement or communication relates to an inquiry or dispute about a specific charge or to interest, fees, or charges that have already been waived or rebated.

i. *Examples of promotional communications.* The following are examples of circumstances in which a card issuer is promoting a waiver or rebate for purposes of § 1026.55(e):

A. A card issuer discloses the waiver or rebate in a newspaper, magazine, leaflet, promotional flyer, catalog, sign, or point-of-sale display, unless the disclosure relates to interest, fees, or charges that have already been waived.

B. A card issuer discloses the waiver or rebate on radio or television or through electronic advertisements (such as on the Internet), unless the disclosure relates to interest, fees, or charges that have already been waived or rebated.

C. A card issuer discloses a waiver or rebate to individual consumers, such as by telephone, letter, or electronic communication, through direct mail literature, or on or with account statements, unless the disclosure relates to an inquiry or dispute about a specific charge or to interest, fees, or charges that have already been waived or rebated.

ii. *Examples of non-promotional communications.* The following are examples of circumstances in which a card issuer is not promoting a waiver or rebate for purposes of § 1026.55(e):

A. After a card issuer has waived or rebated interest, fees, or other charges subject to § 1026.55 with respect to an account, the issuer discloses the waiver or rebate to the accountholder on the periodic statement or by telephone, letter, or electronic communication. However, if the card issuer also discloses prospective waivers or rebates in the same communication, the issuer is pro-

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moting a waiver or rebate for purposes of § 1026.55(e).

B. A card issuer communicates with a consumer about a waiver or rebate of interest, fees, or other charges subject to § 1026.55 in relation to an inquiry or dispute about a specific charge, including a dispute under §§ 1026.12 or 1026.13.

C. A card issuer waives or rebates interest, fees, or other charges subject to § 1026.55 in order to comply with a legal requirement (such as the limitations in § 1026.52(a)).

D. A card issuer discloses a grace period, as defined in § 1026.5(b)(2)(ii)(3).

E. A card issuer provides a period after the payment due date during which interest, fees, or other charges subject to § 1026.55 are waived or rebated even if a payment has not been received.

F. A card issuer provides benefits (such as rewards points or cash back on purchases or finance charges) that can be applied to the account as credits, provided that the benefits are not promoted as reducing interest, fees, or other charges subject to § 1026.55.

3. *Relationship of § 1026.55(e) to grace period.* Section 1026.55(e) does not apply to the waiver of finance charges due to a periodic rate consistent with a grace period, as defined in § 1026.5(b)(2)(ii)(3).

Section 1026.56—Requirements for Over-the-Limit Transactions

56(b) Opt-in requirement.

1. *Policy and practice of declining over-the-limit transactions.* Section 1026.56(b)(1)(i)–(v), including the requirements to provide notice and obtain consumer consent, do not apply to any card issuer that has a policy and practice of declining to pay any over-the-limit transactions for the consumer's credit card account when the card issuer has a reasonable belief that completing a transaction will cause the consumer to exceed the consumer's credit limit for that account. For example, if a card issuer only authorizes those transactions which, at the time of authorization, would not cause the consumer to exceed a credit limit, it is not subject to the requirement to provide consumers notice and an opportunity to affirmatively consent to the card issuer's payment of over-the-limit transactions. However, if an over-the-limit transaction is paid without the consumer providing affirmative consent, the card issuer may not charge a fee for paying the transaction.

2. *Over-the-limit transactions not required to be authorized or paid.* Section 1026.56 does not require a card issuer to authorize or pay an over-the-limit transaction even if the consumer has affirmatively consented to the card issuer's over-the-limit service.

3. *Examples of reasonable opportunity to provide affirmative consent.* A card issuer provides a reasonable opportunity for the consumer to provide affirmative consent to the card issuer's payment of over-the-limit transactions when, among other things, it provides reasonable methods by which the consumer may affirmatively consent. A card issuer provides such reasonable methods if:

i. *On the application.* The card issuer provides the notice on the application form that the consumer can fill out to request the service as part of the application;

ii. *By mail.* The card issuer provides a form with the account-opening disclosures or the periodic statement for the consumer to fill out and mail to affirmatively request the service;

iii. *By telephone.* The card issuer provides a readily available telephone line that consumers may call to provide affirmative consent.

iv. *By electronic means.* The card issuer provides an electronic means for the consumer to affirmatively consent. For example, a card issuer could provide a form that can be accessed and processed at its Web site, where the consumer can check a box to opt in and confirm that choice by clicking on a button that affirms the consumer's consent.

4. *Separate consent required.* A consumer's affirmative consent, or opt-in, to a card issuer's payment of over-the-limit transactions must be obtained separately from other consents or acknowledgments obtained by the card issuer. For example, a consumer's signature on a credit application to request a credit card would not by itself sufficiently evidence the consumer's consent to the card issuer's payment of over-the-limit transactions. However, a card issuer may obtain a consumer's affirmative consent by providing a blank signature line or a check box on the application that the consumer can sign or select to request the over-the-limit service, provided that the signature line or check box is used solely for purposes of evidencing the choice and not for any other purpose, such as to also obtain consumer consents for other account services or features or to receive disclosures electronically.

5. *Written confirmation.* A card issuer may comply with the requirement in §1026.56(b)(1)(iv) to provide written confirmation of the consumer's decision to affirmatively consent, or opt in, to the card issuer's payment of over-the-limit transactions by providing the consumer a copy of the consumer's completed opt-in form or by sending a letter or notice to the consumer acknowledging that the consumer has elected to opt into the card issuer's service. A card issuer may also satisfy the written confirmation requirement by providing the confirmation on the first periodic statement sent after the consumer has opted in. For example, a card

issuer could provide a written notice consistent with §1026.56(e)(2) on the periodic statement. A card issuer may not, however, assess any over-the-limit fees or charges on the consumer's credit card account unless and until the card issuer has sent the written confirmation. Thus, if a card issuer elects to provide written confirmation on the first periodic statement after the consumer has opted in, it would not be permitted to assess any over-the-limit fees or charges until the next statement cycle.

56(b)(2) Completion of over-the-limit transactions without consumer consent

1. *Examples of over-the-limit transactions paid without consumer consent.* Section 1026.56(b)(2) provides that a card issuer may pay an over-the-limit transaction even if the consumer has not provided affirmative consent, so long as the card issuer does not impose a fee or charge for paying the transaction. The prohibition on imposing fees for paying an over-the-limit transaction applies even in circumstances where the card issuer is unable to avoid paying a transaction that exceeds the consumer's credit limit.

i. *Transactions not submitted for authorization.* A consumer has not affirmatively consented to a card issuer's payment of over-the-limit transactions. The consumer purchases a \$3 cup of coffee using his credit card. Because of the small dollar amount of the transaction, the merchant does not submit the transaction to the card issuer for authorization. The transaction causes the consumer to exceed the credit limit. Under these circumstances, the card issuer is prohibited from imposing a fee or charge on the consumer's credit card account for paying the over-the-limit transaction because the consumer has not opted in to the card issuer's over-the-limit service.

ii. *Settlement amount exceeds authorization amount.* A consumer has not affirmatively consented to a card issuer's payment of over-the-limit transactions. The consumer uses his credit card at a pay-at-the-pump fuel dispenser to purchase \$50 of fuel. Before permitting the consumer to use the fuel pump, the merchant verifies the validity of the card by requesting an authorization hold of \$1. The subsequent \$50 transaction amount causes the consumer to exceed his credit limit. Under these circumstances, the card issuer is prohibited from imposing a fee or charge on the consumer's credit card account for paying the over-the-limit transaction because the consumer has not opted in to the card issuer's over-the-limit service.

iii. *Intervening charges.* A consumer has not affirmatively consented to a card issuer's payment of over-the-limit transactions. The consumer makes a \$50 purchase using his credit card. However, before the \$50 transaction is charged to the consumer's account, a separate recurring charge is posted to the

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account. The \$50 purchase then causes the consumer to exceed his credit limit. Under these circumstances, the card issuer is prohibited from imposing a fee or charge on the consumer's credit card account for paying the over-the-limit transaction because the consumer has not opted in to the card issuer's over-the-limit service.

2. *Permissible fees or charges when a consumer has not consented.* Section 1026.56(b)(2) does not preclude a card issuer from assessing fees or charges other than over-the-limit fees when an over-the-limit transaction is completed. For example, if a consumer has not opted in, the card issuer may assess a balance transfer fee in connection with a balance transfer, provided such a fee is assessed whether or not the transfer exceeds the credit limit. Section 1026.56(b)(2) does not limit the card issuer's ability to debit the consumer's account for the amount of the over-the-limit transaction if the card issuer is permitted to do so under applicable law. The card issuer may also assess interest charges in connection with the over-the-limit transaction.

56(c) Method of election

1. *Card issuer-determined methods.* A card issuer may determine the means available to consumers to affirmatively consent, or opt in, to the card issuer's payment of over-the-limit transactions. For example, a card issuer may decide to obtain consents in writing, electronically, or orally, or through some combination of these methods. Section 1026.56(c) further requires, however, that such methods must be made equally available for consumers to revoke a prior consent. Thus, for example, if a card issuer allows a consumer to consent in writing or electronically, it must also allow the consumer to revoke that consent in writing or electronically.

2. *Electronic requests.* A consumer consent or revocation request submitted electronically is not considered a consumer disclosure for purposes of the E-Sign Act.

56(d) Timing and placement of notices

1. *Contemporaneous notice for oral or electronic consent.* Under §1026.56(d)(1)(ii), if a card issuer seeks to obtain consent from the consumer orally or by electronic means, the card issuer must provide a notice containing the disclosures in §1026.56(e)(1) prior to and as part of the process of obtaining the consumer's consent.

56(e) Content

1. *Amount of over-the-limit fee.* See Model Forms G-25(A) and G-25(B) for guidance on how to disclose the amount of the over-the-limit fee.

2. *Notice content.* In describing the consumer's right to affirmatively consent to a

card issuer's payment of over-the-limit transactions, the card issuer may explain that any transactions that exceed the consumer's credit limit will be declined if the consumer does not consent to the service. In addition, the card issuer should explain that even if a consumer consents, the payment of over-the-limit transactions is at the discretion of the card issuer. For example, the card issuer may indicate that it may decline a transaction for any reason, such as if the consumer is past due or significantly over the limit. The card issuer may also disclose the consumer's right to revoke consent.

56(f) Joint relationships

1. *Authorized users.* Section 1026.56(f) does not permit a card issuer to treat a request to opt in or to revoke a prior request for the card issuer's payment of over-the-limit transactions from an authorized user that is not jointly liable on a credit card account as a consent or revocation request for that account.

56(g) Continuing right to opt in or revoke opt-in

1. *Fees or charges for over-the-limit transactions incurred prior to revocation.* Section 1026.56(g) provides that a consumer may revoke his or her prior consent at any time. If a consumer does so, this provision does not require the card issuer to waive or reverse any over-the-limit fees or charges assessed to the consumer's account for transactions that occurred prior to the card issuer's implementation of the consumer's revocation request. Nor does this requirement prevent the card issuer from assessing over-the-limit fees in subsequent cycles if the consumer's account balance continues to exceed the credit limit after the payment due date as a result of an over-the-limit transaction that occurred prior to the consumer's revocation of consent.

56(h) Duration of opt-in

1. *Card issuer ability to stop paying over-the-limit transactions after consumer consent.* A card issuer may cease paying over-the-limit transactions for consumers that have previously opted in at any time and for any reason. For example, a card issuer may stop paying over-the-limit transactions for a consumer to respond to changes in the credit risk presented by the consumer.

56(j) Prohibited practices

1. *Periodic fees or charges.* A card issuer may charge an over-the-limit fee or charge only if the consumer has exceeded the credit limit during the billing cycle. Thus, a card issuer may not impose any recurring or periodic fees for paying over-the-limit transactions (for example, a monthly "over-the-limit protection" service fee), even if the consumer

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has affirmatively consented to or opted in to the service, unless the consumer has in fact exceeded the credit limit during that cycle.

2. *Examples of limits on fees or charges imposed per billing cycle.* Section 1026.56(j)(1) generally prohibits a card issuer from assessing a fee or charge due to the same over-the-limit transaction for more than three billing cycles. The following examples illustrate the prohibition.

i. Assume that a consumer has opted into a card issuer's payment of over-the-limit transactions. The consumer exceeds the credit limit during the December billing cycle and does not make sufficient payment to bring the account balance back under the limit for four consecutive cycles. The consumer does not engage in any additional transactions during this period. In this case, §1026.56(j)(1) would permit the card issuer to charge a maximum of three over-the-limit fees for the December over-the-limit transaction.

ii. Assume the same facts as above except that the consumer makes sufficient payment to reduce his account balance by the payment due date during the February billing cycle. The card issuer may charge over-the-limit fees for the December and January billing cycles. However, because the consumer's account balance was below the credit limit by the payment due date for the February billing cycle, the card issuer may not charge an over-the-limit fee for the February billing cycle.

iii. Assume the same facts as in paragraph i, except that the consumer engages in another over-the-limit transaction during the February billing cycle. Because the consumer has obtained an additional extension of credit which causes the consumer to exceed his credit limit, the card issuer may charge over-the-limit fees for the December transaction on the January, February and March billing statements, and additional over-the-limit fees for the February transaction on the April and May billing statements. The card issuer may not charge an over-the-limit fee for each of the December and the February transactions on the March billing statement because it is prohibited from imposing more than one over-the-limit fee during a billing cycle.

3. *Replenishment of credit line.* Section 1026.56(j)(2) does not prevent a card issuer from delaying replenishment of a consumer's available credit where appropriate, for example, where the card issuer may suspect fraud on the credit card account. However, a card issuer may not assess an over-the-limit fee or charge if the over-the-limit transaction is caused by the card issuer's decision not to promptly replenish the available credit after the consumer's payment is credited to the consumer's account.

4. *Examples of conditioning.* Section 1026.56(j)(3) prohibits a card issuer from con-

ditioning or otherwise tying the amount of a consumer's credit limit on the consumer affirmatively consenting to the card issuer's payment of over-the-limit transactions where the card issuer assesses an over-the-limit fee for the transaction. The following examples illustrate the prohibition.

i. *Amount of credit limit.* Assume that a card issuer offers a credit card with a credit limit of \$1,000. The consumer is informed that if the consumer opts in to the payment of the card issuer's payment of over-the-limit transactions, the initial credit limit would be increased to \$1,300. If the card issuer would have offered the credit card with the \$1,300 credit limit but for the fact that the consumer did not consent to the card issuer's payment of over-the-limit transactions, the card issuer would not be in compliance with §1026.56(j)(3). Section 1026.56(j)(3) prohibits the card issuer from tying the consumer's opt-in to the card issuer's payment of over-the-limit transactions as a condition of obtaining the credit card with the \$1,300 credit limit.

ii. *Access to credit.* Assume the same facts as above, except that the card issuer declines the consumer's application altogether because the consumer has not affirmatively consented or opted in to the card issuer's payment of over-the-limit transactions. The card issuer is not in compliance with §1026.56(j)(3) because the card issuer has required the consumer's consent as a condition of obtaining credit.

5. *Over-the-limit fees caused by accrued fees or interest.* Section 1026.56(j)(4) prohibits a card issuer from imposing any over-the-limit fees or charges on a consumer's account if the consumer has exceeded the credit limit solely because charges imposed as part of the plan as described in §1026.6(b)(3) were charged to the consumer's account during the billing cycle. For example, a card issuer may not assess an over-the-limit fee or charge even if the credit limit was exceeded due to fees for services requested by the consumer if such fees would constitute charges imposed as part of the plan (such as fees for voluntary debt cancellation or suspension coverage). Section 1026.56(j)(4) does not, however, restrict card issuers from assessing over-the-limit fees or charges due to accrued finance charges or fees from prior cycles that have subsequently been added to the account balance. The following examples illustrate the prohibition.

i. Assume that a consumer has opted in to a card issuer's payment of over-the-limit transactions. The consumer's account has a credit limit of \$500. The billing cycles for the account begin on the first day of the month and end on the last day of the month. The account is not eligible for a grace period as defined in §1026.5(b)(2)(ii)(B)(3). On December 31, the only balance on the account is a purchase balance of \$475. On that same date, \$50

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in fees charged as part of the plan under § 1026.6(b)(3)(i) and interest charges are imposed on the account, increasing the total balance at the end of the December billing cycle to \$525. Although the total balance exceeds the \$500 credit limit, § 1026.56(j)(4) prohibits the card issuer from imposing an over-the-limit fee or charge for the December billing cycle in these circumstances because the consumer's credit limit was exceeded solely because of the imposition of fees and interest charges during that cycle.

ii. Same facts as above except that, on December 31, the only balance on the account is a purchase balance of \$400. On that same date, \$50 in fees imposed as part of the plan under § 1026.6(b)(3)(i), including interest charges, are imposed on the account, increasing the total balance at the end of the December billing cycle to \$450. The consumer makes a \$25 payment by the January payment due date and the remaining \$25 in fees imposed as part of the plan in December is added to the outstanding balance. On January 25, an \$80 purchase is charged to the account. At the close of the cycle on January 31, an additional \$20 in fees imposed as part of the plan are imposed on the account, increasing the total balance to \$525. Because § 1026.56(j)(4) does not require the issuer to consider fees imposed as part of the plan for the prior cycle in determining whether an over-the-limit fee may be properly assessed for the current cycle, the issuer need not take into account the remaining \$25 in fees and interest charges from the December cycle in determining whether fees imposed as part of the plan caused the consumer to exceed the credit limit during the January cycle. Thus, under these circumstances, § 1026.56(j)(4) does not prohibit the card issuer from imposing an over-the-limit fee or charge for the January billing cycle because the \$20 in fees imposed as part of the plan for the January billing cycle did not cause the consumer to exceed the credit limit during that cycle.

6. *Additional restrictions on over-the-limit fees.* See § 1026.52(b).

Section 1026.57—Reporting and Marketing Rules for College Student Open-End Credit**57(a) Definitions****57(a)(1) College student credit card**

1. *Definition.* The definition of college student credit card excludes home-equity lines of credit accessed by credit cards and overdraft lines of credit accessed by debit cards. A college student credit card includes a college affinity card within the meaning of TILA section 127(r)(1)(A). In addition, a card may fall within the scope of the definition regardless of the fact that it is not intentionally targeted at or marketed to college students. For example, an agreement be-

tween a college and a card issuer may provide for marketing of credit cards to alumni, faculty, staff, and other non-student consumers who have a relationship with the college, but also contain provisions that contemplate the issuance of cards to students. A credit card issued to a student at the college in connection with such an agreement qualifies as a college student credit card. The definition of college student credit card includes a hybrid prepaid-credit card as defined by § 1026.61 that is issued to any college student where the card can access a covered separate credit feature that is a credit card account under an open-end (not home-secured) consumer credit plan. The definition of college student credit card also includes a prepaid account as defined in § 1026.61 that is issued to any college student where a covered separate credit feature that is a credit card account under an open-end (not home-secured) consumer credit plan accessible by a hybrid prepaid-credit card as defined by § 1026.61 may be added in the future to the prepaid account.

57(a)(5) College credit card agreement

1. *Definition.* Section 1026.57(a)(5) defines “college credit card agreement” to include any business, marketing or promotional agreement between a card issuer and a college or university (or an affiliated organization, such as an alumni club or a foundation) if the agreement provides for the issuance of credit cards to full-time or part-time students. Business, marketing or promotional agreements may include a broad range of arrangements between a card issuer and an institution of higher education or affiliated organization, including arrangements that do not meet the criteria to be considered college affinity card agreements as discussed in TILA section 127(r)(1)(A). For example, TILA section 127(r)(1)(A) specifies that under a college affinity card agreement, the card issuer has agreed to make a donation to the institution or affiliated organization, the card issuer has agreed to offer discounted terms to the consumer, or the credit card will display pictures, symbols, or words identified with the institution or affiliated organization; even if these conditions are not met, an agreement may qualify as a college credit card agreement, if the agreement is a business, marketing or promotional agreement that contemplates the issuance of college student credit cards to college students currently enrolled (either full-time or part-time) at the institution. An agreement may qualify as a college credit card agreement even if marketing of cards under the agreement is targeted at alumni, faculty, staff, and other non-student consumers, as long as cards may also be issued to students in connection with the agreement. This definition

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also includes a business, marketing, or promotional agreement between a card issuer and a college or university (or an affiliated organization, such as an alumni club or a foundation) if the agreement provides for the addition of a covered separate credit feature that is a credit card account under an open-end (not home-secured) consumer credit plan accessible by a hybrid prepaid-credit card as defined by §1026.61 to prepaid accounts previously issued to full-time or part-time students. This definition also includes a business, marketing, or promotional agreement between a card issuer and a college or university (or an affiliated organization, such as an alumni club or a foundation) if (1) the agreement provides for the issuance of prepaid accounts as defined in §1026.61 to full-time or part-time students; and (2) a covered separate credit feature that is a credit card account under an open-end (not home-secured) consumer credit plan accessible by a hybrid prepaid-credit card as defined by §1026.61 may be added in the future to the prepaid account.

57(b) Public disclosure of agreements

1. *Public disclosure.* Section 1026.57(b) requires an institution of higher education to publicly disclose any contract or other agreement made with a card issuer or creditor for the purpose of marketing a credit card. Examples of publicly disclosing such contracts or agreements include, but are not limited to, posting such contracts or agreements on the institution's Web site or making such contracts or agreements available upon request, provided the procedures for requesting the documents are reasonable and free of cost to the requestor, and the requested contracts or agreements are provided within a reasonable time frame.

2. *Redaction prohibited.* An institution of higher education must publicly disclose any contract or other agreement made with a card issuer for the purpose of marketing a credit card in its entirety and may not redact any portion of such contract or agreement. Any clause existing in such contracts or agreements, providing for the confidentiality of any portion of the contract or agreement, would be invalid to the extent it restricts the ability of the institution of higher education to publicly disclose the contract or agreement in its entirety.

3. *Credit card accounts in connection with prepaid accounts.* Section 1026.57(b) applies to any contract or other agreement that an institution of higher education makes with a card issuer or creditor for the purpose of marketing either (1) the addition of a covered separate credit feature that is a credit card account under an open-end (not home-secured) consumer credit plan accessible by a hybrid prepaid-credit card as defined in §1026.61 to prepaid accounts previously

issued to full-time or part-time students; or (2) new prepaid accounts as defined in §1026.61 where a covered separate credit feature that is a credit card account under an open-end (not home-secured) consumer credit plan accessible by a hybrid prepaid-credit card as defined in §1026.61 may be added in the future to the prepaid account. Thus, under §1026.57(b), an institution of higher education must publicly disclose such agreements.

57(c) Prohibited inducements

1. *Tangible item clarified.* A tangible item includes any physical item, such as a gift card, a t-shirt, or a magazine subscription, that a card issuer or creditor offers to induce a college student to apply for or open an open-end consumer credit plan offered by such card issuer or creditor. Tangible items do not include non-physical inducements such as discounts, rewards points, or promotional credit terms.

2. *Inducement clarified.* If a tangible item is offered to a person whether or not that person applies for or opens an open-end consumer credit plan, the tangible item has not been offered to induce the person to apply for or open the plan. For example, refreshments offered to a college student on campus that are not conditioned on whether the student has applied for or agreed to open an open-end consumer credit plan would not violate §1026.57(c).

3. *Near campus clarified.* A location that is within 1,000 feet of the border of the campus of an institution of higher education, as defined by the institution of higher education, is considered near the campus of an institution of higher education.

4. *Mailings included.* The prohibition in §1026.57(c) on offering a tangible item to a college student to induce such student to apply for or open an open-end consumer credit plan offered by such card issuer or creditor applies to any solicitation or application mailed to a college student at an address on or near the campus of an institution of higher education.

5. *Related event clarified.* An event is related to an institution of higher education if the marketing of such event uses the name, emblem, mascot, or logo of an institution of higher education, or other words, pictures, symbols identified with an institution of higher education in a way that implies that the institution of higher education endorses or otherwise sponsors the event.

6. *Reasonable procedures for determining if applicant is a student.* Section 1026.57(c) applies solely to offering a tangible item to a college student. Therefore, a card issuer or creditor may offer any person who is not a college student a tangible item to induce such person to apply for or open an open-end consumer credit plan offered by such card issuer or creditor, on campus, near campus,

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or at an event sponsored by or related to an institution of higher education. The card issuer or creditor must have reasonable procedures for determining whether an applicant is a college student before giving the applicant the tangible item. For example, a card issuer or creditor may ask whether the applicant is a college student as part of the application process. The card issuer or creditor may rely on the representations made by the applicant.

7. *Credit card accounts in connection with prepaid accounts.* Section 1026.57(c) applies to (1) the application for or opening of a covered separate credit feature that is a credit card account under an open-end (not home-secured) consumer credit plan accessible by a hybrid prepaid-credit card as defined in §1026.61 that is being added to a prepaid account previously issued to a full-time or part-time student as well as (2) the application for or opening of a prepaid account as defined in §1026.61 where a covered separate credit feature that is a credit card account under an open-end (not home-secured) consumer credit plan accessible by a hybrid prepaid-credit card as defined in §1026.61 may be added in the future to the prepaid account.

57(d) Annual report to the Bureau

57(d)(2) Contents of report

1. *Memorandum of understanding.* Section 1026.57(d)(2) requires that the report to the Bureau include, among other items, a copy of any memorandum of understanding between the card issuer and the institution (or affiliated organization) that “directly or indirectly relates to the college credit card agreement or that controls or directs any obligations or distribution of benefits between any such entities.” Such a memorandum of understanding includes any document that amends the college credit card agreement, or that constitutes a further agreement between the parties as to the interpretation or administration of the agreement. For example, a memorandum of understanding required to be included in the report would include a document that provides details on the dollar amounts of payments from the card issuer to the university, to supplement the original agreement which only provided for payments in general terms (e.g., as a percentage). A memorandum of understanding for these purposes would not include email (or other) messages that merely discuss matters such as the addresses to which payments should be sent or the names of contact persons for carrying out the agreement.

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58(b) Definitions

58(b)(1) Agreement

1. *Inclusion of pricing information.* For purposes of this section, a credit card agreement is deemed to include certain information, such as annual percentage rates and fees, even if the issuer does not otherwise include this information in the basic credit contract. This information is listed under the defined term “pricing information” in §1026.58(b)(7). For example, the basic credit contract may not specify rates, fees and other information that constitutes pricing information as defined in §1026.58(b)(7); instead, such information may be provided to the cardholder in a separate document sent along with the card. However, this information nevertheless constitutes part of the agreement for purposes of §1026.58.

2. *Provisions contained in separate documents included.* A credit card agreement is defined as the written document or documents evidencing the terms of the legal obligation, or the prospective legal obligation, between a card issuer and a consumer for a credit card account under an open-end (not home-secured) consumer credit plan. An agreement therefore may consist of several documents that, taken together, define the legal obligation between the issuer and consumer. For example, provisions that mandate arbitration or allow an issuer to unilaterally alter the terms of the card issuer’s or consumer’s obligation are part of the agreement even if they are provided to the consumer in a document separate from the basic credit contract.

58(b)(2) Amends

1. *Substantive changes.* A change to an agreement is substantive, and therefore is deemed an amendment of the agreement, if it alters the rights or obligations of the parties. Section 1026.58(b)(2) provides that any change in the pricing information, as defined in §1026.58(b)(7), is deemed to be substantive. Examples of other changes that generally would be considered substantive include:

i. Addition or deletion of a provision giving the issuer or consumer a right under the agreement, such as a clause that allows an issuer to unilaterally change the terms of an agreement.

ii. Addition or deletion of a provision giving the issuer or consumer an obligation under the agreement, such as a clause requiring the consumer to pay an additional fee.

iii. Changes that may affect the cost of credit to the consumer, such as changes in a provision describing how the minimum payment will be calculated.

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iv. Changes that may affect how the terms of the agreement are construed or applied, such as changes in a choice-of-law provision.

v. Changes that may affect the parties to whom the agreement may apply, such as provisions regarding authorized users or assignment of the agreement.

2. *Non-substantive changes.* Changes that generally would not be considered substantive include, for example:

i. Correction of typographical errors that do not affect the meaning of any terms of the agreement.

ii. Changes to the card issuer's corporate name, logo, or tagline.

iii. Changes to the format of the agreement, such as conversion to a booklet from a full-sheet format, changes in font, or changes in margins.

iv. Changes to the name of the credit card to which the program applies.

v. Reordering sections of the agreement without affecting the meaning of any terms of the agreement.

vi. Adding, removing, or modifying a table of contents or index.

vii. Changes to titles, headings, section numbers, or captions.

58(b)(4) Card issuer

1. *Card issuer clarified.* Section 1026.58(b)(4) provides that, for purposes of §1026.58, card issuer or issuer means the entity to which a consumer is legally obligated, or would be legally obligated, under the terms of a credit card agreement. For example, Bank X and Bank Y work together to issue credit cards. A consumer that obtains a credit card issued pursuant to this arrangement between Bank X and Bank Y is subject to an agreement that states "This is an agreement between you, the consumer, and Bank X that governs the terms of your Bank Y Credit Card." The card issuer in this example is Bank X, because the agreement creates a legally enforceable obligation between the consumer and Bank X. Bank X is the issuer even if the consumer applied for the card through a link on Bank Y's Web site and the cards prominently feature the Bank Y logo on the front of the card.

2. *Use of third-party service providers.* An institution that is the card issuer as defined in §1026.58(b)(4) has a legal obligation to comply with the requirements of §1026.58. However, a card issuer generally may use a third-party service provider to satisfy its obligations under §1026.58, provided that the issuer acts in accordance with regulatory guidance regarding use of third-party service providers and other applicable regulatory guidance. In some cases, an issuer may wish to arrange for the institution with which it partners to issue credit cards to fulfill the requirements of §1026.58 on the issuer's behalf. For example, Retailer and Bank work together to issue credit cards. Under the

§1026.58(b)(4) definition, Bank is the issuer of these credit cards for purposes of §1026.58. However, Retailer services the credit card accounts, including mailing account opening materials and periodic statements to cardholders. While Bank is responsible for ensuring compliance with §1026.58, Bank may arrange for Retailer (or another appropriate third-party service provider) to submit credit card agreements to the Bureau under §1026.58 on Bank's behalf. Bank must comply with regulatory guidance regarding use of third-party service providers and other applicable regulatory guidance.

3. *Partner institution Web sites.* i. As explained in comments 58(d)-2 and 58(e)-3, if an issuer provides cardholders with access to specific information about their individual accounts, such as balance information or copies of statements, through a third-party Web site, the issuer is deemed to maintain that Web site for purposes of §1026.58. Such a Web site is deemed to be maintained by the issuer for purposes of §1026.58 even where, for example, an unaffiliated entity designs the Web site and owns and maintains the information technology infrastructure that supports the Web site, cardholders with credit cards from multiple issuers can access individual account information through the same Web site, and the Web site is not labeled, branded, or otherwise held out to the public as belonging to the issuer. A partner institution's Web site is an example of a third-party Web site that may be deemed to be maintained by the issuer for purposes of §1026.58. For example, Retailer and Bank work together to issue credit cards. Under the §1026.58(b)(4) definition, Bank is the issuer of these credit cards for purposes of §1026.58. Bank does not have a Web site. However, cardholders can access information about their individual accounts, such as balance information and copies of statements, through a Web site maintained by Retailer. Retailer designs the Web site and owns and maintains the information technology infrastructure that supports the Web site. The Web site is branded and held out to the public as belonging to Retailer. Because cardholders can access information about their individual accounts through this Web site, the Web site is deemed to be maintained by Bank for purposes of §1026.58. Bank therefore may comply with §1026.58(d) by ensuring that agreements offered to the public are posted on Retailer's Web site in accordance with §1026.58(d). Bank may comply with §1026.58(e) by ensuring that cardholders can request copies of their individual agreements through Retailer's Web site in accordance with §1026.58(e)(1). Bank need not create and maintain a Web site branded and held out to the public as belonging to Bank in order to comply with §§1026.58(d) and (e) as long as Bank ensures that Retailer's Web site complies with these sections.

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ii. In addition, §1026.58(d)(1) provides that, with respect to an agreement offered solely for accounts under one or more private label credit card plans, an issuer may comply with §1026.58(d) by posting the agreement on the publicly available Web site of at least one of the merchants at which credit cards issued under each private label credit card plan with 10,000 or more open accounts may be used. This rule is not conditioned on cardholders' ability to access account-specific information through the merchant's Web site.

58(b)(5) Offers

1. *Cards offered to limited groups.* A card issuer is deemed to offer a credit card agreement to the public even if the issuer solicits, or accepts applications from, only a limited group of persons. For example, a card issuer may market affinity cards to students and alumni of a particular educational institution, or may solicit only high-net-worth individuals for a particular card; in these cases, the agreement would be considered to be offered to the public. Similarly, agreements for credit cards issued by a credit union are considered to be offered to the public even though such cards are available only to credit union members.

2. *Individualized agreements.* A card issuer is deemed to offer a credit card agreement to the public even if the terms of the agreement are changed immediately upon opening of an account to terms not offered to the public.

58(b)(6) Open account

1. *Open account clarified.* The definition of open account includes a credit card account under an open-end (not home-secured) consumer credit plan if either (i) the cardholder can obtain extensions of credit on the account; or (ii) there is an outstanding balance on the account that has not been charged off. Under this definition, an account that meets either of these criteria is considered to be open even if the account is inactive. Similarly, if an account has been closed for new activity (for example, due to default by the cardholder), but the cardholder is still making payments to pay off the outstanding balance, the account is considered open.

58(b)(8) Private Label Credit Card Account and Private Label Credit Card Plan

1. *Private label credit card account.* The term private label credit card account means a credit card account under an open-end (not home-secured) consumer credit plan with a credit card that can be used to make purchases only at a single merchant or an affiliated group of merchants. This term applies to any such credit card account, regardless of whether it is issued by the merchant or its affiliate or by an unaffiliated third party.

2. *Co-branded credit cards.* The term private label credit card account does not include

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accounts with so-called co-branded credit cards. Credit cards that display the name, mark, or logo of a merchant or affiliated group of merchants as well as the mark, logo, or brand of payment network are generally referred to as co-branded cards. While these credit cards may display the brand of the merchant or affiliated group of merchants as the dominant brand on the card, such credit cards are usable at any merchant that participates in the payment network. Because these credit cards can be used at multiple unaffiliated merchants, accounts with such credit cards are not considered private label credit card accounts under §1026.58(b)(8).

3. *Affiliated group of merchants.* The term "affiliated group of merchants" means two or more affiliated merchants or other persons that are related by common ownership or common corporate control. For example, the term would include franchisees that are subject to a common set of corporate policies or practices under the terms of their franchise licenses. The term also applies to two or more merchants or other persons that agree among each other, by contract or otherwise, to accept a credit card bearing the same name, mark, or logo (other than the mark, logo, or brand of a payment network), for the purchase of goods or services solely at such merchants or persons. For example, several local clothing retailers jointly agree to issue credit cards called the "Main Street Fashion Card" that can be used to make purchases only at those retailers. For purposes of this section, these retailers would be considered an affiliated group of merchants.

4. *Private label credit card plan.* i. Which credit card accounts issued by a particular issuer constitute a private label credit card plan is determined by where the credit cards can be used. All of the private label credit card accounts issued by a particular card issuer with credit cards usable at the same merchant or affiliated group of merchants constitute a single private label credit card plan, regardless of whether the rates, fees, or other terms applicable to the individual credit card accounts differ. For example, a card issuer has 3,000 open private label credit card accounts with credit cards usable only at Merchant A and 5,000 open private label credit card accounts with credit cards usable only at Merchant B and its affiliates. The card issuer has two separate private label credit card plans, as defined by §1026.58(b)(8)—one plan consisting of 3,000 open accounts with credit cards usable only at Merchant A and another plan consisting of 5,000 open accounts with credit cards usable only at Merchant B and its affiliates.

ii. The example above remains the same regardless of whether (or the extent to which) the terms applicable to the individual open accounts differ. For example, assume that, with respect to the card issuer's 3,000 open

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accounts with credit cards usable only at Merchant A in the example above, 1,000 of the open accounts have a purchase APR of 12 percent, 1,000 of the open accounts have a purchase APR of 15 percent, and 1,000 of the open accounts have a purchase APR of 18 percent. All of the 5,000 open accounts with credit cards usable only at Merchant B and Merchant B's affiliates have the same 15 percent purchase APR. The card issuer still has only two separate private label credit card plans, as defined by §1026.58(b)(8). The open accounts with credit cards usable only at Merchant A do not constitute three separate private label credit card plans under §1026.58(b)(8), even though the accounts are subject to different terms.

58(c) Submission of Agreements to Bureau

58(c)(1) Quarterly Submissions

1. *Quarterly submission requirement.* Section 1026.58(c)(1) requires card issuers to send quarterly submissions to the Bureau no later than the first business day on or after January 31, April 30, July 31, and October 31 of each year. For example, a card issuer has already submitted three credit card agreements to the Bureau. On October 15, the card issuer stops offering agreement A. On November 20, the card issuer amends agreement B. On December 1, the issuer starts offering a new agreement D. The card issuer must submit to the Bureau no later than the first business day on or after January 31 (i) notification that the card issuer is withdrawing agreement A, because it is no longer offered to the public; (ii) the amended version of agreement B; and (iii) agreement D.

2. *No quarterly submission required.* i. Under §1026.58(c)(1), a card issuer is not required to make any submission to the Bureau at a particular quarterly submission deadline if, during the previous calendar quarter, the card issuer did not take any of the following actions:

A. Offering a new credit card agreement that was not submitted to the Bureau previously.

B. Amending an agreement previously submitted to the Bureau.

C. Ceasing to offer an agreement previously submitted to the Bureau.

ii. For example, a card issuer offers five agreements to the public as of September 30 and submits these to the Bureau by October 31, as required by §1026.58(c)(1). Between September 30 and December 31, the card issuer continues to offer all five of these agreements to the public without amending them and does not begin offering any new agreements. The card issuer is not required to make any submission to the Bureau by the following January 31.

3. *Quarterly submission of complete set of updated agreements.* Section 1026.58(c)(1) permits a card issuer to submit to the Bureau on a

quarterly basis a complete, updated set of the credit card agreements the card issuer offers to the public. For example, a card issuer offers agreements A, B, and C to the public as of March 31. The card issuer submits each of these agreements to the Bureau by April 30 as required by §1026.58(c)(1). On May 15, the card issuer amends agreement A, but does not make any changes to agreements B or C. As of June 30, the card issuer continues to offer amended agreement A and agreements B and C to the public. At the next quarterly submission deadline, July 31, the card issuer must submit the entire amended agreement A and is not required to make any submission with respect to agreements B and C. The card issuer may either: (i) Submit the entire amended agreement A and make no submission with respect to agreements B and C; or (ii) submit the entire amended agreement A and also resubmit agreements B and C. A card issuer may choose to resubmit to the Bureau all of the agreements it offered to the public as of a particular quarterly submission deadline even if the card issuer has not introduced any new agreements or amended any agreements since its last submission and continues to offer all previously submitted agreements.

58(c)(3) Amended Agreements

1. *No requirement to resubmit agreements not amended.* Under §1026.58(c)(3), if a credit card agreement has been submitted to the Bureau, the agreement has not been amended, and the card issuer continues to offer the agreement to the public, no additional submission regarding that agreement is required. For example, a credit card issuer begins offering an agreement in October and submits the agreement to the Bureau the following January 31, as required by §1026.58(c)(1). As of March 31, the card issuer has not amended the agreement and is still offering the agreement to the public. The card issuer is not required to submit anything to the Bureau regarding that agreement by April 30.

2. *Submission of amended agreements.* If a card issuer amends a credit card agreement previously submitted to the Bureau, §1026.58(c)(3) requires the card issuer to submit the entire amended agreement to the Bureau. The issuer must submit the amended agreement to the Bureau by the first quarterly submission deadline after the last day of the calendar quarter in which the change became effective. However, the issuer is required to submit the amended agreement to the Bureau only if the issuer offered the amended agreement to the public as of the last business day of the calendar quarter in which the change became effective. For example, a card issuer submits an agreement to the Bureau on October 31. On November

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15, the issuer changes the balance computation method used under the agreement. Because an element of the pricing information has changed, the agreement has been amended for purposes of §1026.58(c)(3). On December 31, the last business day of the calendar quarter in which the change in the balance computation method became effective, the issuer still offers the agreement to the public as amended on November 15. The issuer must submit the entire amended agreement to the Bureau no later than January 31.

3. *Agreements amended but no longer offered to the public.* A card issuer should submit an amended agreement to the Bureau under §1026.58(c)(3) only if the issuer offered the amended agreement to the public as of the last business day of the calendar quarter in which the amendment became effective. Agreements that are not offered to the public as of the last day of the calendar quarter should not be submitted to the Bureau. For example, on December 31 a card issuer offers two agreements, Agreement A and Agreement B. The issuer submits these agreements to the Bureau by January 31 as required by §1026.58. On February 15, the issuer amends both Agreement A and Agreement B. On February 28, the issuer stops offering Agreement A to the public. On March 15, the issuer amends Agreement B a second time. As a result, on March 31, the last business day of the calendar quarter, the issuer offers to the public one agreement—Agreement B as amended on March 15. By the April 30 quarterly submission deadline, the issuer must (i) notify the Bureau that it is withdrawing Agreement A because Agreement A is no longer offered to the public; and (ii) submit to the Bureau Agreement B as amended on March 15. The issuer should not submit to the Bureau either Agreement A as amended on February 15 or the earlier version of Agreement B (as amended on February 15), as neither was offered to the public on March 31, the last business day of the calendar quarter.

4. *Change-in-terms notices not permissible.* Section 1026.58(c)(3) requires that if an agreement previously submitted to the Bureau is amended, the card issuer must submit the entire revised agreement to the Bureau. A card issuer may not fulfill this requirement by submitting a change-in-terms or similar notice covering only the terms that have changed. In addition, amendments must be integrated into the text of the agreement (or the addenda described in §1026.58(c)(8)), not provided as separate riders. For example, a card issuer changes the purchase APR associated with an agreement the issuer has previously submitted to the Bureau. The purchase APR for that agreement was included in the addendum of pricing information, as required by §1026.58(c)(8). The card issuer may not submit a change-in-terms or similar notice reflecting the change in APR, either

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alone or accompanied by the original text of the agreement and original pricing information addendum. Instead, the card issuer must revise the pricing information addendum to reflect the change in APR and submit to the Bureau the entire text of the agreement and the entire revised addendum, even though no changes have been made to the provisions of the agreement and only one item on the pricing information addendum has changed.

58(c)(4) Withdrawal of Agreements

1. *Notice of withdrawal of agreement.* Section 1026.58(c)(4) requires a card issuer to notify the Bureau if any agreement previously submitted to the Bureau by that issuer is no longer offered to the public by the first quarterly submission deadline after the last day of the calendar quarter in which the card issuer ceased to offer the agreement. For example, on January 5 a card issuer stops offering to the public an agreement it previously submitted to the Bureau. The card issuer must notify the Bureau that the agreement is being withdrawn by April 30, the first quarterly submission deadline after March 31, the last day of the calendar quarter in which the card issuer stopped offering the agreement.

58(c)(5) De Minimis Exception

1. *Relationship to other exceptions.* The de minimis exception is distinct from the private label credit card exception under §1026.58(c)(6) and the product testing exception under §1026.58(c)(7). The de minimis exception provides that a card issuer with fewer than 10,000 open credit card accounts is not required to submit any agreements to the Bureau, regardless of whether those agreements qualify for the private label credit card exception or the product testing exception. In contrast, the private label credit card exception and the product testing exception provide that a card issuer is not required to submit to the Bureau agreements offered solely in connection with certain types of credit card plans with fewer than 10,000 open accounts, regardless of the card issuer's total number of open accounts.

2. *De minimis exception.* Under §1026.58(c)(5), a card issuer is not required to submit any credit card agreements to the Bureau under §1026.58(c)(1) if the card issuer has fewer than 10,000 open credit card accounts as of the last business day of the calendar quarter. For example, a card issuer offers five credit card agreements to the public as of September 30. However, the card issuer has only 2,000 open credit card accounts as of September 30. The card issuer is not required to submit any agreements to the Bureau by October 31 because the issuer qualifies for the de minimis exception.

3. *Date for determining whether card issuer qualifies clarified.* Whether a card issuer

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qualifies for the de minimis exception is determined as of the last business day of each calendar quarter. For example, as of December 31, a card issuer offers three agreements to the public and has 9,500 open credit card accounts. As of January 30, the card issuer still offers three agreements, but has 10,100 open accounts. As of March 31, the card issuer still offers three agreements, but has only 9,700 open accounts. Even though the card issuer had 10,100 open accounts at one time during the calendar quarter, the card issuer qualifies for the de minimis exception because the number of open accounts was less than 10,000 as of March 31. The card issuer therefore is not required to submit any agreements to the Bureau under § 1026.58(c)(1) by April 30.

4. *Date for determining whether card issuer ceases to qualify clarified.* Whether a card issuer has ceased to qualify for the de minimis exception under § 1026.58(c)(5) is determined as of the last business day of the calendar quarter. For example, as of June 30, a card issuer offers three agreements to the public and has 9,500 open credit card accounts. The card issuer is not required to submit any agreements to the Bureau under § 1026.58(c)(1) because the card issuer qualifies for the de minimis exception. As of July 15, the card issuer still offers the same three agreements, but now has 10,000 open accounts. The card issuer is not required to take any action at this time, because whether a card issuer qualifies for the de minimis exception under § 1026.58(c)(5) is determined as of the last business day of the calendar quarter. As of September 30, the card issuer still offers the same three agreements and still has 10,000 open accounts. Because the card issuer had 10,000 open accounts as of September 30, the card issuer ceased to qualify for the de minimis exception and must submit the three agreements it offers to the Bureau by October 31, the next quarterly submission deadline.

5. *Option to withdraw agreements clarified.* Section 1026.58(c)(5) provides that if a card issuer that did not previously qualify for the de minimis exception qualifies for the de minimis exception, the card issuer must continue to make quarterly submissions to the Bureau as required by § 1026.58(c)(1) until the card issuer notifies the Bureau that the issuer is withdrawing all agreements it previously submitted to the Bureau. For example, a card issuer has 10,001 open accounts and offers three agreements to the public as of December 31. The card issuer has submitted each of the three agreements to the Bureau as required under § 1026.58(c)(1). As of March 31, the card issuer has only 9,999 open accounts. The card issuer has two options. First, the card issuer may notify the Bureau that the card issuer is withdrawing each of the three agreements it previously submitted. Once the card issuer has notified the

Bureau, the card issuer is no longer required to make quarterly submissions to the Bureau under § 1026.58(c)(1). Alternatively, the card issuer may choose not to notify the Bureau that it is withdrawing its agreements. In this case, the card issuer must continue making quarterly submissions to the Bureau as required by § 1026.58(c)(1). The card issuer might choose not to withdraw its agreements if, for example, the card issuer believes that it likely will cease to qualify for the de minimis exception again in the near future.

58(c)(6) Private Label Credit Card Exception

1. *Private label credit card exception.* i. Under § 1026.58(c)(6)(i), a card issuer is not required to submit to the Bureau a credit card agreement if, as of the last business day of the calendar quarter, the agreement (A) is offered for accounts under one or more private label credit card plans each of which has fewer than 10,000 open accounts; and (B) is not offered to the public other than for accounts under such a plan. For example, a card issuer offers to the public a credit card agreement offered solely for private label credit card accounts with credit cards that can be used only at Merchant A. The card issuer has 8,000 open accounts with such credit cards usable only at Merchant A. The card issuer is not required to submit this agreement to the Bureau under § 1026.58(c)(1) because the agreement is offered for a private label credit card plan with fewer than 10,000 open accounts, and the credit card agreement is not offered to the public other than for accounts under that private label credit card plan.

ii. In contrast, assume the same card issuer also offers to the public a different credit card agreement that is offered solely for private label credit card accounts with credit cards usable only at Merchant B. The card issuer has 12,000 open accounts with such credit cards usable only at Merchant B. The private label credit card exception does not apply. Although this agreement is offered for a private label credit card plan (*i.e.*, the 12,000 private label credit card accounts with credit cards usable only at Merchant B), and the agreement is not offered to the public other than for accounts under that private label credit card plan, the private label credit card plan has more than 10,000 open accounts. (The card issuer still is not required to submit to the Bureau the agreement offered in connection with credit cards usable only at Merchant A, as each agreement is evaluated separately under the private label credit card exception.)

2. *Card issuers with small private label and other credit card plans.* Whether the private label credit card exception applies is determined on an agreement-by-agreement basis. Therefore, some agreements offered by a

card issuer may qualify for the private label credit card exception even though the card issuer also offers other agreements that do not qualify, such as agreements offered for accounts with cards usable at multiple unaffiliated merchants or agreements offered for accounts under private label plans with 10,000 or more open accounts.

3. *De minimis exception distinguished.* The private label credit card exception under §1026.58(c)(6) is distinct from the de minimis exception under §1026.58(c)(5). The private label credit card exception exempts card issuers from submitting certain agreements to the Bureau regardless of the card issuer's overall size as measured by total number of open accounts. In contrast, the de minimis exception exempts a particular card issuer from submitting any credit card agreements to the Bureau if the card issuer has fewer than 10,000 total open accounts. For example, a card issuer offers to the public two credit card agreements. Agreement A is offered solely for private label credit card accounts with credit cards usable only at Merchant A. The card issuer has 5,000 open credit card accounts with such credit cards usable only at Merchant A. Agreement B is offered solely for credit card accounts with cards usable at multiple unaffiliated merchants that participate in a major payment network. The card issuer has 40,000 open credit card accounts with such payment network cards. The card issuer is not required to submit agreement A to the Bureau under §1026.58(c)(1) because agreement A qualifies for the private label credit card exception under §1026.58(c)(6). Agreement A is offered for accounts under a private label credit card plan with fewer than 10,000 open accounts (*i.e.*, the 5,000 accounts with credit cards usable only at Merchant A) and is not otherwise offered to the public. The card issuer is required to submit agreement B to the Bureau under §1026.58(c)(1). The card issuer does not qualify for the de minimis exception under §1026.58(c)(5) because it has more than 10,000 open accounts, and agreement B does not qualify for the private label credit card exception under §1026.58(c)(6) because it is not offered solely for accounts under a private label credit card plan with fewer than 10,000 open accounts.

4. *Agreement otherwise offered to the public.*

- An agreement qualifies for the private label exception only if it is offered for accounts under one or more private label credit card plans with fewer than 10,000 open accounts and is not offered to the public other than for accounts under such a plan. For example, a card issuer offers a single agreement to the public. The agreement is offered for private label credit card accounts with credit cards usable only at Merchant A. The card issuer has 9,000 such open accounts with credit cards usable only at Merchant A. The agreement also is offered for credit card ac-

counts with credit cards usable at multiple unaffiliated merchants that participate in a major payment network. The agreement does not qualify for the private label credit card exception. The agreement is offered for accounts under a private label credit card plan with fewer than 10,000 open accounts. However, the agreement also is offered to the public for accounts that are not part of a private label credit card plan and therefore does not qualify for the private label credit card exception.

ii. Similarly, an agreement does not qualify for the private label credit card exception if it is offered in connection with one private label credit card plan with fewer than 10,000 open accounts and one private label credit card plan with 10,000 or more open accounts. For example, a card issuer offers a single credit card agreement to the public. The agreement is offered for two types of accounts. The first type of account is a private label credit card account with a credit card usable only at Merchant A. The second type of account is a private label credit card account with a credit card usable only at Merchant B. The card issuer has 10,000 such open accounts with credit cards usable only at Merchant A and 5,000 such open accounts with credit cards usable only at Merchant B. The agreement does not qualify for the private label credit card exception. While the agreement is offered for accounts under a private label credit card plan with fewer than 10,000 open accounts (*i.e.*, the 5,000 open accounts with credit cards usable only at Merchant B), the agreement is also offered for accounts not under such a plan (*i.e.*, the 10,000 open accounts with credit cards usable only at Merchant A).

5. *Agreement used for multiple small private label plans.* The private label exception applies even if the same agreement is used for more than one private label credit card plan with fewer than 10,000 open accounts. For example, a card issuer has 15,000 total open private label credit card accounts. Of these, 7,000 accounts have credit cards usable only at Merchant A, 5,000 accounts have credit cards usable only at Merchant B, and 3,000 accounts have credit cards usable only at Merchant C. The card issuer offers to the public a single credit card agreement that is offered for all three types of accounts and is not offered for any other type of account. The card issuer is not required to submit the agreement to the Bureau under §1026.58(c)(1). The agreement is used for three different private label credit card plans (*i.e.*, the accounts with credit cards usable at Merchant A, the accounts with credit cards usable at Merchant B, and the accounts with credit cards usable at Merchant C), each of which has fewer than 10,000 open accounts, and the card issuer does not offer the agreement for any other type of account. The agreement

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therefore qualifies for the private label credit card exception under §1026.58(c)(6).

6. *Multiple agreements used for one private label credit card plan.* The private label credit card exception applies even if a card issuer offers more than one agreement in connection with a particular private label credit card plan. For example, a card issuer has 5,000 open private label credit card accounts with credit cards usable only at Merchant A. The card issuer offers to the public three different agreements each of which may be used in connection with private label credit card accounts with credit cards usable only at Merchant A. The agreements are not offered for any other type of credit card account. The card issuer is not required to submit any of the three agreements to the Bureau under §1026.58(c)(1) because each of the agreements is used for a private label credit card plan which has fewer than 10,000 open accounts and none of the three is offered to the public other than for accounts under such a plan.

58(c)(8) Form and content of agreements submitted to the Bureau

1. *"As of" date clarified.* Agreements submitted to the Bureau must contain the provisions of the agreement and pricing information in effect as of the last business day of the preceding calendar quarter. For example, on June 1, a card issuer decides to decrease the purchase APR associated with one of the agreements it offers to the public. The change in the APR will become effective on August 1. If the card issuer submits the agreement to the Bureau on July 31 (for example, because the agreement has been otherwise amended), the agreement submitted should not include the new lower APR because that APR was not in effect on June 30, the last business day of the preceding calendar quarter.

2. *Pricing agreement addendum.* Pricing information must be set forth in the separate addendum described in §1026.58(c)(8)(ii)(A) even if it is also stated elsewhere in the agreement.

3. *Pricing agreement variations do not constitute separate agreements.* Pricing information that may vary from one cardholder to another depending on the cardholder's creditworthiness or state of residence or other factors must be disclosed by setting forth all the possible variations or by providing a range of possible variations. Two agreements that differ only with respect to variations in the pricing information do not constitute separate agreements for purposes of this section. For example, a card issuer offers two types of credit card accounts that differ only with respect to the purchase APR. The purchase APR for one type of account is 15 percent, while the purchase APR for the other type of account is 18 percent. The provisions of the agreement and pricing information for the two types of accounts are otherwise iden-

tical. The card issuer should not submit to the Bureau one agreement with a pricing information addendum listing a 15 percent purchase APR and another agreement with a pricing information addendum listing an 18 percent purchase APR. Instead, the card issuer should submit to the Bureau one agreement with a pricing information addendum listing possible purchase APRs of 15 or 18 percent.

4. *Optional variable terms addendum.* Examples of provisions that might be included in the variable terms addendum include a clause that is required by law to be included in credit card agreements in a particular state but not in other states (unless, for example, a clause is included in the agreement used for all cardholders under a heading such as "For State X Residents"), the name of the credit card plan to which the agreement applies (if this information is included in the agreement), or the name of a charitable organization to which donations will be made in connection with a particular card (if this information is included in the agreement).

5. *Integrated agreement requirement.* Card issuers may not provide provisions of the agreement or pricing information in the form of change-in-terms notices or riders. The only two addenda that may be submitted as part of an agreement are the pricing information addendum and optional variable terms addendum described in §1026.58(c)(8). Changes in provisions or pricing information must be integrated into the body of the agreement, pricing information addendum, or optional variable terms addendum described in §1026.58(c)(8). For example, it would be impermissible for a card issuer to submit to the Bureau an agreement in the form of a terms and conditions document dated January 1, 2005, four subsequent change in terms notices, and 2 addenda showing variations in pricing information. Instead, the card issuer must submit a document that integrates the changes made by each of the change in terms notices into the body of the original terms and conditions document and a single addendum displaying variations in pricing information.

58(d) Posting of Agreements Offered to the Public

1. *Requirement applies only to agreements submitted to the Bureau.* Card issuers are only required to post and maintain on their publicly available Web site the credit card agreements that the card issuer must submit to the Bureau under §1026.58(c). If, for example, a card issuer is not required to submit any agreements to the Bureau because the card issuer qualifies for the de minimis exception under §1026.58(c)(5), the card issuer is

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not required to post and maintain any agreements on its Web site under §1026.58(d). Similarly, if a card issuer is not required to submit a specific agreement to the Bureau, such as an agreement that qualifies for the private label exception under §1026.58(c)(6), the card issuer is not required to post and maintain that agreement under §1026.58(d) (either on the card issuer's publicly available Web site or on the publicly available Web sites of merchants at which private label credit cards can be used). (The card issuer in both of these cases is still required to provide each individual cardholder with access to his or her specific credit card agreement under §1026.58(e) by posting and maintaining the agreement on the card issuer's Web site or by providing a copy of the agreement upon the cardholder's request.)

2. *Card issuers that do not otherwise maintain Web sites.* Unlike §1026.58(e), §1026.58(d) does not include a special rule for card issuers that do not otherwise maintain a Web site. If a card issuer is required to submit one or more agreements to the Bureau under §1026.58(c), that card issuer must post those agreements on a publicly available Web site it maintains (or, with respect to an agreement for a private label credit card, on the publicly available Web site of at least one of the merchants at which the card may be used, as provided in §1026.58(d)(1)). If an issuer provides cardholders with access to specific information about their individual accounts, such as balance information or copies of statements, through a third-party Web site, the issuer is considered to maintain that Web site for purposes of §1026.58. Such a third-party Web site is deemed to be maintained by the issuer for purposes of §1026.58(d) even where, for example, an unaffiliated entity designs the Web site and owns and maintains the information technology infrastructure that supports the Web site, cardholders with credit cards from multiple issuers can access individual account information through the same Web site, and the Web site is not labeled, branded, or otherwise held out to the public as belonging to the issuer. Therefore, issuers that provide cardholders with access to account-specific information through a third-party Web site can comply with §1026.58(d) by ensuring that the agreements the issuer submits to the Bureau are posted on the third-party Web site in accordance with §1026.58(d). (In contrast, the §1026.58(d)(1) rule regarding agreements for private label credit cards is not conditioned on cardholders' ability to access account-specific information through the merchant's Web site.)

3. *Private label credit card plans.* i. Section 1026.58(d) provides that, with respect to an agreement offered solely for accounts under one or more private label credit card plans, a card issuer may comply by posting and maintaining the agreement on the Web site

of at least one of the merchants at which the cards issued under each private label credit card plan with 10,000 or more open accounts may be used. For example, a card issuer has 100,000 open private label credit card accounts. Of these, 75,000 open accounts have credit cards usable only at Merchant A and 25,000 open accounts have credit cards usable only at Merchant B and Merchant B's affiliates, Merchants C and D. The card issuer offers to the public a single credit card agreement that is offered for both of these types of accounts and is not offered for any other type of account.

ii. The card issuer is required to submit the agreement to the Bureau under §1026.58(c)(1). (The card issuer has more than 10,000 open accounts, so the §1026.58(c)(5) de minimis exception does not apply. The agreement is offered solely for two different private label credit card plans (*i.e.*, one plan consisting of the accounts with credit cards usable at Merchant A and one plan consisting of the accounts with credit cards usable at Merchant B and its affiliates, Merchants C and D), but both of these plans have more than 10,000 open accounts, so the §1026.58(c)(6) private label credit card exception does not apply. Finally, the agreement is not offered solely in connection with a product test by the card issuer, so the §1026.58(c)(7) product test exception does not apply.)

iii. Because the card issuer is required to submit the agreement to the Bureau under §1026.58(c)(1), the card issuer is required to post and maintain the agreement on the card issuer's publicly available Web site under §1026.58(d). However, because the agreement is offered solely for accounts under one or more private label credit card plans, the card issuer may comply with §1026.58(d) in either of two ways. First, the card issuer may comply by posting and maintaining the agreement on the card issuer's own publicly available Web site. Alternatively, the card issuer may comply by posting and maintaining the agreement on the publicly available Web site of Merchant A and the publicly available Web site of at least one of Merchants B, C and D. It would not be sufficient for the card issuer to post the agreement on Merchant A's Web site alone because §1026.58(d) requires the card issuer to post the agreement on the publicly available Web site of "at least one of the merchants at which cards issued under *each* private label credit card plan may be used" (emphasis added).

iv. In contrast, assume that a card issuer has 100,000 open private label credit card accounts. Of these, 5,000 open accounts have credit cards usable only at Merchant A and 95,000 open accounts have credit cards usable only at Merchant B and Merchant B's affiliates, Merchants C and D. The card issuer offers to the public a single credit card agreement that is offered for both of these types

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of accounts and is not offered for any other type of account.

v. The card issuer is required to submit the agreement to the Bureau under §1026.58(c)(1). (The card issuer has more than 10,000 open accounts, so the §1026.58(c)(5) de minimis exception does not apply. The agreement is offered solely for two different private label credit card plans (*i.e.*, one plan consisting of the accounts with credit cards usable at Merchant A and one plan consisting of the accounts with credit cards usable at Merchant B and its affiliates, Merchants C and D), but one of these plans has more than 10,000 open accounts, so the §1026.58(c)(6) private label credit card exception does not apply. Finally, the agreement is not offered solely in connection with a product test by the card issuer, so the §1026.58(c)(7) product test exception does not apply.)

vi. Because the card issuer is required to submit the agreement to the Bureau under §1026.58(c)(1), the card issuer is required to post and maintain the agreement on the card issuer's publicly available Web site under §1026.58(d). However, because the agreement is offered solely for accounts under one or more private label credit card plans, the card issuer may comply with §1026.58(d) in either of two ways. First, the card issuer may comply by posting and maintaining the agreement on the card issuer's own publicly available Web site. Alternatively, the card issuer may comply by posting and maintaining the agreement on the publicly available Web site of at least one of Merchants B, C and D. The card issuer is not required to post and maintain the agreement on the publicly available Web site of Merchant A because the card issuer's private label credit card plan consisting of accounts with cards usable only at Merchant A has fewer than 10,000 open accounts.

58(e) Agreements for All Open Accounts

1. *Requirement applies to all open accounts.* The requirement to provide access to credit card agreements under §1026.58(e) applies to all open credit card accounts, regardless of whether such agreements are required to be submitted to the Bureau pursuant to §1026.58(c) (or posted on the card issuer's Web site pursuant to §1026.58(d)). For example, a card issuer that is not required to submit agreements to the Bureau because it qualifies for the de minimis exception under §1026.58(c)(5)) would still be required to provide cardholders with access to their specific agreements under §1026.58(e). Similarly, an agreement that is no longer offered to the public would not be required to be submitted to the Bureau under §1026.58(c), but would still need to be provided to the cardholder to whom it applies under §1026.58(e).

2. *Readily available telephone line.* Section 1026.58(e) provides that card issuers that provide copies of cardholder agreements upon

request must provide the cardholder with the ability to request a copy of their agreement by calling a readily available telephone line. To satisfy the readily available standard, the financial institution must provide enough telephone lines so that consumers get a reasonably prompt response. The institution need only provide telephone service during normal business hours. Within its primary service area, an institution must provide a local or toll-free telephone number. It need not provide a toll-free number or accept collect long-distance calls from outside the area where it normally conducts business.

3. *Issuers without interactive Web sites.* Section 1026.58(e)(2) provides that a card issuer that does not maintain a Web site from which cardholders can access specific information about their individual accounts is not required to provide a cardholder with the ability to request a copy of the agreement by using the card issuer's Web site. A card issuer without a Web site of any kind could comply by disclosing the telephone number on each periodic statement; a card issuer with a non-interactive Web site could comply in the same way, or alternatively could comply by displaying the telephone number on the card issuer's Web site. An issuer is considered to maintain an interactive Web site for purposes of the §1026.58(e)(2) special rule if the issuer provide cardholders with access to specific information about their individual accounts, such as balance information or copies of statements, through a third-party interactive Web site. Such a Web site is deemed to be maintained by the issuer for purposes of §1026.58(e)(2) even where, for example, an unaffiliated entity designs the Web site and owns and maintains the information technology infrastructure that supports the Web site. cardholders with credit cards from multiple issuers can access individual account information through the same Web site, and the Web site is not labeled, branded, or otherwise held out to the public as belonging to the issuer. An issuer that provides cardholders with access to specific information about their individual accounts through such a Web site is not permitted to comply with the special rule in §1026.58(e)(2). Instead, such an issuer must comply with §1026.58(e)(1).

4. *Deadline for providing requested agreements clarified.* Sections 1026.58(e)(1)(ii) and (e)(2) require that credit card agreements provided upon request must be sent to the cardholder or otherwise made available to the cardholder in electronic or paper form no later than 30 days after the cardholder's request is received. For example, if a card issuer chooses to respond to a cardholder's request by mailing a paper copy of the cardholder's agreement, the card issuer must mail the agreement no later than 30 days

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after receipt of the cardholder's request. Alternatively, if a card issuer chooses to respond to a cardholder's request by posting the cardholder's agreement on the card issuer's Web site, the card issuer must post the agreement on its Web site no later than 30 days after receipt of the cardholder's request. Section 1026.58(e)(3)(v) provides that a card issuer may provide cardholder agreements in either electronic or paper form regardless of the form of the cardholder's request.

58(g) Temporary Suspension of Agreement Submission Requirement

1. *Suspended quarterly submission requirement.* Pursuant to §1026.58(g)(1), card issuers are not required to make quarterly submissions to the Bureau, as otherwise required by §1026.58(c), for the submissions that would otherwise be due by the first business day on or after April 30, 2015; July 31, 2015; October 31, 2015; and January 31, 2016. Specifically, a card issuer is not required to submit information about the issuer and its agreements pursuant to §1026.58(c)(1)(i), new credit card agreements pursuant to §1026.58(c)(1)(ii), amended agreements pursuant to §1026.58(c)(1)(iii) and (c)(3), or notification of withdrawn agreements pursuant to §1026.58(c)(1)(iv) and (c)(4) through (7) for those four quarters.

2. *Resuming submission of credit card agreements to the Bureau.* Beginning with the submission due on the first business day on or after April 30, 2016, card issuers shall resume submitting credit card agreements on a quarterly basis to the Bureau pursuant to §1026.58(c). A card issuer shall submit agreements for the prior calendar quarter (that is, the calendar quarter ending March 31, 2016), as specified in §1026.58(c)(1)(ii) through (iv) and (c)(3) through (7), to the Bureau no later than the first business day on or after April 30, 2016.

i. Specifically, the submission due on the first business day on or after April 30, 2016 shall contain, as applicable:

A. Identifying information about the card issuer and the agreements submitted, including the issuer's name, address, and identifying number (such as an RSSD ID number or tax identification number), pursuant to §1026.58(c)(1);

B. The credit card agreements that the card issuer offered to the public as of the last business day of the calendar quarter ending March 31, 2016 that the card issuer had not previously submitted to the Bureau as of the first business day on or after January 31, 2015, pursuant to §1026.58(c)(1)(ii);

C. Any credit card agreement previously submitted to the Bureau that was amended since the last business day of the calendar quarter ending December 31, 2014 and that the card issuer offered to the public as of the last business day of the calendar quarter

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ending March 31, 2016, pursuant to §1026.58(c)(1)(iii) and (c)(3); and

D. Notification regarding any credit card agreement previously submitted to the Bureau that the issuer is withdrawing, pursuant to §1026.58(c)(1)(iv) and (c)(4) through (7).

ii. In lieu of the submission described in comment 58(g)-2.i.B through D, §1026.58(c)(1) permits a card issuer to submit to the Bureau a complete, updated set of the credit card agreements the card issuer offered to the public as of the calendar quarter ending March 31, 2016. See comment 58(c)(1)-3.

3. *Continuing obligation to post agreements on a card issuer's own Web site.* Section 1026.58(d) requires a card issuer to post and maintain on its publicly available Web site the credit card agreements that the issuer is required to submit to the Bureau under §1026.58(c). Pursuant to §1026.58(g)(2), during the temporary suspension period set forth in §1026.58(g)(1), a card issuer shall continue to post its agreements to its own publicly available Web site as required by §1026.58(d) using the agreements it would have otherwise submitted to the Bureau under §1026.58(c). For example, for purposes of §1026.58(d)(4), a card issuer must continue to update the agreements posted on its own Web site at least as frequently as the quarterly schedule required for submission of agreements to the Bureau set forth in §1026.58(c)(1), notwithstanding the temporary suspension of submission requirements in §1026.58(g)(1). Similarly, for purposes of §1026.58(d)(2), agreements posted by a card issuer on its own Web site must continue to conform to the form and content requirements set forth in §1026.58(c)(8).

Section 1026.59—Reevaluation of Rate Increases

59(a) General Rule

59(a)(1) Evaluation of Increased Rate

1. *Types of rate increases covered.* Section 1026.59(a) applies both to increases in annual percentage rates imposed on a consumer's account based on that consumer's credit risk or other circumstances specific to that consumer and to increases in annual percentage rates imposed based on factors that are not specific to the consumer, such as changes in market conditions or the issuer's cost of funds.

2. *Rate increases actually imposed.* Under §1026.59(a), a card issuer must review changes in factors only if the increased rate is actually imposed on the consumer's account. For example, if a card issuer increases the penalty rate for a credit card account under an open-end (not home-secured) consumer credit plan and the consumer's account has no balances that are currently subject to the penalty rate, the card issuer is required to provide a notice pursuant to

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§ 1026.9(c) of the change in terms, but the requirements of § 1026.59 do not apply. However, if the consumer's account later becomes subject to the penalty rate, the card issuer is required to provide a notice pursuant to § 1026.9(g) and the requirements of § 1026.59 begin to apply upon imposition of the penalty rate. Similarly, if a card issuer raises the cash advance rate applicable to a consumer's account but the consumer engages in no cash advance transactions to which that increased rate is applied, the card issuer is required to provide a notice pursuant to § 1026.9(c) of the change in terms, but the requirements of § 1026.59 do not apply. If the consumer subsequently engages in a cash advance transaction, the requirements of § 1026.59 begin to apply at that time.

3. *Change in type of rate.* i. *Generally.* A change from a variable rate to a non-variable rate or from a non-variable rate to a variable rate is not a rate increase for purposes of § 1026.59, if the rate in effect immediately prior to the change in type of rate is equal to or greater than the rate in effect immediately after the change. For example, a change from a variable rate of 15.99% to a non-variable rate of 15.99% is not a rate increase for purposes of § 1026.59 at the time of the change. See § 1026.55 for limitations on the permissibility of changing from a non-variable rate to a variable rate.

ii. *Change from non-variable rate to variable rate.* A change from a non-variable to a variable rate constitutes a rate increase for purposes of § 1026.59 if the variable rate exceeds the non-variable rate that would have applied if the change in type of rate had not occurred. For example, assume a new credit card account under an open-end (not home-secured) consumer credit plan is opened on January 1 of year 1 and that a non-variable annual percentage rate of 12% applies to all transactions on the account. On January 1 of year 2, upon 45 days' advance notice pursuant to § 1026.9(c)(2), the rate on all new transactions is changed to a variable rate that is currently 12% and is determined by adding a margin of 10 percentage points to a publicly-available index not under the card issuer's control. The change from the 12% non-variable rate to the 12% variable rate on January 1 of year 2 is not a rate increase for purposes of § 1026.59(a). On April 1 of year 2, the value of the variable rate increases to 12.5%. The increase in the rate from 12% to 12.5% is a rate increase for purposes of § 1026.59, and the card issuer must begin periodically conducting reviews of the account pursuant to § 1026.59. The increase that must be evaluated for purposes of § 1026.59 is the increase from a non-variable rate of 12% to a variable rate of 12.5%.

iii. *Change from variable rate to non-variable rate.* A change from a variable to a non-variable rate constitutes a rate increase for purposes of § 1026.59 if the non-variable rate ex-

ceeds the variable rate that would have applied if the change in type of rate had not occurred. For example, assume a new credit card account under an open-end (not home-secured) consumer credit plan is opened on January 1 of year 1 and that a variable annual percentage rate that is currently 15% and is determined by adding a margin of 10 percentage points to a publicly-available index not under the card issuer's control applies to all transactions on the account. On January 1 of year 2, upon 45 days' advance notice pursuant to § 1026.9(c)(2), the rate on all existing balances and new transactions is changed to a non-variable rate that is currently 15%. The change from the 15% variable rate to the 15% non-variable rate on January 1 of year 2 is not a rate increase for purposes of § 1026.59(a). On April 1 of year 2, the value of the variable rate that would have applied to the account decreases to 12.5%. Accordingly, on April 1 of year 2, the non-variable rate of 15% exceeds the 12.5% variable rate that would have applied but for the change in type of rate. At this time, the change to the non-variable rate of 15% constitutes a rate increase for purposes of § 1026.59, and the card issuer must begin periodically conducting reviews of the account pursuant to § 1026.59. The increase that must be evaluated for purposes of § 1026.59 is the increase from a variable rate of 12.5% to a non-variable rate of 15%.

4. *Rate increases prior to effective date of rule.* For increases in annual percentage rates made on or after January 1, 2009, and prior to August 22, 2010, § 1026.59(a) requires the card issuer to review the factors described in § 1026.59(d) and reduce the rate, as appropriate, if the rate increase is of a type for which 45 days' advance notice would currently be required under § 1026.9(c)(2) or (g). For example, 45 days' notice is not required under § 1026.9(c)(2) if the rate increase results from the increase in the index by which a properly-disclosed variable rate is determined in accordance with § 1026.9(c)(2)(v)(C) or if the increase occurs upon expiration of a specified period of time and disclosures complying with § 1026.9(c)(2)(v)(B) have been provided. The requirements of § 1026.59 do not apply to such rate increases.

5. *Amount of rate decrease.* i. *General.* Even in circumstances where a rate reduction is required, § 1026.59 does not require that a card issuer decrease the rate that applies to a credit card account to the rate that was in effect prior to the rate increase subject to § 1026.59(a). The amount of the rate decrease that is required must be determined based upon the card issuer's reasonable policies and procedures under § 1026.59(b) for consideration of factors described in § 1026.59(a) and (d). For example, assume a consumer's rate on new purchases is increased from a variable rate of 15.99% to a variable rate of

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23.99% based on the consumer's making a required minimum periodic payment five days late. The consumer makes all of the payments required on the account on time for the six months following the rate increase. Assume that the card issuer evaluates the account by reviewing the factors on which the increase in an annual percentage rate was originally based, in accordance with §1026.59(d)(1)(i). The card issuer is not required to decrease the consumer's rate to the 15.99% that applied prior to the rate increase. However, the card issuer's policies and procedures for performing the review required by §1026.59(a) must be reasonable, as required by §1026.59(b), and must take into account any reduction in the consumer's credit risk based upon the consumer's timely payments.

ii. *Change in type of rate.* If the rate increase subject to §1026.59 involves a change from a variable rate to a non-variable rate or from a non-variable rate to a variable rate, §1026.59 does not require that the issuer reinstate the same type of rate that applied prior to the change. However, the amount of any rate decrease that is required must be determined based upon the card issuer's reasonable policies and procedures under §1026.59(b) for consideration of factors described in §1026.59(a) and (d).

59(a)(2) Rate Reductions**59(a)(2)(ii) Applicability of Rate Reduction**

1. *Applicability of reduced rate to new transactions.* Section 1026.59(a)(2)(ii) requires, in part, that any reduction in rate required pursuant to §1026.59(a)(1) must apply to new transactions that occur after the effective date of the rate reduction, if those transactions would otherwise have been subject to the increased rate described in §1026.59(a)(1). A credit card account may have multiple types of balances, for example, purchases, cash advances, and balance transfers, to which different rates apply. For example, assume a new credit card account opened on January 1 of year one has a rate applicable to purchases of 15% and a rate applicable to cash advances and balance transfers of 20%. Effective March 1 of year two, consistent with the limitations in §1026.55 and upon giving notice required by §1026.9(c)(2), the card issuer raises the rate applicable to new purchases to 18% based on market conditions. The only transaction in which the consumer engages in year two is a \$1,000 purchase made on July 1. The rate for cash advances and balance transfers remains at 20%. Based on a subsequent review required by §1026.59(a)(1), the card issuer determines that the rate on purchases must be reduced to 16%. Section 1026.59(a)(2)(ii) requires that the 16% rate be applied to the \$1,000 purchase made on July 1 and to all new purchases. The rate for new cash advances and balance transfers may re-

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main at 20%, because there was no rate increase applicable to those types of transactions and, therefore, the requirements of §1026.59(a) do not apply.

59(c) Timing

1. *In general.* The issuer may review all of its accounts subject to §1026.59(a) at the same time once every six months, may review each account once each six months on a rolling basis based on the date on which the rate was increased for that account, or may otherwise review each account not less frequently than once every six months.

2. *Example.* A card issuer increases the rates applicable to one half of its credit card accounts on June 1, 2011. The card issuer increases the rates applicable to the other half of its credit card accounts on September 1, 2011. The card issuer may review the rate increases for all of its credit card accounts on or before December 1, 2011, and at least every six months thereafter. In the alternative, the card issuer may first review the rate increases for the accounts that were repriced on June 1, 2011 on or before December 1, 2011, and may first review the rate increases for the accounts that were repriced on September 1, 2011 on or before March 1, 2012.

3. *Rate increases prior to effective date of rule.* For increases in annual percentage rates applicable to a credit card account under an open-end (not home-secured) consumer credit plan on or after January 1, 2009 and prior to August 22, 2010, §1026.59(c) requires that the first review for such rate increases be conducted prior to February 22, 2011.

59(d) Factors

1. *Change in factors.* A creditor that complies with §1026.59(a) by reviewing the factors it currently considers in determining the annual percentage rates applicable to similar new credit card accounts may change those factors from time to time. When a creditor changes the factors it considers in determining the annual percentage rates applicable to similar new credit card accounts from time to time, it may comply with §1026.59(a) by reviewing the set of factors it considered immediately prior to the change in factors for a brief transition period, or may consider the new factors. For example, a creditor changes the factors it uses to determine the rates applicable to similar new credit card accounts on January 1, 2012. The creditor reviews the rates applicable to its existing accounts that have been subject to a rate increase pursuant to §1026.59(a) on January 25, 2012. The creditor complies with §1026.59(a) by reviewing, at its option, either the factors that it considered on December 31, 2011 when determining the rates applicable to similar new credit card accounts or the factors that it considers as of January 25,

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2012. For purposes of compliance with § 1026.59(d), a transition period of 60 days from the change of factors constitutes a brief transition period.

2. *Comparison of existing account to factors used for similar new accounts.* Under § 1026.59(a), if a card issuer evaluates an existing account using the same factors that it considers in determining the rates applicable to similar new accounts, the review of factors need not result in existing accounts being subject to exactly the same rates and rate structure as a card issuer imposes on similar new accounts. For example, a card issuer may offer variable rates on similar new accounts that are computed by adding a margin that depends on various factors to the value of a SOFR index. The account that the card issuer is required to review pursuant to § 1026.59(a) may have variable rates that were determined by adding a different margin, depending on different factors, to a published prime index. In performing the review required by § 1026.59(a), the card issuer may review the factors it uses to determine the rates applicable to similar new accounts. If a rate reduction is required, however, the card issuer need not base the variable rate for the existing account on the SOFR index but may continue to use the published prime index. Section 1026.59(a) requires, however, that the rate on the existing account after the reduction, as determined by adding the published prime index and margin, be comparable to the rate, as determined by adding the margin and the SOFR index, charged on a new account for which the factors are comparable.

3. *Similar new credit card accounts.* A card issuer complying with § 1026.59(d)(1)(ii) is required to consider the factors that the card issuer currently considers when determining the annual percentage rates applicable to similar new credit card accounts under an open-end (not home-secured) consumer credit plan. For example, a card issuer may review different factors in determining the annual percentage rate that applies to credit card plans for which the consumer pays an annual fee and receives rewards points than it reviews in determining the rates for credit card plans with no annual fee and no rewards points. Similarly, a card issuer may review different factors in determining the annual percentage rate that applies to private label credit cards than it reviews in determining the rates applicable to credit cards that can be used at a wider variety of merchants. In addition, a card issuer may review different factors in determining the annual percentage rate that applies to private label credit cards usable only at Merchant A than it may review for private label credit cards usable only at Merchant B. However, § 1026.59(d)(1)(ii) requires a card issuer to review the factors it considers when determining the rates for new credit card ac-

counts with similar features that are offered for similar purposes.

4. *No similar new credit card accounts.* In some circumstances, a card issuer that complies with § 1026.59(a) by reviewing the factors that it currently considers in determining the annual percentage rates applicable to similar new accounts may not be able to identify a class of new accounts that are similar to the existing accounts on which a rate increase has been imposed. For example, consumers may have existing credit card accounts under an open-end (not home-secured) consumer credit plan but the card issuer may no longer offer a product to new consumers with similar characteristics, such as the availability of rewards, size of credit line, or other features. Similarly, some consumers' accounts may have been closed and therefore cannot be used for new transactions, while all new accounts can be used for new transactions. In those circumstances, § 1026.59 requires that the card issuer nonetheless perform a review of the rate increase on the existing customers' accounts. A card issuer does not comply with § 1026.59 by maintaining an increased rate without performing such an evaluation. In such circumstances, § 1026.59(d)(1)(ii) requires that the card issuer compare the existing accounts to the most closely comparable new accounts that it offers.

5. *Consideration of consumer's conduct on existing account.* A card issuer that complies with § 1026.59(a) by reviewing the factors that it currently considers in determining the annual percentage rates applicable to similar new accounts may consider the consumer's payment or other account behavior on the existing account only to the same extent and in the same manner that the issuer considers such information when one of its current cardholders applies for a new account with the card issuer. For example, a card issuer might obtain consumer reports for all of its applicants. The consumer reports contain certain information regarding the applicant's past performance on existing credit card accounts. However, the card issuer may have additional information about an existing cardholder's payment history or account usage that does not appear in the consumer report and that, accordingly, it would not generally have for all new applicants. For example, a consumer may have made a payment that is five days late on his or her account with the card issuer, but this information does not appear on the consumer report. The card issuer may consider this additional information in performing its review under § 1026.59(a), but only to the extent and in the manner that it considers such information if a current cardholder applies for a new account with the issuer.

6. *Multiple rate increases between January 1, 2009 and February 21, 2010. i. General.* Section 1026.59(d)(2) applies if an issuer increased the

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rate applicable to a credit card account under an open-end (not home-secured) consumer credit plan between January 1, 2009 and February 21, 2010, and the increase was not based solely upon factors specific to the consumer. In some cases, a credit card account may have been subject to multiple rate increases during the period from January 1, 2009 to February 21, 2010. Some such rate increases may have been based solely upon factors specific to the consumer, while others may have been based on factors not specific to the consumer, such as the issuer's cost of funds or market conditions. In such circumstances, when conducting the first two reviews required under §1026.59, the card issuer may separately review: {i} Rate increases imposed based on factors not specific to the consumer, using the factors described in §1026.59(d)(1)(ii) (as required by §1026.59(d)(2)); and {ii} rate increases imposed based on consumer-specific factors, using the factors described in §1026.59(d)(1)(i). If the review of factors described in §1026.59(d)(1)(i) indicates that it is appropriate to continue to apply a penalty or other increased rate to the account as a result of the consumer's payment history or other factors specific to the consumer, §1026.59 permits the card issuer to continue to impose the penalty or other increased rate, even if the review of the factors described in §1026.59(d)(1)(ii) would otherwise require a rate decrease.

i. *Example.* Assume a credit card account was subject to a rate of 15% on all transactions as of January 1, 2009. On May 1, 2009, the issuer increased the rate on existing balances and new transactions to 18%, based upon market conditions or other factors not specific to the consumer or the consumer's account. Subsequently, on September 1, 2009, based on a payment that was received five days after the due date, the issuer increased the applicable rate on existing balances and new transactions from 18% to a penalty rate of 25%. When conducting the first review required under §1026.59, the card issuer reviews the rate increase from 15% to 18% using the factors described in §1026.59(d)(1)(ii) (as required by §1026.59(d)(2)), and separately but concurrently reviews the rate increase from 18% to 25% using the factors described in paragraph §1026.59(d)(1)(i). The review of the rate increase from 15% to 18% based upon the factors described in §1026.59(d)(1)(ii) indicates that a similarly situated new consumer would receive a rate of 17%. The review of the rate increase from 18% to 25% based upon the factors described in §1026.59(d)(1)(i) indicates that it is appropriate to continue to apply the 25% penalty rate based upon the consumer's late payment. Section 1026.59 permits the rate on the account to remain at 25%.

12 CFR Ch. X (1-1-24 Edition)**59(f) Termination of Obligation To Review Factors**

1. *Revocation of temporary rates.* i. *In general.* If an annual percentage rate is increased due to revocation of a temporary rate, §1026.59(a) requires that the card issuer periodically review the increased rate. In contrast, if the rate increase results from the expiration of a temporary rate previously disclosed in accordance with §1026.9(c)(2)(v)(B), the review requirements in §1026.59(a) do not apply. If a temporary rate is revoked such that the requirements of §1026.59(a) apply, §1026.59(f) permits an issuer to terminate the review of the rate increase if and when the applicable rate is the same as the rate that would have applied if the increase had not occurred.

ii. *Examples.* Assume that on January 1, 2011, a consumer opens a new credit card account under an open-end (not home-secured) consumer credit plan. The annual percentage rate applicable to purchases is 15%. The card issuer offers the consumer a 10% rate on purchases made between February 1, 2012, and August 1, 2013, and discloses pursuant to §1026.9(c)(2)(v)(B) that on August 1, 2013, the rate on purchases will revert to the original 15% rate. The consumer makes a payment that is five days late in July 2012.

A. Upon providing 45 days' advance notice and to the extent permitted under §1026.55, the card issuer increases the rate applicable to new purchases to 15%, effective on September 1, 2012. The card issuer must review that rate increase under §1026.59(a) at least once each six months during the period from September 1, 2012, to August 1, 2013, unless and until the card issuer reduces the rate to 10%. The card issuer performs reviews of the rate increase on January 1, 2013, and July 1, 2013. Based on those reviews, the rate applicable to purchases remains at 15%. Beginning on August 1, 2013, the card issuer is not required to continue periodically reviewing the rate increase, because if the temporary rate had expired in accordance with its previously disclosed terms, the 15% rate would have applied to purchase balances as of August 1, 2013, even if the rate increase had not occurred on September 1, 2012.

B. Same facts as above except that the review conducted on July 1, 2013, indicates that a reduction to the original temporary rate of 10% is appropriate. Section 1026.59(a)(2)(i) requires that the rate be reduced no later than 45 days after completion of the review, or no later than August 15, 2013. Because the temporary rate would have expired prior to the date on which the rate decrease is required to take effect, the card issuer may, at its option, reduce the rate to 10% for any portion of the period from July 1, 2013, to August 1, 2013, or may continue to impose the 15% rate for that entire period.

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The card issuer is not required to conduct further reviews of the 15% rate on purchases.

C. Same facts as above except that on September 1, 2012, the card issuer increases the rate applicable to new purchases to the penalty rate on the consumer's account, which is 25%. The card issuer conducts reviews of the increased rate in accordance with §1026.59 on January 1, 2013, and July 1, 2013. Based on those reviews, the rate applicable to purchases remains at 25%. The card issuer's obligation to review the rate increase continues to apply after August 1, 2013, because the 25% penalty rate exceeds the 15% rate that would have applied if the temporary rate expired in accordance with its previously disclosed terms. The card issuer's obligation to review the rate terminates if and when the annual percentage rate applicable to purchases is reduced to the 15% rate.

2. *Example—relationship to §1026.59(a).* Assume that on January 1, 2011, a consumer opens a new credit card account under an open-end (not home-secured) consumer credit plan. The annual percentage rate applicable to purchases is 15%. Upon providing 45 days' advance notice and to the extent permitted under §1026.55, the card issuer increases the rate applicable to new purchases to 18%, effective on September 1, 2012. The card issuer conducts reviews of the increased rate in accordance with §1026.59 on January 1, 2013, and July 1, 2013, based on the factors described in §1026.59(d)(1)(ii). Based on the January 1, 2013, review, the rate applicable to purchases remains at 18%. In the review conducted on July 1, 2013, the card issuer determines that, based on the relevant factors, the rate it would offer on a comparable new account would be 14%. Consistent with §1026.59(f), §1026.59(a) requires that the card issuer reduce the rate on the existing account to the 15% rate that was in effect prior to the September 1, 2012, rate increase.

3. *Transition from LIBOR.* i. *General.* Effective April 1, 2022, in the case where the rate applicable immediately prior to the increase was a variable rate with a formula based on a LIBOR index, a card issuer may terminate the obligation to review if the card issuer reduces the annual percentage rate to a rate determined by a replacement formula that is derived from a replacement index value on October 18, 2021, plus replacement margin that is equal to the annual percentage rate of the LIBOR index value on October 18, 2021, plus the margin used to calculate the rate immediately prior to the increase (previous formula).

ii. *Examples.* A. Assume that on April 1, 2022, the previous formula is the 1-month U.S. Dollar LIBOR index plus a margin of 10% equal to a 12% annual percentage rate. In this case, the LIBOR index value is 2%. The card issuer selects the prime index published in the Wall Street Journal as the re-

placement index. The replacement formula used to derive the rate at which the card issuer may terminate its obligation to review factors must be set at a replacement index plus replacement margin that equals 12%. If the prime index is 4% on October 18, 2021, the replacement margin must be 8% in the replacement formula. The replacement formula for purposes of determining when the card issuer can terminate the obligation to review factors is the prime index plus 8%.

B. Assume that on April 1, 2022, the account was not subject to §1026.59 and the annual percentage rate was the 1-month U.S. Dollar LIBOR index plus a margin of 10% equal to 12%. On May 1, 2022, the card issuer raises the annual percentage rate to the 1-month U.S. Dollar LIBOR index plus a margin of 12% equal to 14%. On June 1, 2022, the card issuer transitions the account from the LIBOR index in accordance with §1026.55(b)(7)(ii). The card issuer selects the prime index published in the Wall Street Journal as the replacement index with a value on October 18, 2021, of 4%. The replacement formula used to derive the rate at which the card issuer may terminate its obligation to review factors must be set at the value of a replacement index on October 18, 2021, plus replacement margin that equals 12%. In this example, the replacement formula is the prime index plus 8%.

4. *Selecting a replacement index.* In selecting a replacement index for purposes of §1026.59(f)(3), the card issuer must meet the conditions for selecting a replacement index that are described in §1026.55(b)(7)(ii) and comment 55(b)(7)(ii)-1. For example, a card issuer may select a replacement index that is not newly established for purposes of §1026.59(f)(3), so long as the replacement index has historical fluctuations that are substantially similar to those of the LIBOR index used in the previous formula. 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. 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.

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Dollar LIBOR indices, and no further determination is required. 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*.

See also comment 55(b)(7)(ii)-1. As a result, the Board-selected benchmark replacement for consumer loans meets the "historical fluctuations are substantially similar" standard for the LIBOR index being replaced, and no further determination is required. Also, for purposes of §1026.59(f)(3), a card issuer may select a replacement index that is newly established as described in §1026.55(b)(7)(ii).

59(g) Acquired Accounts

59(g)(1) General

1. *Relationship to §1026.59(d)(2) for rate increases imposed between January 1, 2009 and February 21, 2010.* Section 1026.59(d)(2) applies to acquired accounts. Accordingly, if a card issuer acquires accounts on which a rate increase was imposed between January 1, 2009 and February 21, 2010 that was not based solely upon consumer-specific factors, that acquiring card issuer must consider the factors that it currently considers when determining the annual percentage rates applicable to similar new credit card accounts, if it conducts either or both of the first two reviews of such accounts that are required after August 22, 2010 under §1026.59(a).

59(g)(2) Review of Acquired Portfolio

1. *Example—general.* A card issuer acquires a portfolio of accounts that currently are subject to annual percentage rates of 12%, 15%, and 18%. Not later than six months after the acquisition of such accounts, the card issuer reviews all of these accounts in accordance with the factors that it currently uses in determining the rates applicable to similar new credit card accounts. As a result of that review, the card issuer decreases the rate on the accounts that are currently subject to a 12% annual percentage rate to 10%, leaves the rate applicable to the accounts currently subject to a 15% annual percentage rate at 15%, and increases the rate applicable to the accounts currently subject to a rate of 18% to 20%. Section 1026.59(g)(2) requires the card issuer to review, no less frequently than once every six months, the accounts for which the rate has been increased to 20%. The card issuer is not required to review the

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accounts subject to 10% and 15% rates pursuant to §1026.59(a), unless and until the card issuer makes a subsequent rate increase applicable to those accounts.

2. *Example—penalty rates.* A card issuer acquires a portfolio of accounts that currently are subject to standard annual percentage rates of 12% and 15%. In addition, several acquired accounts are subject to a penalty rate of 24%. Not later than six months after the acquisition of such accounts, the card issuer reviews all of these accounts in accordance with the factors that it currently uses in determining the rates applicable to similar new credit card accounts. As a result of that review, the card issuer leaves the standard rates applicable to the accounts at 12% and 15%, respectively. The card issuer decreases the rate applicable to the accounts currently at 24% to its penalty rate of 23%. Section 1026.59(g)(2) requires the card issuer to review, no less frequently than once every six months, the accounts that are subject to a penalty rate of 23%. The card issuer is not required to review the accounts subject to 12% and 15% rates pursuant to §1026.59(a), unless and until the card issuer makes a subsequent rate increase applicable to those accounts.

59(h) Exceptions

1. *Transition from LIBOR.* The exception to the requirements of this section does not apply to rate increases already subject to §1026.59 prior to the transition from the use of a LIBOR index as the index in setting a variable rate to the use of a different index in setting a variable rate where the change from the use of a LIBOR index to a different index occurred in accordance with §1026.55(b)(7)(i) or (ii).

Section 1026.60—Credit and Charge Card Applications and Solicitations

1. *General.* Section 1026.60 generally requires that credit disclosures be contained in application forms and solicitations initiated by a card issuer to open a credit or charge card account. (See §1026.60(a)(5) and (e)(2) for exceptions; see §1026.60(a)(1) and accompanying commentary for the definition of solicitation; see also §1026.2(a)(15) and accompanying commentary for the definition of charge card and §1026.61(c) for restrictions on when credit or charge card accounts can be added to previously issued prepaid accounts.)

2. *Substitution of account-opening summary table for the disclosures required by §1026.60.* In complying with §1026.60(c), (e)(1) or (f), a card issuer may provide the account-opening summary table described in §1026.6(b)(1) in lieu of the disclosures required by §1026.60, if the issuer provides the disclosures required by §1026.6 on or with the application or solicitation.

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3. *Clear and conspicuous standard.* See comment 5(a)(1)-1 for the clear and conspicuous standard applicable to §1026.60 disclosures.

60(a) General Rules

60(a)(1) Definition of Solicitation

1. *Invitations to apply.* A card issuer may contact a consumer who has not been preapproved for a card account about opening an account (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 section, unless the contact itself includes an application form in a direct mailing, electronic communication or “take-one”; an oral application in a telephone contact initiated by the card issuer; or an application in an in-person contact initiated by the card issuer.

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

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

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

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

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

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

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

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

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

4. *Deletion of inapplicable disclosures.* Generally, disclosures need only be given as applicable. Card issuers may, therefore, omit inapplicable headings and their corresponding boxes in the table. For example, if no foreign transaction fee is imposed on the account, the heading *Foreign transaction* and disclosure may be deleted from the table or the disclosure form may contain the heading *Foreign transaction* and a disclosure showing *none*. There is an exception for the grace period disclosure; even if no grace period exists, that fact must be stated.

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

ii. *Maximum limits on fees.* Section 1026.60(a)(2)(iv) provides that any maximum limits on fee amounts must be disclosed in bold text. For example, assume that, consistent with §1026.52(b)(1)(ii), a card issuer's late payment fee will not exceed \$35. The maximum limit of \$35 for the late payment fee must be highlighted in bold. Similarly, assume an issuer will charge a cash advance fee of \$5 or 3 percent of the cash advance transaction amount, whichever is greater, but the fee will not exceed \$100. The maximum limit of \$100 for the cash advance fee must be highlighted in bold.

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

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this example, the \$10 fee disclosure would not be disclosed in bold, but the \$120 annualized amount must be disclosed in bold. In addition, if an issuer must disclose any annual fee in the table, the amount of the annual fee must be disclosed in bold.

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

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

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

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

60(a)(4) Fees That Vary by State

1. *Manner of disclosing range.* If the card issuer discloses a range of fees instead of disclosing the amount of the specific fee applicable to the consumer's account, the range may be stated as the lowest authorized fee (zero, if there are one or more states where no fee applies) to the highest authorized fee.

60(a)(5) Exceptions

1. *Noncoverage of consumer-initiated requests.* Applications provided to a consumer upon request are not covered by §1026.60, even if the request is made in response to the card issuer's invitation to apply for a card account. To illustrate, if a card issuer invites consumers to call a toll-free number or to return a response card to obtain an application, the application sent in response to the consumer's request need not contain the disclosures required under §1026.60. Similarly, if the card issuer invites consumers to call and make an oral application on the telephone,

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§1026.60 does not apply to the application made by the consumer. If, however, the card issuer calls a consumer or initiates a telephone discussion with a consumer about opening a card account and contemporaneously takes an oral application, such applications are subject to §1026.60, specifically §1026.60(d). Likewise, if the card issuer initiates an in-person discussion with a consumer about opening a card account and contemporaneously takes an application, such applications are subject to §1026.60, specifically §1026.60(f).

60(b) Required Disclosures

1. *Tabular format.* Provisions in §1026.60(b) and its commentary provide that certain information must appear or is permitted to appear in a table. The tabular format is required for §1026.60(b) disclosures given pursuant to §1026.60(c), (d)(2), (e)(1) and (f). The tabular format does not apply to oral disclosures given pursuant to §1026.60(d)(1). (See §1026.60(a)(2).)

2. *Accuracy.* Rules concerning accuracy of the disclosures required by §1026.60(b), including variable rate disclosures, are stated in §1026.60(c)(2), (d)(3), and (e)(4), as applicable.

3. *Fees imposed on the asset feature of a prepaid account in connection with a covered separate credit feature 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, a card issuer is required to disclose under §1026.60(b) any fees or charges imposed on the asset feature of the prepaid account that are charges imposed as part of the plan under §1026.6(b)(3) to the extent those fees or charges fall within the categories of fees or charges required to be disclosed under §1026.60(b). For example, assume that a card issuer imposes a \$1.25 per transaction fee on the asset feature of a prepaid account for purchases when a hybrid prepaid-credit card accesses a covered separate credit feature in the course of authorizing, settling, or otherwise completing purchase transactions conducted with the card, and the card issuer charges \$0.50 per transaction for purchases that access funds in the asset feature of the prepaid account in the same program without such a credit feature. In this case, the \$0.75 excess is a charge imposed as part of the plan under §1026.6(b)(3) and must be disclosed under §1026.60(b)(4).

4. *Fees imposed on the asset feature of a prepaid account that are not charges imposed as part of the plan.* A card issuer is not required under §1026.60(b) to disclose 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

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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.

60(b)(1) Annual Percentage Rate

1. *Variable-rate accounts—definition.* For purposes of § 1026.60(b)(1), a variable-rate account exists when rate changes are part of the plan and are tied to an index or formula. (See the commentary to § 1026.6(b)(4)(ii) for examples of variable-rate plans.)

2. *Variable-rate accounts—fact that rate varies and how the rate will be determined.* In describing how the applicable rate will be determined, the card issuer must identify in the table the type of index or formula used, such as the prime rate. In describing the index, the issuer may not include in the table details about the index. For example, if the issuer uses a prime rate, the issuer must disclose the rate as a “prime rate” and may not disclose in the table other details about the prime rate, such as the fact that it is the highest prime rate published in the Wall Street Journal two business days before the closing date of the statement for each billing period. The issuer may not disclose in the table the current value of the index (such as that the prime rate is currently 7.5 percent) or the amount of the margin or spread added to the index or formula in setting the applicable rate. A card issuer may not disclose any applicable limitations on rate increases or decreases in the table, such as describing that the rate will not go below a certain rate or higher than a certain rate. (See Samples G-10(B) and G-10(C) for guidance on how to disclose the fact that the applicable rate varies and how it is determined.)

3. *Discounted initial rates.* i. *Immediate proximity.* If the term “introductory” is in the same phrase as the introductory rate, as that term is defined in § 1026.16(g)(2)(ii), it will be deemed to be in immediate proximity of the listing. For example, an issuer that uses the phrase “introductory balance transfer APR X percent” has used the word “introductory” within the same phrase as the rate. (See Sample G-10(C) for guidance on how to disclose clearly and conspicuously the expiration date of the introductory rate and the rate that will apply after the introductory rate expires, if an introductory rate is disclosed in the table.)

ii. *Subsequent changes in terms.* The fact that an issuer may reserve the right to change a rate subsequent to account opening, pursuant to the notice requirements of § 1026.9(c) and the limitations in § 1026.55, does not, by itself, make that rate an introductory rate. For example, assume an issuer discloses an annual percentage rate for purchases of 12.99% but does not specify a time

period during which that rate will be in effect. Even if that issuer subsequently increases the annual percentage rate for purchases to 15.99%, pursuant to a change-in-terms notice provided under § 1026.9(c), the 12.99% is not an introductory rate.

iii. *More than one introductory rate.* If more than one introductory rate may apply to a particular balance in succeeding periods, the term “introductory” need only be used to describe the first introductory rate. For example, if an issuer offers a rate of 8.99% on purchases for six months, 10.99% on purchases for the following six months, and 14.99% on purchases after the first year, the term “introductory” need only be used to describe the 8.99% rate.

4. *Premium initial rates—subsequent changes in terms.* The fact that an issuer may reserve the right to change a rate subsequent to account opening, pursuant to the notice requirements of § 1026.9(c) and the limitations in § 1026.55 (as applicable), does not, by itself, make that rate a premium initial rate. For example, assume an issuer discloses an annual percentage rate for purchases of 18.99% but does not specify a time period during which that rate will be in effect. Even if that issuer subsequently reduces the annual percentage rate for purchases to 15.99%, the 18.99% is not a premium initial rate. If the rate decrease is the result of a change from a non-variable rate to a variable rate or from a variable rate to a non-variable rate, see comments 9(c)(2)(v)-3 and 9(c)(2)(v)-4 for guidance on the notice requirements under § 1026.9(c).

5. *Increased penalty rates.* i. *In general.* For rates that are not introductory rates or employee preferential rates, if a rate may increase as a penalty for one or more events specified in the account agreement, such as a late payment or an extension of credit that exceeds the credit limit, the card issuer must disclose the increased rate that would apply, a brief description of the event or events that may result in the increased rate, and a brief description of how long the increased rate will remain in effect. The description of the specific event or events that may result in an increased rate should be brief. For example, if an issuer may increase a rate to the penalty rate because the consumer does not make the minimum payment by 5 p.m., Eastern Time, on its payment due date, the issuer should describe this circumstance in the table as “make a late payment.” Similarly, if an issuer may increase a rate that applies to a particular balance because the account is more than 60 days late, the issuer should describe this circumstance in the table as “make a late payment.” An issuer may not distinguish between the events that may result in an increased rate for existing balances and the events that may result in an increased rate for new transactions. (See

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Samples G-10(B) and G-10(C) (in the row labeled “Penalty APR and When it Applies”) for additional guidance on the level of detail in which the specific event or events should be described.) The description of how long the increased rate will remain in effect also should be brief. If a card issuer reserves the right to apply the increased rate to any balances indefinitely, to the extent permitted by §§1026.55(b)(4) and 1026.59, the issuer should disclose that the penalty rate may apply indefinitely. The card issuer may not disclose in the table any limitations imposed by §§1026.55(b)(4) and 1026.59 on the duration of increased rates. For example, if the issuer generally provides that the increased rate will apply until the consumer makes twelve timely consecutive required minimum periodic payments, except to the extent that §§1026.55(b)(4) and 1026.59 apply, the issuer should disclose that the penalty rate will apply until the consumer makes twelve consecutive timely minimum payments. (See Samples G-10(B) and G-10(C) (in the row labeled “Penalty APR and When it Applies”) for additional guidance on the level of detail which the issuer should use to describe how long the increased rate will remain in effect.) A card issuer will be deemed to meet the standard to clearly and conspicuously disclose the information required by §1026.60(b)(1)(iv)(A) if the issuer uses the format shown in Samples G-10(B) and G-10(C) (in the row labeled “Penalty APR and When it Applies”) to disclose this information.

ii. *Introductory rates—general.* An issuer is required to disclose directly beneath the table the circumstances under which an introductory rate, as that term is defined in §1026.16(g)(2)(ii), may be revoked, and the rate that will apply after the revocation. This information about revocation of an introductory rate and the rate that will apply after revocation must be provided even if the rate that will apply after the introductory rate is revoked is the rate that would have applied at the end of the promotional period. In a variable-rate account, the rate that would have applied at the end of the promotional period is a rate based on the applicable index or formula in accordance with the accuracy requirements set forth in §1026.60(c)(2) or (e)(4). In describing the rate that will apply after revocation of the introductory rate, if the rate that will apply after revocation of the introductory rate is already disclosed in the table, the issuer is not required to repeat the rate, but may refer to that rate in a clear and conspicuous manner. For example, if the rate that will apply after revocation of an introductory rate is the standard rate that applies to that type of transaction (such as a purchase or balance transfer transaction), and the standard rates are labeled in the table as “standard APRs,” the issuer may refer to the “standard APR” when describing the rate that will apply

after revocation of an introductory rate. (See Sample G-10(C) in the disclosure labeled “Loss of Introductory APR” directly beneath the table.) The description of the circumstances in which an introductory rate could be revoked should be brief. For example, if an issuer may increase an introductory rate because the account is more than 60 days late, the issuer should describe this circumstance directly beneath the table as “make a late payment.” In addition, if the circumstances in which an introductory rate could be revoked are already listed elsewhere in the table, the issuer is not required to repeat the circumstances again, but may refer to those circumstances in a clear and conspicuous manner. For example, if the circumstances in which an introductory rate could be revoked are the same as the event or events that may trigger a “penalty rate” as described in §1026.60(b)(1)(iv)(A), the issuer may refer to the actions listed in the Penalty APR row, in describing the circumstances in which the introductory rate could be revoked. (See Sample G-10(C) in the disclosure labeled “Loss of Introductory APR” directly beneath the table for additional guidance on the level of detail in which to describe the circumstances in which an introductory rate could be revoked.) A card issuer will be deemed to meet the standard to clearly and conspicuously disclose the information required by §1026.60(b)(1)(iv)(B) if the issuer uses the format shown in Sample G-10(C) to disclose this information.

iii. *Introductory rates—limitations on revocation.* Issuers that are disclosing an introductory rate are prohibited by §1026.55 from increasing or revoking the introductory rate before it expires unless the consumer fails to make a required minimum periodic payment within 60 days after the due date for the payment. In making the required disclosure pursuant to §1026.60(b)(1)(iv)(B), issuers should describe this circumstance directly beneath the table as “make a late payment.”

iv. *Employee preferential rates.* An issuer is required to disclose directly beneath the table the circumstances under which an employee preferential rate may be revoked, and the rate that will apply after the revocation. In describing the rate that will apply after revocation of the employee preferential rate, if the rate that will apply after revocation of the employee preferential rate is already disclosed in the table, the issuer is not required to repeat the rate, but may refer to that rate in a clear and conspicuous manner. For example, if the rate that will apply after revocation of an employee preferential rate is the standard rate that applies to that type of transaction (such as a purchase or balance transfer transaction), and the standard rates are labeled in the table as “standard APRs,” the issuer may refer to the “standard APR” when describing the rate that will apply

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after revocation of an employee preferential rate. The description of the circumstances in which an employee preferential rate could be revoked should be brief. For example, if an issuer may increase an employee preferential rate based upon termination of the employee's employment relationship with the issuer or a third party, issuers may describe this circumstance as "if your employment with [issuer or third party] ends."

6. *Rates that depend on consumer's creditworthiness.* i. *In general.* The card issuer, at its option, may disclose the possible rates that may apply as either specific rates, or a range of rates. For example, if there are three possible rates that may apply (9.99, 12.99 or 17.99 percent), an issuer may disclose specific rates (9.99, 12.99 or 17.99 percent) or a range of rates (9.99 to 17.99 percent). The card issuer may not disclose only the lowest, highest or median rate that could apply. (See Samples G-10(B) and G-10(C) for guidance on how to disclose a range of rates.)

ii. *Penalty rates.* If the rate is a penalty rate, as described in § 1026.60(b)(1)(iv), the card issuer at its option may disclose the highest rate that could apply, instead of disclosing the specific rates or the range of rates that could apply. For example, if the penalty rate could be up to 28.99 percent, but the issuer may impose a penalty rate that is less than that rate depending on factors at the time the penalty rate is imposed, the issuer may disclose the penalty rate as "up to" 28.99 percent. The issuer also must include a statement that the penalty rate for which the consumer may qualify will depend on the consumer's creditworthiness, and other factors if applicable.

iii. *Other factors.* Section 1026.60(b)(1)(v) applies even if other factors are used in combination with a consumer's creditworthiness to determine the rate for which a consumer may qualify at account opening. For example, § 1026.60(b)(1)(v) would apply if the issuer considers the type of purchase the consumer is making at the time the consumer opens the account, in combination with the consumer's creditworthiness, to determine the rate for which the consumer may qualify at account opening. If other factors are considered, the issuer should amend the statement about creditworthiness, to indicate that the rate for which the consumer may qualify at account opening will depend on the consumer's creditworthiness and other factors. Nonetheless, § 1026.60(b)(1)(v) does not apply if a consumer's creditworthiness is not one of the factors that will determine the rate for which the consumer may qualify at account opening (for example, if the rate is based solely on the type of purchase that the consumer is making at the time the consumer opens the account, or is based solely on whether the consumer has other banking relationships with the card issuer).

7. *Rate based on another rate on the account.* In some cases, one rate may be based on another rate on the account. For example, assume that a penalty rate as described in § 1026.60(b)(1)(iv)(A) is determined by adding 5 percentage points to the current purchase rate, which is 10 percent. In this example, the card issuer in disclosing the penalty rate must disclose 15 percent as the current penalty rate. If the purchase rate is a variable rate, then the penalty rate also is a variable rate. In that case, the card issuer also must disclose the fact that the penalty rate may vary and how the rate is determined, such as "This APR may vary with the market based on the Prime Rate." In describing the penalty rate, the issuer shall not disclose in the table the amount of the margin or spread added to the current purchase rate to determine the penalty rate, such as describing that the penalty rate is determined by adding 5 percentage points to the purchase rate. (See § 1026.60(b)(1)(i) and comment 60(b)(1)-2 for further guidance on describing a variable rate.)

8. *Rates.* The only rates that shall be disclosed in the table are annual percentage rates determined under § 1026.14(b). Periodic rates shall not be disclosed in the table.

9. *Deferred interest or similar transactions.* An issuer offering a deferred interest or similar plan, such as a promotional program that provides that 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, may not disclose a 0% rate as the rate applicable to deferred interest or similar transactions if there are any circumstances under which the consumer will be obligated for interest on such transactions for the deferred interest or similar period.

60(b)(2) Fees for Issuance or Availability

1. *Membership fees.* Membership fees for opening an account must be disclosed under this paragraph. A membership fee to join an organization that provides a credit or charge card as a privilege of membership must be disclosed only if the card is issued automatically upon membership. Such a fee shall not be disclosed in the table if membership results merely in eligibility to apply for an account.

2. *Enhancements.* Fees for optional services in addition to basic membership privileges in a credit or charge card account (for example, travel insurance or card-registration services) shall not be disclosed in the table if the basic account may be opened without paying such fees. Issuing a card to each primary cardholder (not authorized users) is considered a basic membership privilege and fees for additional cards, beyond the first card on the account, must be disclosed as a fee for

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issuance or availability. Thus, a fee to obtain an additional card on the account beyond the first card (so that each cardholder would have his or her own card) must be disclosed in the table as a fee for issuance or availability under §1026.60(b)(2). This fee must be disclosed even if the fee is optional; that is, if the fee is charged only if the cardholder requests one or more additional cards. (See the available credit disclosure in §1026.60(b)(14).)

3. *One-time fees.* Disclosure of non-periodic fees is limited to fees related to opening the account, such as one-time membership or participation fees, or an application fee that is excludable from the finance charge under §1026.4(c)(1). The following are examples of fees that shall not be disclosed in the table:

- i. Fees for reissuing a lost or stolen card.
- ii. Statement reproduction fees.

4. *Waived or reduced fees.* If fees required to be disclosed are waived or reduced for a limited time, the introductory fees or the fact of fee waivers may be disclosed in the table in addition to the required fees if the card issuer also discloses how long the reduced fees or waivers will remain in effect in accordance with the requirements of §§1026.9(c)(2)(v)(B) and 1026.55(b)(1).

5. *Periodic fees and one-time fees.* A card issuer disclosing a periodic fee must disclose the amount of the fee, how frequently it will be imposed, and the annualized amount of the fee. A card issuer disclosing a non-periodic fee must disclose that the fee is a one-time fee. (See Sample G-10(C) for guidance on how to meet these requirements.)

60(b)(3) Fixed Finance Charge; Minimum Interest Charge

1. *Example of brief statement.* See Samples G-10(B) and G-10(C) for guidance on how to provide a brief description of a minimum interest charge.

2. *Adjustment of \$1.00 threshold amount.* Consistent with §1026.60(b)(3), the Bureau will publish adjustments to the \$1.00 threshold amount, as appropriate.

60(b)(4) Transaction Charges

1. *Charges imposed by person other than card issuer.* Charges imposed by a third party, such as a seller of goods, shall not be disclosed in the table under this section; the third party would be responsible for disclosing the charge under §1026.9(d)(1).

2. *Foreign transaction fees.* A transaction charge imposed by the card issuer for the use of the card for purchases includes any fee imposed by the issuer for purchases in a foreign currency or that take place outside the United States or with a foreign merchant. (See comment 4(a)-4 for guidance on when a foreign transaction fee is considered charged by the card issuer.) If an issuer charges the same foreign transaction fee for purchases

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and cash advances in a foreign currency, or that take place outside the United States or with a foreign merchant, the issuer may disclose this foreign transaction fee as shown in Samples G-10(B) and G-10(C). Otherwise, the issuer must revise the foreign transaction fee language shown in Samples G-10(B) and G-10(C) to disclose clearly and conspicuously the amount of the foreign transaction fee that applies to purchases and the amount of the foreign transaction fee that applies to cash advances.

3. *Prepaid cards.* i. With respect to a covered separate credit feature accessible by a hybrid prepaid-credit card as defined by §1026.61, if a card issuer assesses a fee (other than a periodic rate that may be used to compute the finance charge on an outstanding balance) to make a purchase where this fee is imposed as part of the plan as described in §1026.60(b)(3), that fee is a transaction charge described in §1026.60(b)(4). See comments 60(b)-3 and -4. This is so whether the fee is a per transaction fee to make a purchase, or a flat fee for each day (or other period) the consumer has an outstanding balance of purchase transactions.

ii. A fee for a transaction will be treated as a fee to make a purchase under §1026.60(b)(4) in cases where a consumer uses a hybrid prepaid-credit card as defined in §1026.61 to make a purchase to obtain goods or services from a merchant and credit is drawn directly from a covered separate credit feature accessed by the hybrid prepaid-credit card without transferring funds into the asset feature of the prepaid account to cover the amount of the purchase. For example, assume that the consumer has \$10 of funds in the asset feature of the prepaid account and initiates a transaction with a merchant to obtain goods or services with the hybrid prepaid-credit card for \$25. In this case, \$10 is debited from the asset feature and \$15 of credit is drawn directly from the covered separate credit feature accessed by the hybrid prepaid-credit card without any transfer of funds into the asset feature of the prepaid account to cover the amount of the purchase. A per transaction fee imposed for the \$15 credit transaction must be disclosed under §1026.60(b)(4).

iii. On the other hand, a fee for a transaction will be treated as a cash advance fee under §1026.60(b)(8) in cases where a consumer uses a hybrid prepaid-credit card as defined in §1026.61 to make a purchase to obtain goods or services from a merchant and credit is transferred from a covered separate credit feature accessed by the hybrid prepaid-credit card into the asset feature of the prepaid account to cover the amount of the purchase. For example, assume the same facts as above, except that the \$15 will be transferred from the covered separate credit feature to the asset feature, and a transaction of \$25 is debited from the asset feature

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of the prepaid account. In this case, a per transaction fee for the \$15 credit transaction must be disclosed under §1026.60(b)(8).

60(b)(5) Grace Period

1. *How grace period disclosure is made.* The card issuer must state any conditions on the applicability of the grace period. An issuer, however, may not disclose under §1026.60(b)(5) the limitations on the imposition of finance charges as a result of a loss of a grace period in §1026.54, or the impact of payment allocation on whether interest is charged on purchases as a result of a loss of a grace period. Some issuers may offer a grace period on all purchases under which interest will not be charged on purchases if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement for one or more billing cycles. In these circumstances, §1026.60(b)(5) requires that the issuer disclose the grace period and the conditions for its applicability using the following language, or substantially similar language, as applicable: “Your due date is [at least] ____ days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month.” However, other issuers may offer a grace period on all purchases under which interest may be charged on purchases even if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement each billing cycle. In these circumstances, §1026.60(b)(5) requires the issuer to amend the above disclosure language to describe accurately the conditions on the applicability of the grace period.

2. *No grace period.* The issuer may use the following language to describe that no grace period on any purchases is offered, as applicable: “We will begin charging interest on purchases on the transaction date.”

3. *Grace period on some purchases.* If the issuer provides a grace period on some types of purchases but no grace period on others, the issuer may combine and revise the language in comments 60(b)(5)-1 and -2 as appropriate to describe to which types of purchases a grace period applies and to which types of purchases no grace period is offered.

60(b)(6) Balance Computation Method

1. *Form of disclosure.* In cases where the card issuer uses a balance computation method that is identified by name in §1026.60(g), the card issuer must disclose below the table only the name of the method. In cases where the card issuer uses a balance computation method that is not identified by name in §1026.60(g), the disclosure below the table must clearly explain the method in as much detail as set forth in the descriptions of balance methods in

§1026.60(g). The explanation need not be as detailed as that required for the disclosures under §1026.6(b)(4)(i)(D).

2. *Determining the method.* In determining which balance computation method to disclose for purchases, the card issuer must assume that a purchase balance will exist at the end of any grace period. Thus, for example, if the average daily balance method will include new purchases only if purchase balances are not paid within the grace period, the card issuer would disclose the name of the average daily balance method that includes new purchases. The card issuer must not assume the existence of a purchase balance, however, in making other disclosures under §1026.60(b).

60(b)(7) Statement on Charge Card Payments

1. *Applicability and content.* The disclosure that charges are payable upon receipt of the periodic statement is applicable only to charge card accounts. In making this disclosure, the card issuer may make such modifications as are necessary to more accurately reflect the circumstances of repayment under the account. For example, the disclosure might read, “Charges are due and payable upon receipt of the periodic statement and must be paid no later than 15 days after receipt of such statement.”

60(b)(8) Cash Advance Fee

1. *Content.* See Samples G-10(B) and G-10(C) for guidance on how to disclose clearly and conspicuously the cash advance fee.

2. *Foreign cash advances.* Cash advance fees required to be disclosed under §1026.60(b)(8) include any charge imposed by the card issuer for cash advances in a foreign currency or that take place outside the United States or with a foreign merchant. (See comment 4(a)-4 for guidance on when a foreign transaction fee is considered charged by the card issuer.) If an issuer charges the same foreign transaction fee for purchases and cash advances in a foreign currency or that take place outside the United States or with a foreign merchant, the issuer may disclose this foreign transaction fee as shown in Samples G-10(B) and (C). Otherwise, the issuer must revise the foreign transaction fee language shown in Samples G-10(B) and (C) to disclose clearly and conspicuously the amount of the foreign transaction fee that applies to purchases and the amount of the foreign transaction fee that applies to cash advances.

3. *ATM fees.* An issuer is not required to disclose pursuant to §1026.60(b)(8) any charges imposed on a cardholder by an institution other than the card issuer for the use of the other institution’s ATM in a shared or interchange system.

4. *Prepaid cards.* i. With respect to a covered separate credit feature accessible by a

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hybrid prepaid-credit card as defined by §1026.61, if a card issuer assesses a fee (other than a periodic rate that may be used to compute the finance charge on an outstanding balance) for a cash advance, such as a cash withdrawal at an ATM, where the fee is imposed as part of the plan as described in §1026.6(b)(3), that fee is a cash advance fee. *See* comments 60(b)-3 and -4. In addition, a fee for a transaction will be treated as a cash advance fee under §1026.60(b)(8) in cases where a consumer uses a hybrid prepaid-credit card as defined in §1026.61 to make a purchase to obtain goods or services from a merchant and credit is transferred from a covered separate credit feature accessed by the hybrid prepaid-credit card into the asset feature of the prepaid account to cover the amount of the purchase. *See* comment 60(b)(4)-3.iii.

ii. If the cash advance fee is the same dollar amount as the transaction charge for purchases described in §1026.60(b)(4), the card issuer may disclose the fee amount under a heading that indicates the fee applies to both purchase transactions and cash advances. Examples of how fees for purchase transactions described in §1026.60(b)(4) and fees for cash advances described in §1026.60(b)(8) must be disclosed are as follows. Assume that all the fees in the examples below are charged on the covered separate credit feature.

A. A card issuer assesses a \$15 fee for credit drawn from a covered separate credit feature using a hybrid prepaid-credit card to purchase goods or services at the point of sale when the consumer has insufficient or unavailable funds in the prepaid account as described in comment 60(b)(4)-3.ii. The card issuer assesses a \$25 fee for credit drawn from a covered separate credit feature using a hybrid prepaid-credit card for a cash advance at an ATM when the consumer has insufficient or unavailable funds in the prepaid account. In this instance, the card issuer must disclose separately a purchase transaction charge of \$15 and a cash advance fee of \$25.

B. A card issuer assesses a \$15 fee for credit drawn from a covered separate credit feature using a hybrid prepaid-credit card to purchase goods or services at the point of sale when the consumer has insufficient or unavailable funds in the prepaid account as discussed in comment 60(b)(4)-3.ii. The card issuer assesses a \$15 fee for credit drawn from a covered separate credit feature using a hybrid prepaid-credit card for providing cash at an ATM when the consumer has insufficient or unavailable funds in the prepaid account. In this instance, the card issuer may disclose the \$15 fee under a heading that indicates the fee applies to both purchase transactions and ATM cash advances. Alternatively, the card issuer may disclose the \$15 fee on two separate rows, one row indicating

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that a \$15 fee applies to purchase transactions, and a second row indicating that a \$15 fee applies to ATM cash advances.

C. A card issuer assesses a \$15 fee for credit drawn from a covered separate credit feature using a hybrid prepaid-credit card for providing cash at an ATM when the consumer has insufficient or unavailable funds in the prepaid account. The card issuer also assesses a fee of \$1.50 for out-of-network ATM cash withdrawals and \$1.00 for in-network ATM cash withdrawals. The card issuer must disclose the cash advance fee as \$16.50 for out-of-network ATM cash withdrawals, indicating that \$1.50 is for the out-of-network ATM withdrawal fee, such as "\$16.50 (including a \$1.50 out-of-network ATM withdrawal fee)." The card issuer also must disclose the cash advance fee as \$16.00 for in-network ATM cash withdrawals, indicating that \$1.00 is for the in-network ATM withdrawal fee, such as "\$16 (including a \$1.00 in-network ATM cash withdrawal fee)."

60(b)(9) Late Payment Fee

1. *Applicability.* The disclosure of the fee for a late payment includes only those fees that will be imposed for actual, unanticipated late payments. (See the commentary to §1026.4(c)(2) for additional guidance on late payment fees. See Samples G-10(B) and G-10(C) for guidance on how to disclose clearly and conspicuously the late payment fee.)

60(b)(10) Over-the-Limit Fee

1. *Applicability.* The disclosure of fees for exceeding a credit limit does not include fees for other types of default or for services related to exceeding the limit. For example, no disclosure is required of fees for reinstating credit privileges or fees for the dishonor of checks on an account that, if paid, would cause the credit limit to be exceeded. (See Samples G-10(B) and G-10(C) for guidance on how to disclose clearly and conspicuously the over-the-limit fee.)

60(b)(13) Required Insurance, Debt Cancellation or Debt Suspension Coverage

1. *Content.* See Sample G-10(B) for guidance on how to comply with the requirements in §1026.60(b)(13).

60(b)(14) Available Credit

1. *Calculating available credit.* If the 15 percent threshold test is met, the issuer must disclose the available credit excluding optional fees, and the available credit including optional fees. In calculating the available credit to disclose in the table, the issuer must consider all fees for the issuance or availability of credit described in §1026.60(b)(2), and any security deposit, that will be imposed and charged to the account when the account is opened, such as one-time issuance and set-up fees. For example,

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in calculating the available credit, issuers must consider the first year's annual fee and the first month's maintenance fee (as applicable) if they are charged to the account on the first billing statement. In calculating the amount of the available credit including optional fees, if optional fees could be charged multiple times, the issuer shall assume that the optional fee is only imposed once. For example, if an issuer charges a fee for each additional card issued on the account, the issuer in calculating the amount of the available credit including optional fees may assume that the cardholder requests only one additional card. In disclosing the available credit, the issuer shall round down the available credit amount to the nearest whole dollar.

2. *Content.* See Sample G-10(C) for guidance on how to provide the disclosure required by § 1026.60(b)(14) clearly and conspicuously.

60(b)(15) Web Site Reference

1. *Content.* See Samples G-10(B) and G-10(C) for guidance on disclosing a reference to the Web site established by the Bureau and a statement that consumers may obtain on the Web site information about shopping for and using credit card accounts.

60(c) Direct Mail and Electronic Applications and Solicitations

1. *Mailed publications.* Applications or solicitations contained in generally available publications mailed to consumers (such as subscription magazines) are subject to the requirements applicable to *take-ones* in § 1026.60(e), rather than the direct mail requirements of § 1026.60(c). However, if a primary purpose of a card issuer's mailing is to offer credit or charge card accounts—for example, where a card issuer "prescreens" a list of potential cardholders using credit criteria, and then mails to the targeted group its catalog containing an application or a solicitation for a card account—the direct mail rules apply. In addition, a card issuer may use a single application form as a *take-one* (in racks in public locations, for example) and for direct mailings, if the card issuer complies with the requirements of § 1026.60(e) even when the form is used as a *take-one*—that is, by presenting the required § 1026.60 disclosures in a tabular format. When used in a direct mailing, the credit term disclosures must be accurate as of the mailing date whether or not the § 1026.60(e)(1)(ii) and (e)(1)(iii) disclosures are included; when used in a *take-one*, the disclosures must be accurate for as long as the *take-one* forms remain available to the public if the § 1026.60(e)(1)(ii) and (e)(1)(iii) disclosures are omitted. (If those disclosures are included in the *take-one*, the credit term disclosures need only be accurate as of the printing date.)

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60(d) Telephone Applications and Solicitations

1. *Coverage.* i. This paragraph applies if:

A. A telephone conversation between a card issuer and consumer may result in the issuance of a card as a consequence of an issuer-initiated offer to open an account for which the issuer does not require any application (that is, a *prescreened* telephone solicitation).

B. The card issuer initiates the contact and at the same time takes application information over the telephone.

ii. This paragraph does not apply to:

A. Telephone applications initiated by the consumer.

B. Situations where no card will be issued—because, for example, the consumer indicates that he or she does not want the card, or the card issuer decides either during the telephone conversation or later not to issue the card.

2. *Right to reject the plan.* The right to reject the plan referenced in this paragraph is the same as the right to reject the plan described in § 1026.5(b)(1)(iv). If an issuer substitutes the account-opening summary table described in § 1026.6(b)(1) in lieu of the disclosures specified in § 1026.60(d)(2)(ii), the disclosure specified in § 1026.60(d)(2)(ii)(B) must appear in the table, if the issuer is required to do so pursuant to § 1026.6(b)(2)(xiii). Otherwise, the disclosure specified in § 1026.60(d)(2)(ii)(B) may appear either in or outside the table containing the required credit disclosures.

3. *Substituting account-opening table for alternative written disclosures.* An issuer may substitute the account-opening summary table described in § 1026.6(b)(1) in lieu of the disclosures specified in § 1026.60(d)(2)(ii).

60(e) Applications and Solicitations Made Available to General Public

1. *Coverage.* Applications and solicitations made available to the general public include what are commonly referred to as *take-one* applications typically found at counters in banks and retail establishments, as well as applications contained in catalogs, magazines and other generally available publications. In the case of credit unions, this paragraph applies to applications and solicitations to open card accounts made available to those in the general field of membership.

2. *In-person applications and solicitations.* In-person applications and solicitations initiated by a card issuer are subject to § 1026.60(f), not § 1026.60(e). (See § 1026.60(f) and accompanying commentary for rules relating to in-person applications and solicitations.)

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3. *Toll-free telephone number.* If a card issuer, in complying with any of the disclosure options of §1026.60(e), provides a telephone number for consumers to call to obtain credit information, the number must be toll-free for nonlocal calls made from an area code other than the one used in the card issuer's dialing area. Alternatively, a card issuer may provide any telephone number that allows a consumer to call for information and reverse the telephone charges.

60(e)(1) Disclosure of Required Credit Information

1. *Date of printing.* Disclosure of the month and year fulfills the requirement to disclose the date an application was printed.

2. *Form of disclosures.* The disclosures specified in §1026.60(e)(1)(ii) and (e)(1)(iii) may appear either in or outside the table containing the required credit disclosures.

60(e)(2) No Disclosure of Credit Information

1. *When disclosure option available.* A card issuer may use this option only if the issuer does not include on or with the application or solicitation any statement that refers to the credit disclosures required by §1026.60(b). Statements such as *no annual fee, low interest rate, favorable rates, and low costs* are deemed to refer to the required credit disclosures and, therefore, may not be included on or with the solicitation or application, if the card issuer chooses to use this option.

60(e)(3) Prompt Response to Requests for Information

1. *Prompt disclosure.* Information is promptly disclosed if it is given within 30 days of a consumer's request for information but in no event later than delivery of the credit or charge card.

2. *Information disclosed.* When a consumer requests credit information, card issuers need not provide all the required credit disclosures in all instances. For example, if disclosures have been provided in accordance with §1026.60(e)(1) and a consumer calls or writes a card issuer to obtain information about changes in the disclosures, the issuer need only provide the items of information that have changed from those previously disclosed on or with the application or solicitation. If a consumer requests information about particular items, the card issuer need only provide the requested information. If, however, the card issuer has made disclosures in accordance with the option in §1026.60(e)(2) and a consumer calls or writes the card issuer requesting information about costs, all the required disclosure information must be given.

3. *Manner of response.* A card issuer's response to a consumer's request for credit information may be provided orally or in writing, regardless of the manner in which the

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consumer's request is received by the issuer. Furthermore, the card issuer must provide the information listed in §1026.60(e)(1). Information provided in writing need not be in a tabular format.

60(f) In-Person Applications and Solicitations

1. *Coverage.* i. This paragraph applies if:

A. An in-person conversation between a card issuer and a consumer may result in the issuance of a card as a consequence of an issuer-initiated offer to open an account for which the issuer does not require any application (that is, a *preapproved* in-person solicitation).

B. The card issuer initiates the contact and at the same time takes application information in person. For example, the following are covered:

1. A consumer applies in person for a car loan at a financial institution and the loan officer invites the consumer to apply for a credit or charge card account; the consumer accepts the invitation and submits an application.

2. An employee of a retail establishment, in the course of processing a sales transaction using a bank credit card, asks a customer if he or she would like to apply for the retailer's credit or charge card; the customer responds affirmatively and submits an application.

ii. This paragraph does not apply to:

A. In-person applications initiated by the consumer.

B. Situations where no card will be issued—because, for example, the consumer indicates that he or she does not want the card, or the card issuer decides during the in-person conversation not to issue the card.

Section 1026.61 Hybrid Prepaid-Credit Cards

61(a) Hybrid Prepaid-Credit Card

1. *Scope of §1026.61.* Section 1026.61 sets forth the definition of hybrid prepaid-credit card, and several requirements that only apply to covered separate credit features accessible by hybrid prepaid-credit cards as defined in §1026.61(a)(2)(i). Hybrid prepaid-credit cards and covered separate credit features accessible by hybrid prepaid-credit cards are also subject to other rules in this regulation, and some of those rules and related commentary contain specific guidance related to hybrid prepaid-credit cards and covered separate credit features accessible by hybrid prepaid-credit cards. For example, as discussed in §§1026.2(a)(15)(i) and 1026.61(a), a hybrid prepaid-credit card is a credit card for purposes of this regulation with respect to a covered separate credit feature. A covered separate credit feature accessible by a hybrid prepaid-credit card also will be a credit card account under an open-end (not home-secured) consumer credit plan as defined in

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§ 1026.2(a)(15)(ii) if the covered separate credit feature is an open-end credit plan. Thus, the provisions in this regulation that apply to credit cards and credit card accounts under an open-end (not home-secured) consumer credit plan generally will apply to hybrid prepaid-credit cards and covered separate credit features accessible by hybrid prepaid-credit cards as applicable (*see generally* subparts B and G). Some of those rules and related commentary contain specific guidance with respect to hybrid prepaid-credit cards and covered separate credit features accessible by hybrid prepaid-credit cards. *See, e.g.*, §§ 1026.2(a)(15)(i) and (ii), 1026.4(b)(11), (c)(3) and (4), 1026.6(b)(3)(iii)(D) and (E), 1026.7(b)(11)(ii)(A), 1026.12(d)(3)(ii), 1026.13(i)(2), 1026.60(a)(5)(iv) and (b), and related commentary to these and other rules in the regulation.

61(a)(1) In General

1. *Credit.* Under § 1026.61(a)(1), except as provided in § 1026.61(a)(4), a prepaid card is a hybrid prepaid-credit card if the prepaid card can access credit from a covered separate credit feature as described in § 1026.61(a)(2)(i) or if it can access credit extended through a negative balance on the asset feature of the prepaid account as described in § 1026.61(a)(3). When § 1026.61 references credit that can be accessed from a separate credit feature or credit that can be extended through a negative balance on the asset feature, it means credit that can be accessed or can be extended even if, for example:

- i. The person that can extend the credit does not agree in writing to extend the credit;
- ii. The person retains discretion not to extend the credit, or
- iii. The person does not extend the credit once the consumer has exceeded a certain amount of credit.

2. *Prepaid card that is solely an account number.* A prepaid card that is solely an account number is a hybrid prepaid-credit card if it meets the conditions set forth in § 1026.61(a).

3. *Usable from time to time.* In order for a prepaid card to be a hybrid prepaid-credit card under § 1026.61(a), the prepaid card must be capable of being used from time to time to access credit as described in § 1026.61(a). Since this involves the possibility of repeated use of a single device, checks and similar instruments that can be used only once to obtain a single credit extension are not hybrid prepaid-credit cards. With respect to a preauthorized check that is issued on a prepaid account for which credit is extended through a negative balance on the asset feature of the prepaid account, or credit is drawn, transferred or authorized to be drawn or transferred from a separate credit feature, the credit is obtained using the prepaid account number and not the check at the time of preauthorization using the prepaid ac-

count number. The prepaid account number is a hybrid prepaid-credit card if the account number meets the conditions set forth in § 1026.61(a). *See comment 61(a)(1)-2.*

4. *Prepaid account that is a digital wallet.* i. A digital wallet that is capable of being loaded with funds is a prepaid account under Regulation E, 12 CFR 1005.2(b)(3). *See Regulation E, 12 CFR 1005.2(b)(3)* and comment 2(b)(3)(i)-6. A prepaid account number that can access such a digital wallet would be a hybrid prepaid-credit card if it meets the conditions set forth in § 1026.61(a). To illustrate:

A. A prepaid account number that can access such a digital wallet is a hybrid prepaid-credit card where it can be used from time to time to access a covered separate credit feature offered by the prepaid account issuer, its affiliate, or its business partner in the course of authorizing, settling, or otherwise completing a transaction conducted with the prepaid account number to obtain goods or services, obtain cash, or conduct person-to-person transfers as described in § 1026.61(a)(2)(i).

B. A prepaid account number that can access such a digital wallet also is a hybrid prepaid-credit card where it can be used from time to time to access the stored credentials for a covered separate credit feature offered by the prepaid account issuer, its affiliate, or its business partner in the course of authorizing, settling, or otherwise completing a transaction conducted with the prepaid account number to obtain goods or services, obtain cash, or conduct person-to-person transfers as described in § 1026.61(a)(2)(i).

C. A prepaid account number that can access such a digital wallet is not a hybrid prepaid-credit card with respect to credentials stored in the prepaid account that can access a non-covered separate credit feature as described in § 1026.61(a)(2)(ii) that is not offered by the prepaid account issuer, its affiliate, or its business partner, even if the prepaid account number can access those credentials in the course of authorizing, settling, or otherwise completing a transaction conducted with the prepaid account number to obtain goods or services, obtain cash, or conduct person-to-person transfers.

D. A prepaid account number that can access such a digital wallet is not a hybrid prepaid-credit card with respect to credentials stored in the prepaid account that can access a non-covered separate credit feature as described in § 1026.61(a)(2)(ii) where the prepaid account number cannot access those credentials in the course of authorizing, settling, or otherwise completing a transaction conducted with the prepaid account number to obtain goods or services, obtain cash, or conduct person-to-person transfers, even if such credit feature is offered by the prepaid account issuer, its affiliate, or its business partner.

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ii. A digital wallet is not a prepaid account under Regulation E, 12 CFR 1005.2(b)(3), if the digital wallet can never be loaded with funds, such as a digital wallet that only stores payment credentials for other accounts. See Regulation E, 12 CFR 1005.2(b)(3) and comment 2(b)(3)(i)-6. An account number that can access such a digital wallet would not be a hybrid prepaid-credit card under §1026.61(a), even if it stores a credential for a separate credit feature that is offered by the digital wallet provider, its affiliate, or its business partner and can be used in the course of a transaction involving the digital wallet.

5. *Prepaid account that can be used for bill payment services.* Where a prepaid account can be used for online bill payment services offered by the prepaid account issuer, the prepaid card (including a prepaid account number) that can access that prepaid account is a hybrid prepaid-credit card if it meets the requirements set forth in §1026.61(a). For example, if a prepaid account number can be used from time to time to initiate a transaction using the online bill payment service offered by the prepaid account issuer to pay a bill, and credit can be drawn, transferred, or authorized to be drawn or transferred, to the prepaid account from a covered separate credit feature offered by the prepaid account issuer, its affiliate, or its business partner in the course of authorizing, settling, or otherwise completing that transaction as described in §1026.61(a)(2)(i), the prepaid account number would be a hybrid prepaid-credit card under §1026.61(a). In this case, the prepaid account number can be used to draw or transfer credit, or authorize the draw or transfer of credit, from a covered separate credit feature offered by the prepaid account issuer, its affiliate, or its business partner in the course of completing a transaction to pay for goods or services through the online bill payment service.

61(a)(2) Prepaid Card Can Access Credit From a Covered Separate Credit Feature

1. *Draws or transfers of credit.* i. For a prepaid card to be a hybrid prepaid-credit card under §1026.61(a)(2)(i) with respect to a separate credit feature, the prepaid account must be structured such that the draw or transfer of credit, or authorizations of either, from a separate credit feature offered by the prepaid account issuer, its affiliate, or its business partner is capable of occurring in the course of authorizing, settling, or otherwise completing transactions conducted with the prepaid card to obtain goods or services, obtain cash, or conduct person-to-person transfers. See comment 61(a)(2)-2 for guidance on when draws or transfers of credit can occur in the course of authorizing, settling, or otherwise completing a transaction described in §1026.61(a)(2)(i). In this case, the separate

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credit feature is a covered separate credit feature accessible by a hybrid prepaid-credit card under §1026.61(a)(2)(i).

ii. A prepaid card is a hybrid prepaid-credit card with respect to a covered separate credit feature regardless of whether:

A. The credit is pushed from the covered separate credit feature to the asset feature of the prepaid account in the course of authorizing, settling, or otherwise completing transactions conducted with the card to obtain goods or services, obtain cash, or conduct person-to-person transfers; or

B. The credit is pulled from the covered separate credit feature to the asset feature of the prepaid account in the course of authorizing, settling, or otherwise completing transactions conducted with the card to obtain goods or services, obtain cash, or conduct person-to-person transfers.

iii. A prepaid card is a hybrid prepaid-credit card with respect to a covered separate credit feature regardless of whether the covered separate credit feature can only be used as an overdraft credit feature, solely accessible by the hybrid prepaid-credit card, or whether it is a general line of credit that can be accessed in other ways.

2. *Credit that can be accessed from a separate credit feature in the course of authorizing, settling, or otherwise completing a transaction.* i. Under §1026.61(a)(2)(i), a prepaid card is a hybrid prepaid-credit card when the card can be used from time to time to access a separate credit feature that is offered by the prepaid account issuer, its affiliate, or its business partner and can be used to access credit in the course of authorizing, settling, or otherwise completing transactions conducted with the card to obtain goods or services, obtain cash, or conduct person-to-person transfers. A draw, transfer, or authorization of a draw or transfer from a separate credit feature is deemed to be in the “course of authorizing, settling, or otherwise completing” a transaction if it occurs during the authorization phase of the transaction as discussed in comment 61(a)(2)-2.ii or in later periods up to the settlement of the transaction, as discussed in comment 61(a)(2)-2.iii.

ii. The following examples illustrate transactions where credit can be drawn, transferred, or authorized to be drawn or transferred from a separate credit feature in the course of authorizing a transaction.

A. A transaction initiated using a prepaid card when there are insufficient or unavailable funds in the asset feature of the prepaid account at the time the transaction is initiated and credit is transferred from the credit feature to the asset feature at the time the transaction is authorized to complete the transaction.

B. A transaction initiated using a prepaid card when there are insufficient or unavailable funds in the asset feature of the prepaid

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account at the time the transaction is initiated and credit is directly drawn from the credit feature to complete the transaction, without transferring funds into the prepaid account.

iii. The following examples illustrate transactions where credit can be drawn, transferred, or authorized to be drawn or transferred, in the course of settling a transaction.

A. A transaction initiated using a prepaid card when there are sufficient or available funds in the asset feature of the prepaid account at the time of authorization to cover the amount of the transaction but where the consumer does not have sufficient or available funds in the asset feature to cover the transaction at the time of settlement. Credit automatically is drawn, transferred, or authorized to be drawn or transferred from the credit feature at settlement to pay the transaction.

B. A transaction that was not authorized in advance where the consumer does not have sufficient or available funds in the asset feature to cover the transaction at the time of settlement. Credit automatically is drawn, transferred, or authorized to be drawn or transferred from the credit feature at settlement to pay the transaction.

3. *Accessing credit when the asset feature has sufficient funds.* Section 1026.61(a)(2)(i) applies where the prepaid card can be used from time to time to draw funds from a covered separate credit feature that is offered by a prepaid account issuer, its affiliate, or its business partner in the course of authorizing, settling, or otherwise completing transactions conducted with the card to obtain goods or services, obtain cash, or conduct person-to-person transfers, even if there are sufficient or available funds in the asset feature of the prepaid account to complete the transaction. For example, the following separate credit feature would meet the conditions of § 1026.61(a)(2)(i).

i. The prepaid card can be used from time to time both to access the asset feature of a prepaid account and to draw on the covered separate credit feature in the course of a transaction independent of whether there are sufficient or available funds in the asset feature to complete the transaction. For example, assume that a consumer has \$50 available funds in her prepaid account. The consumer initiates a \$25 transaction with the card to purchase goods and services. If the consumer chooses at the time the transaction is initiated to use the card to access the prepaid account, the card will draw on the funds in the asset feature of the prepaid account to complete the transaction. If the consumer chooses at the time the transaction is initiated to use the card to access the credit feature, the card will draw on credit from the credit feature to complete the transaction, regardless of the fact that

there were sufficient or available funds the prepaid account to complete the transaction.

4. *Covered separate credit features.* i. Under § 1026.61(a)(2)(i), a separate credit feature that meets the conditions of § 1026.61(a)(2)(i) is defined as a covered separate credit feature. In this case, the hybrid prepaid-credit card can access both the covered separate credit feature and the asset feature of the prepaid account. Section 1026.61 and other provisions in the regulation and commentary related to hybrid prepaid-credit cards refer to this credit feature either as a covered separate credit feature or a covered separate credit feature accessible by a hybrid prepaid-credit card. See, e.g., §§ 1026.4(c)(4), 1026.7(b)(11)(ii)(A), 1026.12(d)(3)(ii), and 1026.60(a)(5)(iv) and (b). In addition, several provisions in the regulation and commentary also describe this arrangement as one where a covered separate credit feature and an asset feature on a prepaid account are both accessible by a hybrid prepaid-credit card as defined in § 1026.61. See, e.g., §§ 1026.4(b)(11), 1026.6(b)(3)(iii)(D), and 1026.13(i)(2).

ii. If a prepaid card is capable of drawing or transferring credit, or authorizing either, from a separate credit feature offered by the prepaid account issuer, its affiliate, or its business partner in the course of authorizing, settling, or otherwise completing transactions conducted with the prepaid card to obtain goods or services, obtain cash, or conduct a person-to-person transfer, the credit feature is a covered separate credit feature accessible by a hybrid prepaid-credit card, even with respect to credit that is drawn or transferred, or authorized to be drawn or transferred, from the credit feature outside the course of a transaction conducted with the card to obtain goods or services, obtain cash, or conduct person-to-person transfers. For example, with respect to a covered separate credit feature, a consumer may use the prepaid card at the prepaid account issuer's Web site to load funds from the covered separate credit feature outside the course of a transaction conducted with the card to obtain goods or services, obtain cash, or conduct person-to-person transfers. This credit transaction is considered a credit transaction on a covered separate credit feature accessible by a hybrid prepaid-credit card, even though the load or transfer of funds occurred outside the course of a transaction conducted with the card to obtain goods or services, obtain cash, or conduct person-to-person transfers.

5. *Non-covered separate credit features.* A separate credit feature that does not meet the conditions set forth in § 1026.61(a)(2)(i) is defined as a non-covered separate credit feature as described in § 1026.61(a)(2)(ii). A prepaid card is not a hybrid prepaid-credit card with respect to a non-covered separate credit feature. To illustrate:

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i. A prepaid card is not a hybrid prepaid credit card under §1026.61(a)(2)(i) with respect to a separate credit feature if the credit feature is not offered by the prepaid account issuer, its affiliate, or its business partner. This is true even if the draw or transfer of credit, or authorization of either, occurs during the course of authorizing, settling, or otherwise completing transactions to obtain goods or services, obtain cash, or conduct person-to-person transfers. For example, assume a consumer links her prepaid account to a credit card issued by a card issuer that is not the prepaid account issuer, its affiliate, or its business partner so that credit is drawn automatically into the asset feature of the prepaid account in the course of authorizing, settling, or otherwise completing transactions conducted with the prepaid card for which there are insufficient funds in the asset feature. In this case, the separate credit feature is a non-covered separate credit feature under §1026.61(a)(2)(ii). In this situation, the prepaid card is not a hybrid prepaid-credit card with respect to the separate credit feature offered by the unrelated third-party card issuer.

ii. Even if a separate credit feature is offered by the prepaid account issuer, its affiliate, or its business partner, a prepaid card is not a hybrid prepaid-credit card under §1026.61(a)(2)(i) with respect to that separate credit feature if the separate credit feature cannot be accessed within the course of authorizing, settling, or otherwise completing transactions to obtain goods or services, obtain cash, or conduct person-to-person transfers. For example, assume that a consumer can only conduct a draw or transfer of credit, or authorization of either, from a separate credit feature to a prepaid account at the prepaid account issuer's Web site, and these draws, transfers, or authorizations of either, cannot occur in the course of authorizing, settling, or otherwise completing transactions at the Web site to obtain goods or services, obtain cash, or conduct person-to-person transfers. In this case, the separate credit feature is a non-covered separate credit feature under §1026.61(a)(2)(ii). In this situation, the prepaid card is not a hybrid prepaid-credit card with respect to this non-covered separate credit feature.

iii. The person offering the non-covered separate credit feature does not become a card issuer under §1026.2(a)(7) and thus does not become a creditor under §1026.2(a)(17)(iii) or (iv) because the prepaid card can be used to access credit from the non-covered separate credit feature. The person offering the non-covered separate credit feature, however, may already have obligations under this regulation with respect to that separate credit feature. For example, if the non-covered separate credit feature is an open-end credit card account offered by an unrelated third-party creditor that is not an affiliate

or business partner of the prepaid account issuer, the person already will be a card issuer under §1026.2(a)(7) and a creditor under §1026.2(a)(17)(iii). Nonetheless, in that case, the person does not need to comply with the provisions in the regulation applicable to hybrid prepaid-credit cards even though the prepaid card can access credit from the non-covered separate credit feature. The obligations under this regulation that apply to a non-covered separate credit feature are not affected by the fact that the prepaid card can access credit from the non-covered separate credit feature. See §1026.6(b)(3)(iii)(E) and comments 4(b)(11)-1.ii, 6(b)(2)-2, 6(b)(3)(iii)(E)-1, 12(d)(3)-2.iii, 52(a)(2)-3, 52(b)-4, 55(a)-4, and 60(b)-4.

6. *Prepaid card that can access multiple separate credit features.* i. Even if a prepaid card is a hybrid prepaid-credit card with respect to a covered separate credit feature, it is not a hybrid prepaid-credit card with respect to any non-covered separate credit features.

ii. For example, assume that a prepaid card can access "Separate Credit Feature A" where the card can be used from time to time to access credit from a separate credit feature that is offered by the prepaid account issuer, its affiliate, or its business partner in the course of authorizing, settling, or otherwise completing transactions conducted with the card to obtain goods or services, obtain cash, or conduct person-to-person transfers. In addition, assume that the prepaid card can also access "Separate Credit Feature B" but that credit feature is being offered by an unrelated third-party creditor that is not the prepaid account issuer, its affiliate, or its business partner. The prepaid card is a hybrid prepaid-credit card with respect to Separate Credit Feature A because it is a covered separate credit feature. The prepaid card, however, is not a hybrid prepaid-credit card with respect to Separate Credit Feature B because it is a non-covered separate credit feature.

61(a)(3) Prepaid Card Can Access Credit Extended Through a Negative Balance on the Asset Feature**61(a)(3)(i) In General**

1. *Credit accessed on an asset feature of a prepaid account.* i. See comment 2(a)(14)-3 for examples of when transactions authorized or paid on the asset feature of a prepaid account meet the definition of credit under §1026.2(a)(14).

ii. Except as provided in §1026.61(a)(4), a prepaid card would trigger coverage as a hybrid prepaid-credit card if it is a single device that can be used from time to time to access credit that can be extended through a negative balance on the asset feature of the prepaid account. (However, unless the credit extended through a negative balance on the asset feature of the prepaid account meets

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the requirements of §1026.61(a)(4), such a product structure would violate the rules under §1026.61(b). A credit extension through a negative balance on the asset feature of a prepaid account can occur during the authorization phase of the transaction as discussed in comment 61(a)(3)(i)-1.iii or in later periods up to the settlement of the transaction, as discussed in comment 61(a)(3)(i)-1.iv.

iii. The following example illustrates transactions where a credit extension occurs during the course of authorizing a transaction.

A. A transaction initiated using a prepaid card when there are insufficient or unavailable funds in the asset feature of the prepaid account at the time the transaction is initiated and credit is extended through a negative balance on the asset feature of the prepaid account when the transaction is authorized.

iv. The following examples illustrate transactions where a credit extension occurs at settlement.

A. Transactions that occur when there are sufficient or available funds in the asset feature of the prepaid account at the time of authorization to cover the amount of the transaction but where the consumer does not have sufficient or available funds in the asset feature to cover the transaction at the time of settlement. Credit is extended through a negative balance on the asset feature at settlement to pay those transactions.

B. Transactions that settle even though they were not authorized in advance where credit is extended through a negative balance on the asset feature at settlement to pay those transactions.

61(a)(3)(ii) Negative Asset Balances

1. *Credit extended on the asset feature of the prepaid account.* Section 1026.61(a)(3)(i) determines whether a prepaid card triggers coverage as a hybrid prepaid-credit card under §1026.61(a), and thus, whether a prepaid account issuer is a card issuer under §1026.2(a)(7) subject to this regulation, including §1026.61(b). However, §1026.61(b) requires that any credit feature accessible by a hybrid prepaid-credit card must be structured as a separate credit feature using either a credit subaccount of the prepaid account or a separate credit account. Unless §1026.61(a)(4) applies, a card issuer would violate §1026.61(b) if it structures a credit feature as a negative balance on the asset feature of the prepaid account. A prepaid account issuer can use a negative asset balance structure to extend credit on a prepaid account if the prepaid card is not a hybrid prepaid-credit card with respect to that credit as described in §1026.61(a)(4).

61(a)(4) Exception for Credit Extended Through a Negative Balance

1. *Prepaid card that is not a hybrid prepaid-credit card.* i. A prepaid card that is not a hybrid prepaid-credit card as described in §1026.61(a)(4) with respect to credit extended through a negative balance on the asset feature of the prepaid account is not a credit card under this regulation with respect to that credit. A prepaid card is not a hybrid prepaid-credit card with respect to credit extended through a negative balance on the asset feature of the prepaid account if:

A. The card cannot access credit from a covered separate credit feature under §1026.61(a)(2)(i) that is offered by the prepaid account issuer or its affiliate, though it is permissible for it to access credit from a covered separate credit feature offered by a business partner or from a non-covered separate credit feature as described under §1026.61(a)(2)(ii); and

B. The card can only access credit extended through a negative balance on the asset feature of the prepaid account in accordance with both the conditions set forth in §1026.61(a)(4)(ii)(A) and (B).

ii. If the conditions of §1026.61(a)(4) are met and the prepaid card can access credit from a covered separate credit feature as defined in §1026.61(a)(2)(i) that is offered by a business partner, the prepaid card is a hybrid prepaid-credit card with respect to the covered separate credit feature pursuant to §1026.61(a)(2)(i) but is not a hybrid prepaid-credit card with respect to credit extended by a prepaid account issuer through a negative balance on the asset feature of the prepaid account that meets the conditions of §1026.61(a)(4) or with respect to any non-covered separate credit feature pursuant to §1026.61(a)(2)(ii). If the conditions of §1026.61(a)(4) are met and the prepaid card cannot access credit from any covered separate credit feature as defined in §1026.61(a)(2)(i), the prepaid card is not a hybrid prepaid-credit card with respect to credit extended by a prepaid account issuer through a negative balance on the asset feature of the prepaid account that meets the conditions of §1026.61(a)(4) or with respect to any non-covered separate credit feature pursuant to §1026.61(a)(2)(ii).

iii. Below is an example of when a prepaid card is not a hybrid prepaid-credit card with respect to credit extended through a negative balance on the asset feature of the prepaid account because the conditions set forth in §1026.61(a)(4) have been met.

A. The prepaid card can only access credit extended through a negative balance on the asset feature of the prepaid account in accordance with both the conditions set forth in §1026.61(a)(4)(ii)(A) and (B). The card can access credit from a non-covered separate credit feature as defined in §1026.61(a)(2)(ii)

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and from a covered separate credit feature as defined in §1026.61(a)(2)(i) offered by a business partner, but cannot access credit for a covered separate credit feature that is offered by a prepaid account issuer or its affiliate.

iv. Below is an example of when a prepaid card is a hybrid prepaid-credit card with respect to credit extended through a negative balance on the asset feature of the prepaid account because the conditions set forth in §1026.61(a)(4) have not been met.

A. When there are insufficient or unavailable funds in the asset feature of the prepaid account at the time a transaction is initiated, the card can be used to draw, transfer, or authorize the draw or transfer of credit from a covered separate credit feature offered by the prepaid account issuer or its affiliate during the authorization phase to complete the transaction so that credit is not extended on the asset feature of the prepaid account. The exception in §1026.61(a)(4) does not apply because the prepaid card can be used to draw, transfer, or authorize the draw or transfer of credit from a covered separate credit feature defined in §1026.61(a)(2)(i) that is offered by the prepaid account issuer or its affiliate. The card is a hybrid prepaid-credit card with respect to credit extended through a negative balance on the asset feature of the prepaid account pursuant to §1026.61(a)(3) and with respect to the covered separate credit feature pursuant to §1026.61(a)(2)(i). In that case, a card issuer has violated §1026.61(b) because it has structured the credit feature as a negative balance on the asset feature of the prepaid account. See §1026.61(a)(3)(ii) and (b).

v. In the case where a prepaid card is not a hybrid prepaid-credit card with respect to credit extended through a negative balance on the asset feature of the prepaid account because the conditions set forth in §1026.61(a)(4) are met:

A. The prepaid account issuer is not a card issuer under §1026.2(a)(7) with respect to the prepaid card when it accesses credit extended through the negative balance on the asset feature of the prepaid account. The prepaid account issuer also is not a creditor under §1026.2(a)(17)(iii) or (iv) because it is not a card issuer under §1026.2(a)(7) with respect to the prepaid card when it accesses credit extended through the negative balance on the asset feature of the prepaid account. The prepaid account issuer also is not a creditor under §1026.2(a)(17)(i) with respect to credit extended through the negative balance on the asset feature of the prepaid account as a result of imposing fees on the prepaid account because those fees are not finance charges with respect to that credit. See comment 4(b)(11)-1.iii.

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Paragraph 61(a)(4)(ii)

Paragraph 61(a)(4)(ii)(A)

1. *Authorization not required for every transaction.* The prepaid account issuer is not required to receive an authorization request for each transaction to comply with §1026.61(a)(4)(ii)(A). Nonetheless, the prepaid account issuer generally must establish an authorization policy as described in §1026.61(a)(4)(ii)(A) and have reasonable practices in place to comply with its established policy with respect to the authorization requests it receives. In that case, a prepaid account issuer is deemed to satisfy §1026.61(a)(4)(ii)(A) even if a negative balance results on the prepaid account when a transaction is settled.

2. *Provisional credit.* A prepaid account issuer may still satisfy the requirements set forth in §1026.61(a)(4)(ii)(A) even if a negative balance results on the asset feature of the prepaid account because the prepaid account issuer debits the amount of any provisional credit that was previously granted on the prepaid account as specified in Regulation E, 12 CFR 1005.11, so long as the prepaid account issuer otherwise complies with the conditions set forth in §1026.61(a)(4). For example, under §1026.61(a)(4), a prepaid account issuer may not impose a fee or charge enumerated under §1026.61(a)(4)(ii)(B) with respect to this negative balance.

3. *Delayed load cushion.* i. *Incoming fund transfers.* For purposes of §1026.61(a)(4)(ii)(A)(2), cases where the prepaid account issuer has received an instruction or confirmation for an incoming electronic fund transfer originated from a separate asset account to load funds to the prepaid account include a direct deposit of salary from an employer and a direct deposit of government benefits.

ii. *Consumer requests.* For purposes of §1026.61(a)(4)(ii)(A)(2), cases where the prepaid account issuer has received a request from the consumer to load funds to the prepaid account from a separate asset account include where the consumer, in the course of a transaction, requests a load from a deposit account or uses a debit card to cover the amount of the transaction if there are insufficient funds in the asset feature of the prepaid account to pay for the transaction.

4. *Permitted authorization circumstances are not mutually exclusive.* The two circumstances set forth in §1026.61(a)(4)(ii)(A)(1) and (2) are not mutually exclusive. For example, assume a prepaid account issuer has adopted the \$10 cushion described in §1026.61(a)(4)(ii)(A)(1), and the delayed load cushion described in §1026.61(a)(4)(ii)(A)(2). Also, assume the prepaid account issuer has received an instruction or confirmation for an incoming electronic fund transfer originated from a separate asset account to load funds to the prepaid account but the prepaid

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account issuer has not received the funds from the separate asset account. In this case, a prepaid account issuer satisfies §1026.61(a)(4)(ii)(A) if the amount of a transaction at authorization will not cause the prepaid account balance to become negative at the time of the authorization by more than the requested load amount plus the \$10 cushion.

Paragraph 61(a)(4)(ii)(B)

1. Different terms on different prepaid account programs. Section 1026.61(a)(4)(ii)(B) does not prohibit a prepaid account issuer from charging different terms on different prepaid account programs. For example, the terms may differ between a prepaid account program where a covered separate credit feature accessible by a hybrid prepaid-credit card is not offered in connection with any prepaid accounts within the prepaid account program, and a prepaid account program where a covered separate credit feature accessible by a hybrid prepaid-credit card may be offered to some consumers in connection with their prepaid accounts.

Paragraph 61(a)(4)(ii)(B)(1)

1. Fees or charges covered by §1026.61(a)(4)(ii)(B)(1). To qualify for the exception in §1026.61(a)(4)(ii)(B), the prepaid account issuer may not impose any fees or charges for opening, issuing, or holding a negative balance on the asset feature, or for the availability of credit, whether imposed on a one-time or periodic basis. Section 1026.61(a)(4)(ii)(B)(1) does not include fees or charges to open, issue, or hold the prepaid account where the amount of the fee or charge imposed on the asset feature is not higher based on whether credit might be offered or has been accepted, whether or how much credit the consumer has accessed, or the amount of credit available.

i. The types of fees or charges prohibited by §1026.61(a)(4)(ii)(B)(1) include:

A. A daily, weekly, monthly, or other periodic fee assessed each period a prepaid account has a negative balance or is in “overdraft” status; and

B. A daily, weekly, monthly or other periodic fee to hold the prepaid account where the amount of the fee that applies each period is higher if the consumer is enrolled in a purchase cushion as described in §1026.61(a)(4)(ii)(A)(1) or a delayed load cushion as described in §1026.61(a)(4)(ii)(A)(2) during that period. For example, assume that a consumer will pay a fee to hold the prepaid account of \$10 if the consumer is not enrolled in a purchase cushion as described in §1026.61(a)(4)(ii)(A)(1) or a delayed load cushion as described in §1026.61(a)(4)(ii)(A)(2) during that month, and will pay a fee to hold the prepaid account of \$15 if the consumer is enrolled in a purchase cushion or delayed

load cushion that period. The \$15 charge is a charge described in §1026.61(a)(4)(ii)(B)(1) because the amount of the fee to hold the prepaid account is higher based on whether the consumer is participating in the payment cushion or delayed load cushion during that period.

ii. Fees or charges described in §1026.61(a)(4)(ii)(B) do not include:

A. A daily, weekly, monthly, or other periodic fee to hold the prepaid account where the amount of the fee is not higher based on whether the consumer is enrolled in a purchase cushion as described in §1026.61(a)(4)(ii)(A)(1) or a delayed load cushion as described in §1026.61(a)(4)(ii)(A)(2) during that period, whether or how much credit has been extended during that period, or the amount of credit that is available during that period.

Paragraph 61(a)(4)(ii)(B)(2)

1. Fees or charges covered by §1026.61(a)(4)(ii)(B)(2). To qualify for the exception in §1026.61(a)(4)(ii)(B), the prepaid account issuer may not impose any fees or charges on the asset feature of the prepaid account that will be imposed only when credit is extended on the asset feature or when there is a negative balance on the asset feature.

i. These types of fees or charges include:

A. A fee imposed because the balance on the prepaid account becomes negative;

B. Interest charges attributable to a periodic rate that applies to the negative balance;

C. Any fees for delinquency, default, or a similar occurrences that result from the prepaid account having a negative balance or being in “overdraft” status, except that the actual costs to collect the credit may be imposed if otherwise permitted by law; and

D. Late payment fees.

ii. Fees or charges described in §1026.61(a)(4)(ii)(B) do not include:

A. Fees for actual collection costs, including attorney's fees, to collect any credit extended on the prepaid account if otherwise permitted by law. Late payment fees are not considered fees imposed for actual collection costs. See comment 61(a)(4)(ii)(B)(2)-1.i.D.

Paragraph 61(a)(4)(ii)(B)(3)

1. Fees or charges covered by §1026.61(a)(4)(ii)(B)(3). i. To qualify for the exception in §1026.61(a)(4)(ii)(B), the prepaid account issuer may not impose any fees or charges on the asset feature of the prepaid account that are higher when credit is extended on the asset feature or when there is a negative balance on the asset feature. These types of fees or charges include:

A. Transaction fees where the amount of the fee is higher based on whether the transaction accesses only asset funds in the asset

feature or accesses credit. For example, a \$15 transaction charge is imposed on the asset feature each time a transaction is authorized or paid when there are insufficient or unavailable funds in the asset feature at the time of the authorization or settlement. A \$1.50 fee is imposed each time a transaction only accesses funds in the asset feature. The \$15 charge is a charge described in §1026.61(a)(4)(ii)(B)(3) because the amount of the transaction fee is higher when the transaction accesses credit than the amount of the fee that applies when the transaction accesses only asset funds in the asset feature; and

B. A fee for a service on the prepaid account where the amount of the fee is higher based on whether the service is requested when the asset feature has a negative balance. For example, if a prepaid account issuer charges a higher fee for an ATM balance inquiry requested on the prepaid account if the balance inquiry is requested when there is a negative balance on the asset feature than the amount of fee imposed when there is a positive balance on the asset feature, the balance inquiry fee is a fee described in §1026.61(a)(4)(ii)(B)(3) because the amount of the fee is higher based on whether it is imposed when there is a negative balance on the asset feature.

ii. Fees or charges described in §1026.61(a)(4)(ii)(B) do not include:

A. Transaction fees on the prepaid account where the amount of the fee imposed when the transaction accesses credit does not exceed the amount of the fee imposed when the transaction only accesses asset funds in the prepaid account. For example, assume a \$1.50 transaction charge is imposed on the prepaid account for each paid transaction that is made with the prepaid card, including transactions that only access asset funds, transactions that take the account balance negative, and transactions that occur when the account balance is already negative. The \$1.50 transaction charge imposed on the prepaid account is not a fee described in §1026.61(a)(4)(ii)(B); and

B. A fee for a service on the prepaid account where the amount of the fee is not higher based on whether the service is requested when the asset feature has a negative balance. For example, if a prepaid account issuer charges the same amount of fee for an ATM balance inquiry regardless of whether there is a positive or negative balance on the asset feature, the balance inquiry fee is not a fee described in §1026.61(a)(4)(ii)(B).

Paragraph 61(a)(4)(ii)(C)

1. Fees or charges not covered by §1026.61(a)(4)(ii)(B). Under §1026.61(a)(4)(ii)(C), a prepaid account issuer may still satisfy the exception in §1026.61(a)(4) even if it debits fees or charges from the prepaid account

when there are insufficient or unavailable funds in the asset feature of the prepaid account to cover those fees or charges at the time they are imposed, so long as those fees or charges are not the type of fees or charges enumerated in §1026.61(a)(4)(ii)(B). A fee or charge not otherwise covered by §1026.61(a)(4)(ii)(B) does not become covered by that provision simply because there are insufficient or unavailable funds in the asset feature of the prepaid account to pay the fee when it is imposed. For example, assume that a prepaid account issuer imposes a fee for an ATM balance inquiry and the amount of the fee is not higher based on whether credit is extended or whether there is a negative balance on the prepaid account. Also assume that when the fee is imposed, there are insufficient or unavailable funds in the asset feature of the prepaid account to pay the fee. The ATM balance inquiry fee does not become a fee covered by §1026.61(a)(4)(ii)(B) because the fee is debited from the prepaid account balance when there are insufficient or unavailable funds in the asset feature of the prepaid account to cover the fee at the time it is imposed.

61(a)(5) Definitions

Paragraph 61(a)(5)(iii)

1. *Card network or payment network agreements.* A draw, transfer, or authorization of the draw or transfer from a credit feature may be effectuated through a card network or a payment network. However, for purposes of §1026.61(a)(5)(iii), agreements to participate in a card network or payment network themselves do not constitute an “agreement” or a “business, marketing, or promotional agreement or other arrangement” described in §1026.61(a)(5)(iii)(B) or (C), respectively.

2. *Relationship to prepaid account issuer.* A person (other than a prepaid account issuer or its affiliates) that can extend credit through a separate credit feature will be deemed to have an arrangement with the prepaid account issuer if the person that can extend credit, its service provider, or the person's affiliate has an arrangement with the prepaid account issuer, its service provider such as a program manager, or the issuer's affiliate. In that case, the person that can extend credit will be a business partner of the prepaid account issuer. For example, if the affiliate of the person that can extend credit has an arrangement with the prepaid account issuer's affiliate, the person that can extend credit will be the business partner of the prepaid account issuer.

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61(a)(5)(iii)(D) Exception for Certain Credit Card Account Arrangements

1. *When the exception applies.* If the exception in §1026.61(a)(5)(iii)(D) applies, a person that can extend credit through the credit card account is not a business partner of a prepaid account issuer with which it has an arrangement as defined in §1026.61(a)(5)(iii)(A) through (C). Accordingly, where a consumer has authorized his or her prepaid card in accordance with §1026.61(a)(5)(iii)(D) to be linked to the credit card account in such a way as to allow the prepaid card to access the credit card account as described in §1026.61(a)(5)(iii)(D)(2), the linked prepaid card is not a hybrid prepaid-credit card with respect to the linked credit card account. Rather, the linked credit card account is a non-covered separate credit feature as discussed in §1026.61(a)(2)(ii). See comment 61(a)(2)-5. In this case, by definition, the linked credit card account will be subject to the credit card rules in this regulation in its own right because it is a credit card account under an open-end (not home-secured) consumer credit plan, pursuant to the condition set forth in §1026.61(a)(5)(iii)(D)(I).

Paragraph 61(a)(5)(iii)(D)(1)

1. *Traditional credit card.* For purposes of §1026.61(a)(5)(iii)(D), “traditional credit card” means a credit card that is not a hybrid prepaid-credit card. Thus, the condition in §1026.61(a)(5)(iii)(D)(1) is not satisfied if the only credit card that a consumer can use to access the credit card account under an open-end (not home-secured) consumer credit plan is a hybrid prepaid-credit card.

Paragraph 61(a)(5)(iii)(D)(2)

1. *Written request.* Under §1026.61(a)(5)(iii)(D)(2), any accountholder on either the prepaid account or the credit card account may make the written request.

Paragraph 61(a)(5)(iii)(D)(4)

1. *Account terms, conditions, or features.* Account terms, conditions, and features subject to §1026.61(a)(5)(iii)(D)(4) include, but are not limited to:

- i. Interest paid on funds deposited into the prepaid account, if any;
 - ii. Fees or charges imposed on the prepaid account (see comment 61(a)(5)(iii)(D)(4)-3 for additional guidance on this element with regard to load fees);
 - iii. The type of access device provided to the consumer;
 - iv. Minimum balance requirements on the prepaid account; or
 - v. Account features offered in connection with the prepaid account, such as online bill payment services.
2. *The same terms, conditions, and features apply to the consumer's prepaid account.* For

the exception in §1026.61(a)(5)(iii)(D) to apply, under §1026.61(a)(5)(iii)(D)(4), the prepaid account issuer must not vary the terms, conditions, and features on the consumer's prepaid account depending on whether the consumer has authorized linking the prepaid card to the credit card account as described in §1026.61(a)(5)(iii)(D)(2). For example, a prepaid account issuer would not satisfy this condition of §1026.61(a)(5)(iii)(D)(4) if it provides on a consumer's prepaid account rewards points or cash back on purchases with the prepaid card where the consumer has authorized a link to the credit card account as discussed above while not providing such rewards points or cash back on the consumer's account if the consumer has not authorized such a linkage.

3. *Example of impermissible variations in load fees.* For the exception in §1026.61(a)(5)(iii)(D) to apply, under §1026.61(a)(5)(iii)(D)(4), the prepaid account issuer must apply the same fees to load funds from the credit card account that is linked to the prepaid account as described in §1026.61(a)(5)(iii)(D)(2) as it charges for a comparable load on the consumer's prepaid account to access a credit feature offered by a person that is not the prepaid account issuer, its affiliates, or a person with which the prepaid account issuer has an arrangement as described in §1026.61(a)(5)(iii)(A) through (C). For example, a prepaid account issuer would not satisfy this condition of §1026.61(a)(5)(iii)(D)(4) if it charges on the consumer's prepaid account \$0.50 to load funds in the course of a transaction from a credit card account offered by a card issuer with which the prepaid account issuer has an arrangement, but \$1.00 to load funds in the course of a transaction from a credit card account offered by a card issuer with which it does not have an arrangement.

Paragraph 61(a)(5)(iii)(D)(5)

1. *Specified terms and conditions.* For purposes of §1026.61(a)(5)(iii)(D), “specified terms and conditions” on a credit card account means:

- i. The terms and conditions required to be disclosed under §1026.6(b), which include pricing terms, such as periodic rates, annual percentage rates, and fees and charges imposed on the credit card account; any security interests acquired under the credit account; claims and defenses rights under §1026.12(c); and error resolution rights under §1026.13;
- ii. Any repayment terms and conditions, including the length of the billing cycle, the payment due date, any grace period on the transactions on the account, the minimum payment formula, and the required or permitted methods for making conforming payments on the credit feature; and
- iii. The limits on liability for unauthorized credit transactions.

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2. *Same specified terms and conditions regardless of whether the credit card account is linked to the prepaid account.* For the exception in § 1026.61(a)(5)(iii)(D) to apply, under § 1026.61(a)(5)(iii)(D)(5), the card issuer must not vary the specified terms and conditions on the consumer's credit card account depending on whether the consumer has authorized linking the prepaid card to the credit card account as described in § 1026.61(a)(5)(iii)(D)(2). The following are examples of circumstances in which a card issuer would not meet the condition described above:

i. The card issuer structures the credit card account as a "charge card account," (where no periodic rate is used to compute a finance charge on the credit card account) if the credit feature is linked to the prepaid card as described in § 1026.61(a)(5)(iii)(D)(2), but applies a periodic rate to compute a finance charge on the consumer's account (and thus does not use a charge card account structure) if there is no such link. See § 1026.2(a)(15)(iii) for the definition of "charge card."

ii. The card issuer imposes a \$50 annual fee on a consumer's credit card account if the credit feature is linked to the prepaid card as described in § 1026.61(a)(5)(iii)(D)(2), but does not impose an annual fee on the consumer's credit card account if there is no such link.

3. *Same specified terms and conditions regardless of whether credit is accessed by the prepaid card or the traditional credit card.* To satisfy the condition of § 1026.61(a)(5)(iii)(D)(I), the credit card account must be a credit card account under an open-end (not home-secured) consumer credit plan that a consumer can access through a traditional credit card. As explained in comment 61(a)(5)(iii)(D)(I)-1, for purposes of § 1026.61(a)(5)(iii)(D), "traditional credit card" means a credit card that is not a hybrid prepaid-credit card. For the exception in § 1026.61(a)(5)(iii)(D) to apply, under § 1026.61(a)(5)(iii)(D)(5), a card issuer must not vary the specified terms and conditions on the credit card account when a consumer authorizes linking the account with the prepaid card as described in § 1026.61(a)(5)(iii)(D)(2) depending on whether a particular credit extension from the credit card account is accessed by the prepaid card or by the traditional credit card.

i. The following examples are circumstances in which a card issuer would not meet the condition of § 1026.61(a)(5)(iii)(D)(5) described above:

A. The card issuer considers transactions using the traditional credit card to obtain goods or services from an unaffiliated merchant of the card issuer as purchase transactions with certain annual percentage rates (APRs), fees, and a grace period that applies to those purchase transactions, but treats credit extensions as cash advances that are subject to different APRs, fees, grace peri-

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ods, and other specified terms and conditions where the prepaid card is used to draw, transfer, or authorize the draw or transfer of credit from the linked credit card account in the course of authorizing, settling, or otherwise completing transactions conducted with the prepaid card to obtain goods or services from an unaffiliated merchant of the card issuer.

B. The card issuer generally treats one-time transfers of credit using the credit card account number to asset accounts as cash advance transactions with certain APRs and fees, but treats one-time transfers of credit using the prepaid card to the prepaid account as purchase transactions that are subject to different APRs and fees.

ii. To apply the same rights under § 1026.12(c) regarding claims and defenses applicable to use of a credit card to purchase property or services, the card issuer must treat an extension of credit as a credit card transaction to purchase property or services where a prepaid card is used to draw, transfer, or authorize the draw or transfer of credit from the linked credit card account in the course of authorizing, settling, or otherwise completing transactions conducted with the prepaid card to purchase property or services and provide the same rights under § 1026.12(c) as it applies to property or services purchased with the traditional credit card. This includes situations where a consumer uses a prepaid card to make a purchase to obtain property or services from a merchant and credit is transferred from the linked credit card account in the course of authorizing, settling, or otherwise completing the prepaid transaction to make the purchase. For a transaction where a prepaid card is used to obtain property or services from a merchant and the transaction is partially paid with funds from the asset feature of the prepaid account, and partially paid with credit from the linked credit card account, the amount of the purchase transaction that is funded by credit would be subject to this guidance. A card issuer is not required to provide the rights under § 1026.12(c) with respect to the amount of the transaction funded from the prepaid account.

iii. To apply the same limits on liability for unauthorized extensions of credit from the credit card account using the prepaid card as it applies to unauthorized extensions of credit from the credit card account using the traditional credit card, the card issuer must treat an extension of credit accessed by the prepaid card as a credit card transaction for purposes of the limits on liability for unauthorized extensions of credit set forth in § 1026.12(b) and impose the same liability under § 1026.12(b) to this credit extension as it applies to unauthorized transactions using the traditional credit card.

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Paragraph 61(a)(5)(iv)

1. *Applicability of credit feature definition.* The definition of credit feature set forth in §1026.61(a)(5)(iv) only defines that term for purposes of this regulation in relation to credit in connection with a prepaid account or prepaid card. This definition does not impact when an account, subaccount or negative balance is a credit feature under the regulation with respect to credit in relation to a checking account or other transaction account that is not a prepaid account, or a debit card. *See, e.g., comments 2(a)(15)-2.ii.A and 4(b)(2)-1 for where the term credit feature is used in relation to a debit card or asset account other than a prepaid account.*

2. *Asset account other than a prepaid account.* A credit feature for purposes of §1026.61(a)(5)(iv) does not include an asset account other than a prepaid account that has an attached overdraft feature. For example, assume that funds are loaded or transferred to a prepaid account from an asset account (other than a prepaid account) on which an overdraft feature is attached. The asset account is not a credit feature under §1026.61(a)(5)(iv) even if the load or transfer of funds to the prepaid account triggers the overdraft feature that is attached to the asset account.

Paragraph 61(a)(5)(vii)

1. *Definition of prepaid card.* The term “prepaid card” in §1026.61(a)(5)(vii) includes any card, code, or other device that can be used to access a prepaid account, including a prepaid account number or other code.

61(b) Structure of Credit Features Accessible by Hybrid Prepaid-Credit Cards

1. *Credit subaccount on a prepaid account.* If a credit feature that is accessible by a hybrid prepaid-credit card is structured as a subaccount of the prepaid account, the credit feature must be set up as a separate balance on the prepaid account such that there are at least two balances on the prepaid account—the asset account balance and the credit account balance.

2. *Credit extended on a credit subaccount or a separate credit account.* Under §1026.61(b), with respect to a credit feature that is accessed by a hybrid prepaid-credit card, a card issuer at its option may structure the credit feature as a separate credit feature, either as a subaccount on the prepaid account that is separate from the asset feature or as a separate credit account. The separate credit feature would be a covered separate credit feature accessible by a hybrid prepaid-credit card under §1026.61(a)(2)(i). Regardless of whether the card issuer is structuring its covered separate credit feature as a subaccount of the prepaid account or as a separate credit account:

i. If at the time a prepaid card transaction is initiated there are insufficient or unavailable funds in the asset feature of the prepaid account to complete the transaction, credit must be drawn, transferred or authorized to be drawn or transferred, from the covered separate credit feature at the time the transaction is authorized. The card issuer may not allow the asset feature on the prepaid account to become negative and draw or transfer the credit from the covered separate credit feature at a later time, such as at the end of the day. The card issuer must comply with the applicable provisions of this regulation with respect to the credit extension from the time the prepaid card transaction is authorized.

ii. For transactions where there are insufficient or unavailable funds in the asset feature of the prepaid account to cover that transaction at the time it settles and the prepaid transaction either was not authorized in advance or the transaction was authorized and there were sufficient or available funds in the prepaid account at the time of authorization to cover the transaction, credit must be drawn from the covered separate credit feature to settle these transactions. The card issuer may not allow the asset feature on the prepaid account to become negative. The card issuer must comply with the applicable provisions of this regulation from the time the transaction is settled.

iii. If a negative balance would result on the asset feature in circumstances other than those described in comment 61(b)-2.i and ii, credit must be drawn from the covered separate credit feature to avoid the negative balance. The card issuer may not allow the asset feature on the prepaid account to become negative. The card issuer must comply with the applicable provisions in this regulation from the time credit is drawn from the covered separate credit feature. For example, assume that a fee for an ATM balance inquiry is imposed on the prepaid account when there are insufficient or unavailable funds to cover the amount of the fee when it is imposed. Credit must be drawn from the covered separate credit feature to avoid a negative balance.

61(c) Timing Requirement for Solicitation or Application With Respect to Hybrid Prepaid-Credit Cards

1. *Meaning of registration of a prepaid card or prepaid account.* A prepaid card or prepaid account is registered, such that the 30-day timing requirement required by §1026.61(c) begins, when the prepaid account issuer successfully completes its collection of consumer identifying information and identity verification in accordance with the requirements of applicable Federal and state law. The beginning of the required 30-day timing

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requirement is triggered by successful completion of collection of consumer identifying information and identity verification, not by the consumer's mere purchase or obtaining of the card. With respect to a prepaid account for which customer identification and verification are completed before the account is opened, the 30-day timing requirement begins on the day the prepaid account is opened.

2. *Unsolicited issuance of credit cards and disclosures related to applications or solicitations for credit or charge card accounts.* See §1026.12(a)(1) and comment 12(a)(1)-7.ii for additional rules that apply to the addition of a credit card or charge card account to a previously-issued prepaid account. See also §1026.60 and related commentary for disclosures that generally must be provided on or with applications or solicitations to open a credit or charge card account.

3. *Replacement or substitute cards.* A card issuer is not required to comply with §1026.61(c) when a hybrid prepaid-credit card is permitted to be replaced, or substituted, for another hybrid prepaid-credit card without a request or application under §1026.12(a)(2) and related commentary. For example, §1026.61(c) does not apply to situations where a prepaid account or credit feature that is accessible by a hybrid prepaid-credit card is replaced because of security concerns and a new hybrid prepaid-credit card is issued to access the new prepaid account or covered separate credit feature without a request or application under §1026.12(a)(2).

APPENDIX A—EFFECT ON STATE LAWS

1. *Who may make requests.* Appendix A sets forth the procedures for preemption determinations. As discussed in §1026.28, which contains the standards for preemption, a request for a determination of whether a state law is inconsistent with the requirements of chapters 1, 2, or 3 may be made by creditors, states, or any interested party. However, only states may request and receive determinations in connection with the fair credit billing provisions of chapter 4.

APPENDIX B—STATE EXEMPTIONS

1. *General.* Appendix B sets forth the procedures for exemption applications. The exemption standards are found in §1026.29 and are discussed in the commentary to that section.

APPENDIX C—ISSUANCE OF OFFICIAL INTERPRETATIONS

1. *General.* This commentary is the vehicle for providing official interpretations. Individual interpretations generally will not be issued separately from the commentary.

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APPENDIX D—MULTIPLE-ADVANCE CONSTRUCTION LOANS

1. *General rule.* Appendix D provides a special procedure that creditors may use, at their option, to estimate and disclose the terms of multiple-advance construction loans when the amounts or timing of advances is unknown at consummation of the transaction. This appendix reflects the approach taken in §1026.17(c)(6)(ii), which permits creditors to provide separate or combined disclosures for the construction period and for the permanent financing, if any; i.e., the construction phase and the permanent phase may be treated as one transaction or more than one transaction. Appendix D may also be used in multiple-advance transactions other than construction loans, when the amounts or timing of advances is unknown at consummation.

2. *Variable-rate multiple-advance loans.* The hypothetical disclosure required in variable-rate transactions by §1026.18(f)(1)(iv) is not required for multiple-advance loans disclosed pursuant to appendix D, part I.

3. *Calculation of the total of payments.* When disclosures are made pursuant to appendix D, the total of payments may reflect either the sum of the payments or the sum of the amount financed and the finance charge.

4. *Annual percentage rate.* Appendix D does not require the use of Volume I of the Bureau's Annual Percentage Rate Tables for calculation of the annual percentage rate. Creditors utilizing appendix D in making calculations and disclosures may use other computation tools to determine the estimated annual percentage rate, based on the finance charge and payment schedule obtained by use of the appendix.

5. *Interest reserves.* In a multiple-advance construction loan, a creditor may establish an "interest reserve" to ensure that interest is paid as it accrues by designating a portion of the loan to be used for paying the interest that accrues on the loan. An interest reserve is not treated as a prepaid finance charge, whether the interest reserve is the same as or different from the estimated interest figure calculated under appendix D.

i. If a creditor permits a consumer to make interest payments as they become due, the interest reserve should be disregarded in the disclosures and calculations under appendix D.

ii. If a creditor requires the establishment of an interest reserve and automatically deducts interest payments from the reserve amount rather than allow the consumer to make interest payments as they become due, the fact that interest will accrue on those interest payments as well as the other loan proceeds must be reflected in the calculations and disclosures. To reflect the effects of such compounding, a creditor should first calculate interest on the commitment

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amount (exclusive of the interest reserve) and then add the figure obtained by assuming that one-half of that interest is outstanding at the contract interest rate for the entire construction period. For example, using the example shown under paragraph A, part I of appendix D, the estimated interest would be \$1,117.68 (\$1093.75 plus an additional \$23.93 calculated by assuming half of \$1093.75 is outstanding at the contract interest rate for the entire construction period), and the estimated annual percentage rate would be 21.18%.

6. *Relation to §1026.18(s).* A creditor must disclose an interest rate and payment summary table for certain transactions secured by a dwelling, pursuant to §1026.18(s), instead of the general payment schedule required by §1026.18(g) or the projected payments table required by §§1026.37(c) and 1026.38(c). Accordingly, some home construction loans that are secured by a dwelling are subject to §1026.18(s) and not §1026.18(g). See comment app. D-7 for a discussion of transactions that are subject to §§1026.37 and 1026.38. Under §1026.17(c)(6)(ii), when a multiple-advance construction loan may be permanently financed by the same creditor, the construction phase and the permanent phase may be treated as either one transaction or more than one transaction. Following are illustrations of the application of appendix D to transactions subject to §1026.18(s), under each of these two alternatives:

i. If a creditor uses appendix D and elects pursuant to §1026.17(c)(6)(ii) to disclose the construction and permanent phases as separate transactions, the construction phase must be disclosed according to the rules in §1026.18(s). Under §1026.18(s), the creditor must disclose the applicable interest rates and corresponding periodic payments during the construction phase in an interest rate and payment summary table. The provision in appendix D, part I.A.3, which allows the creditor to omit the number and amounts of any interest payments “in disclosing the payment schedule under §1026.18(g)” does not apply because the transaction is governed by §1026.18(s) rather than §1026.18(g). Also, because the construction phase is being disclosed as a separate transaction and its terms do not repay all principal, the creditor must disclose a balloon payment, pursuant to §1026.18(s)(5).

ii. On the other hand, if the creditor elects to disclose the construction and permanent phases as a single transaction, where interest is payable on the amount actually advanced for the time it is outstanding, the construction phase must be disclosed pursuant to appendix D, part II.C.1, which provides that the creditor shall disclose the repayment schedule without reflecting the number or amounts of payments of interest only that are made during the construction phase. Appendix D also provides, however, that credi-

tors must disclose (outside of the table) the fact that interest payments must be made and the timing of such payments. The interest rate and payment summary table disclosed under §1026.18(s) in such cases must reflect only the permanent phase of the transaction. Therefore, in determining the rates and payments that must be disclosed in the columns of the table, creditors should apply the requirements of §1026.18(s) to the permanent phase only. For example, under §1026.18(s)(2)(i)(A) or §1026.18(s)(2)(i)(B)(1), as applicable, the creditor should disclose the interest rate corresponding to the first installment due under the permanent phase and not any rate applicable during the construction phase.

7. *Relation to §§1026.37 and 1026.38.* Creditors may use, at their option, the following methods to estimate and disclose the terms of multiple-advance construction loans pursuant to §§1026.37 and 1026.38. As stated in comment app. D-1, appendix D may also be used in multiple-advance transactions other than construction loans, when the amounts or timing of advances is unknown at consummation.

i. *Loan term.* A. *Disclosure as single transaction.* If the construction and permanent financing are disclosed as a single transaction, the loan term disclosed is the total combined term of the construction period and the permanent period. For example, if the term of the construction financing is 12 months and the term of the permanent financing is 30 years, and the two phases are disclosed as a single transaction, the loan term disclosed is 31 years.

B. *Term of permanent financing.* The loan term of the permanent financing is counted from the date that interest for the permanent financing periodic payments begins to accrue, regardless of when the permanent phase is disclosed.

ii. *Product.* A. *Separate construction loan disclosure.* If the construction financing is disclosed separately and has payments of interest only, the time period of the “Interest Only” feature that is disclosed as part of the product disclosure under §§1026.37(a)(10) and 1026.38(a)(5)(iii) is the period during which interest-only payments are actually made and excludes any final balloon payment of principal and interest. For example, the product disclosure for a fixed rate, interest-only construction loan with a term of 12 months in which there will be 11 monthly interest payments and a final balloon payment of principal and interest is “11 mo. Interest Only, Fixed Rate.”

B. *Combined construction-permanent disclosure.* If a single, combined construction-permanent disclosure is provided, the time period of the “Interest Only” feature that is disclosed as part of the product disclosure under §§1026.37(a)(10) and 1026.38(a)(5)(iii) is

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the full term of the interest-only construction financing plus any interest-only period for the permanent financing. For example, the product disclosure for a single disclosure, fixed rate, construction-permanent loan with a 12 month interest-only construction phase where the interest rate is not subject to modification upon conversion to the permanent phase is "1 Year Interest Only, Fixed Rate." If the first year of the permanent phase in this example also has a 12 month interest-only period, the product disclosure is "2 Year Interest Only, Fixed Rate."

C. *Product when interest rate at consummation not known.* If the interest rate for the permanent phase is not known at consummation for a construction-permanent loan using a single, combined construction-permanent disclosure or using separate disclosures for the permanent phase, the creditor shall disclose the loan product under §§1026.37(a)(10) and 1026.38(a)(5)(iii) as "Adjustable Rate." If the interest rate may increase under the terms of the legal obligation from the disclosures provided at consummation, the loan product description is "Adjustable Rate" in such cases, even if the interest rate will be fixed for the term of the permanent phase once it is set.

iii. *Interest rate.* If the permanent financing has an adjustable rate at consummation and separate disclosures are provided, the rate disclosed for the permanent financing is the fully-indexed rate pursuant to §1026.37(b)(2) and its commentary. If the permanent financing has a fixed rate that will not be adjusted when the construction phase converts to the permanent phase, that fixed rate is used for disclosure purposes. If the permanent financing has a rate that may adjust when the construction phase converts to the permanent phase, the permanent financing has an adjustable rate. If the legal obligation for a loan secured by the consumer's principal dwelling provides that the permanent financing interest rate may adjust when the construction financing converts to permanent financing, and such adjustment to the interest rate results in a corresponding adjustment to the payment, the creditor provides the disclosures pursuant to §1026.20(c), but not (d), if the interest rate for the permanent phase will be fixed after the conversion.

iv. *Increase in periodic payment.* If the amounts or timing of advances is unknown at or before consummation and the appendix D assumption that applies if interest is payable only on the amount advanced for the time it is outstanding is used to calculate the periodic payment:

A. A creditor discloses "YES" as the answer to "Can this amount increase after closing?" pursuant to §1026.37(b)(6)(iii) whether the creditor provides separate construction disclosures or combined construction-permanent disclosures, even though cal-

culation of the construction financing periodic payments using the assumptions in appendix D produces interest-only periodic payments that are equal in amount.

B. A creditor that discloses "YES" as the answer to "Can this amount increase after closing?" pursuant to §1026.37(b)(6)(iii) may use months or years for the §1026.37(b)(6)(iii) disclosures, consistent with comment 37(b)(6)-1. For example, for a 10-month construction loan, the first §1026.37(b)(6)(iii) disclosure bullet may disclose, "Adjusts every mo. starting in mo. 1" and the second §1026.37(b)(6)(iii) disclosure bullet may disclose, "Can go as high as \$[insert maximum possible periodic principal and interest payment] in year 1". The calculation of the maximum possible periodic principal and interest payment disclosed is based on the maximum principal balance that could be outstanding during the construction phase. As part of the "First Change/Amount" disclosure in the "Adjustable Payment (AP) Table" pursuant to §1026.37(i)(5)(i), the creditor may omit and leave blank the amount or range corresponding to the first periodic principal and interest payment that may change. In such cases, the creditor must still disclose the timing of the first change, which is the number of the earliest possible payment (e.g., 1st payment) that may change under the terms of the legal obligation.

C. When separate construction disclosures or the combined construction-permanent disclosures are provided for adjustable-rate construction financing, a creditor provides the §1026.37(b)(6)(iii) disclosures reflecting changes that are due to changes in the interest rate and changes that are due to changes in the total amount advanced. Such a creditor discloses "YES" as the answer to "Can this amount increase after closing?" pursuant to §1026.37(b)(6), because the initial periodic payment may increase based upon an increase in the interest rate in addition to a change based on the total amount advanced. Such a creditor also discloses a reference to the adjustable payment table required by §1026.37(i), disclosed as provided in comment app. D-7.iv.B, because that disclosure reflects both a change due to a change in the total amount advanced, which is a change to the periodic principal and interest payment that is not based on an adjustment to the interest rate, as well as the fact that there are interest-only payments. Such a creditor also includes a reference to the adjustable interest rate table required by §1026.37(j) because that disclosure reflects a change due to a change in the interest rate.

v. *Projected payments table.* A creditor must disclose a projected payments table for certain transactions secured by real property or a cooperative unit, pursuant to §§1026.37(c) and 1026.38(c), instead of the general payment schedule required by §1026.18(g) or the interest rate and payments summary table

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required by § 1026.18(s). Accordingly, some home construction loans that are secured by real property or a cooperative unit are subject to §§ 1026.37(c) and 1026.38(c) and not § 1026.18(g). See comment app. D–6 for a discussion of transactions that are subject to § 1026.18(s). Under § 1026.17(c)(6)(ii), when a multiple-advance construction loan may be permanently financed by the same creditor, the construction phase and the permanent phase may be treated as either one transaction or more than one transaction. The following are illustrations of the application of appendix D to transactions subject to §§ 1026.37(c) and 1026.38(c), under each of the § 1026.17(c)(6)(ii) alternatives:

A. If a creditor uses appendix D and elects pursuant to § 1026.17(c)(6)(ii) to disclose the construction and permanent phases as separate transactions, the construction phase must be disclosed according to the rules in §§ 1026.37(c) and 1026.38(c). Under §§ 1026.37(c) and 1026.38(c), the creditor must disclose the periodic payments during the construction phase in a projected payments table. The provision in appendix D, part I.A.3, which allows the creditor to omit the number and amounts of any interest payments “in disclosing the payment schedule under § 1026.18(g)” does not apply because the transaction is governed by §§ 1026.37(c) and 1026.38(c) rather than § 1026.18(g). If interest is payable only on the amount actually advanced for the time it is outstanding, the creditor determines the amount of the interest-only payment to be made during the construction phase using the assumptions in appendix D, part I.A.1. Also, because the construction phase is being disclosed as a separate transaction and its periodic payments do not repay the principal, the creditor must disclose the construction phase transaction as a product with a balloon payment feature, pursuant to §§ 1026.37(a)(10)(ii)(D) and 1026.38(a)(5)(iii), unless the transaction has negative amortization, interest-only, or step payment features, consistent with the requirement at § 1026.37(a)(10)(iii). In addition, the creditor must provide the balloon payment disclosures pursuant to §§ 1026.37(b)(5), 1026.37(b)(7)(ii), and 1026.38(b) and disclose the balloon payment in the projected payments table.

B. If the creditor elects to disclose the construction and permanent phases as a single transaction, the repayment schedule must be disclosed pursuant to appendix D, part II.C.2. Under appendix D, part II.C.2, the projected payments table reflects the interest-only payments during the construction phase in a first column. The first column also reflects the amortizing payments, and mortgage insurance and escrow payments, if any, for the permanent phase if the term of the construction phase is not a full year. The following column(s) reflect the payments for the permanent phase. If interest is payable only on

the amount actually advanced for the time it is outstanding, the creditor determines the amount of the interest-only payment to be made during the construction phase using the assumption in appendix D, part II.A.1.

C. Consistent with comments 37(c)(2)(ii)–1 and 37(c)(2)(iii)–1, when the loan is disclosed as one transaction and only the terms of the legal obligation for the permanent phase require mortgage insurance or escrow, the way the creditor discloses the escrow and mortgage insurance depends on whether the first column of the projected payments table exclusively discloses the construction phase. If the first column of the projected payments table exclusively discloses the construction phase, the creditor discloses “0” in the first column of the projected payments table for mortgage insurance and a hyphen or dash in the first column of the projected payments table for escrow. If the first column discloses both the construction phase and the permanent phase payments, the amount of the mortgage insurance premium or escrow payment (if any) for the permanent phase is disclosed in the first column.

vi. Disclosure of construction costs.

A. Construction costs are the costs of improvements to be made to the property that the consumer contracts for in connection with the financing transaction and that will be paid in whole or in part with loan proceeds.

B. On the Loan Estimate, a creditor factors construction costs into the funds for borrower calculation under § 1026.37(h)(1)(v). Because these amounts are disclosed under § 1026.38(j)(1)(v) on the Closing Disclosure, they are included in existing debt that is factored into the funds for borrower calculation under § 1026.37(h)(1)(v). Comment 37(h)(1)(v)–2 explains that the total amount of all existing debt being satisfied in the transaction that is used in the funds for borrower calculation 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. For transactions without a seller or for simultaneous subordinate financing, construction costs may instead be disclosed under § 1026.37(h)(2)(iii) in the optional alternative calculating cash to close table.

C. A creditor discloses the amount of construction costs on the Closing Disclosure under § 1026.38(j)(1)(v) in the summaries of transactions table and factors them into the down payment/funds from borrower and funds for borrower calculation under § 1026.38(i)(4) and (6). For transactions without a seller or for simultaneous subordinate financing, construction costs may instead be disclosed under § 1026.38(t)(5)(vii)(B) in the optional alternative calculating cash to close table.

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D. A creditor in some cases places a portion of a construction loan's proceeds in a reserve or other account at consummation. The amount of such an account, at the creditor's option, may be disclosed separately from other construction costs under §1026.38(j)(1)(v) if space permits, or may be included in the amount disclosed for construction costs under §1026.38(j)(1)(v). If the creditor chooses to disclose separately the amount of loan proceeds placed in a reserve or other account at consummation, the creditor may disclose the amount as a separate itemized cost, along with an itemized cost for the balance of the construction costs, in accordance with the disclosure and calculation options described in comments app. D-7.vi-B and C. The amount may be labeled with any accurate term, so long as any label the creditor uses is in accordance with the "clear and conspicuous" standard explained at comment 37(f)(5)-1. If the amount placed in an account is disclosed separately, the balance of construction costs disclosed excludes the amount placed in an account to avoid double counting.

vii. *Construction loan inspection and handling fees.* Comment 4(a)-1.ii.A provides that inspection and handling fees, including draw fees, for the staged disbursement of construction loan proceeds are part of the finance charge. Comment 37(f)-3 states that such inspection and handling fees are loan costs associated with the transaction for purposes of §1026.37(f) and, as such, must be disclosed accurately as part of the Loan Estimate. These fees must also be disclosed accurately as part of the Closing Disclosure. Comment 38(f)-2 refers to explanations under comments 37(f)-3 and 37(f)(6)-3 for making these disclosures. Comment 37(f)-3 explains that, if such fees are collected at or before consummation, they are disclosed in the loan costs table. If such fees will be collected after consummation, they are disclosed in a separate addendum and are not counted for purposes of the calculating cash to close table. Comment 37(f)(6)-3 explains how to disclose inspection and handling fees that will be collected after consummation in an addendum. Under comment 38(f)-2, the same explanation applies to an addendum used for disclosing such fees in the Closing Disclosure. Comment 37(l)(1)-1 explains that 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, and that loan costs are those costs disclosed under §1026.37(f). Construction loan inspection and handling fees are loan costs that must be included in the sum of the "In 5 Years" disclosure under §1026.37(l)(1) and the "Total of Payments" disclosure under §1026.38(o)(1) because they are disclosed

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under §1026.37(f), even when they are disclosed on an addendum.

APPENDIX F—OPTIONAL ANNUAL PERCENTAGE RATE COMPUTATIONS FOR CREDITORS OFFERING OPEN-END CREDIT PLANS SECURED BY A CONSUMER'S DWELLING

1. *Daily rate with specific transaction charge.* If the finance charge results from a charge relating to a specific transaction and the application of a daily periodic rate, see comment 14(c)(3)-2 for guidance on an appropriate calculation method.

APPENDICES G AND H—OPEN-END AND CLOSED-END MODEL FORMS AND CLAUSES

1. *Permissible changes.* Although use of the model forms and clauses is not required, creditors using them properly will be deemed to be in compliance with the regulation with regard to those disclosures. Creditors may make certain changes in the format or content of the forms and clauses and may delete any disclosures that are inapplicable to a transaction or a plan without losing the Act's protection from liability, except for formatting changes may not be made to model forms and samples in H-18, H-19, H-20, H-21, H-22, H-23, H-24, H-25, H-26, H-27, H-28, G-2(A), G-3(A), G-4(A), G-10(A)-(E), G-17(A)-(D), G-18(A) (except as permitted pursuant to §1026.7(b)(2)), G-18(B)-(C), G-19, G-20, and G-21, or to the model clauses in H-4(E), H-4(F), H-4(G), and H-4(H). Creditors may modify the heading of the second column shown in Model Clause H-4(H) to read "first adjustment" or "first increase," as applicable, pursuant to §1026.18(s)(2)(i)(C). The rearrangement of the model forms and clauses may not be so extensive as to affect the substance, clarity, or meaningful sequence of the forms and clauses. Creditors making revisions with that effect will lose their protection from civil liability. Except as otherwise specifically required, acceptable changes include, for example:

i. Using the first person, instead of the second person, in referring to the borrower.

ii. Using "borrower" and "creditor" instead of pronouns.

iii. Rearranging the sequences of the disclosures.

iv. Not using bold type for headings.

v. Incorporating certain State "plain English" requirements.

vi. Deleting inapplicable disclosures by whiting out, blocking out, filling in "N/A" (not applicable) or "0," crossing out, leaving blanks, checking a box for applicable items, or circling applicable items. (This should permit use of multipurpose standard forms.)

vii. Using a vertical, rather than a horizontal, format for the boxes in the closed-end disclosures.

2. *Debt-cancellation coverage.* This part does not authorize creditors to characterize debt-

cancellation fees as insurance premiums for purposes of this part. Creditors may provide a disclosure that refers to debt cancellation or debt suspension coverage whether or not the coverage is considered insurance. Creditors may use the model credit insurance disclosures only if the debt cancellation coverage constitutes insurance under state law.

APPENDIX G—OPEN-END MODEL FORMS AND CLAUSES

1. Models G-1 and G-1(A). The model disclosures in G-1 and G-1(A) (different balance computation methods) may be used in both the account-opening disclosures under § 1026.6 and the periodic disclosures under § 1026.7. As is clear from the models given, “shorthand” descriptions of the balance computation methods are not sufficient, except where § 1026.7(b)(5) applies. For creditors using model G-1, the phrase “a portion of” the finance charge should be included if the total finance charge includes other amounts, such as transaction charges, that are not due to the application of a periodic rate. If unpaid interest or finance charges are subtracted in calculating the balance, that fact must be stated so that the disclosure of the computation method is accurate. Only model G-1(b) contains a final sentence appearing in brackets, which reflects the total dollar amount of payments and credits received during the billing cycle. The other models do not contain this language because they reflect plans in which payments and credits received during the billing cycle are subtracted. If this is not the case, however, the language relating to payments and credits should be changed, and the creditor should add either the disclosure of the dollar amount as in model G-1(b) or an indication of which credits (disclosed elsewhere on the periodic statement) will not be deducted in determining the balance. (Such an indication may also substitute for the bracketed sentence in model G-1(b).) (See the commentary to § 1026.7(a)(5) and (b)(5).) For open-end plans subject to the requirements of § 1026.40, creditors may, at their option, use the clauses in G-1 or G-1(A).

2. Models G-2 and G-2(A). These models contain the notice of liability for unauthorized use of a credit card. For home-equity plans subject to the requirements of § 1026.40, at the creditor's option, a creditor either may use G-2 or G-2(A). For open-end plans not subject to the requirements of § 1026.40, creditors properly use G-2(A).

3. Models G-3, G-3(A), G-4 and G-4(A).

i. These set out models for the long-form billing-error rights statement (for use with the account-opening disclosures and as an annual disclosure or, at the creditor's option, with each periodic statement) and the alternative billing-error rights statement (for use with each periodic statement), respectively. For home-equity plans subject to

the requirements of § 1026.40, at the creditor's option, a creditor either may use G-3 or G-3(A), and for creditors that use the short form, G-4 or G-4(A). For open-end (not home-secured) plans that are not subject to the requirements of § 1026.40, creditors properly use G-3(A) and G-4(A). Creditors must provide the billing-error rights statements in a form substantially similar to the models in order to comply with the regulation. The model billing-rights statements may be modified in any of the ways set forth in the first paragraph to the commentary on Appendices G and H. The models may, furthermore, be modified by deleting inapplicable information, such as:

A. The paragraph concerning stopping a debit in relation to a disputed amount, if the creditor does not have the ability to debit automatically the consumer's savings or checking account for payment.

B. The rights stated in the special rule for credit card purchases and any limitations on those rights.

ii. The model billing rights statements also contain optional language that creditors may use. For example, the creditor may:

A. Include a statement to the effect that notice of a billing error must be submitted on something other than the payment ticket or other material accompanying the periodic disclosures.

B. Insert its address or refer to the address that appears elsewhere on the bill.

C. Include instructions for consumers, at the consumer's option, to communicate with the creditor electronically or in writing.

iii. Additional information may be included on the statements as long as it does not detract from the required disclosures. For instance, information concerning the reporting of errors in connection with a checking account may be included on a combined statement as long as the disclosures required by the regulation remain clear and conspicuous.

4. Models G-5 through G-9. These models set out notices of the right to rescind that would be used at different times in an open-end plan. The last paragraph of each of the rescission model forms contains a blank for the date by which the consumer's notice of cancellation must be sent or delivered. A parenthetical is included to address the situation in which the consumer's right to rescind the transaction exists beyond 3 business days following the date of the transaction, for example, when the notice or material disclosures are delivered late or when the date of the transaction in paragraph 1 of the notice is an estimate. The language of the parenthetical is not optional. See the commentary to § 1026.2(a)(25) regarding the specificity of the security interest disclosure for model form G-7.

5. Model G-10(A), samples G-10(B) and G-10(C), model G-10(D), sample G-10(E), model G-

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17(A), and samples G-17(B), 17(C) and 17(D). i. Model G-10(A) and Samples G-10(B) and G-10(C) illustrate, in the tabular format, the disclosures required under §1026.60 for applications and solicitations for credit cards other than charge cards. Model G-10(D) and Sample G-10(E) illustrate the tabular format disclosure for charge card applications and solicitations and reflect the disclosures in the table. Model G-17(A) and Samples G-17(B), G-17(C) and G-17(D) illustrate, in the tabular format, the disclosures required under §1026.6(b)(2) for account-opening disclosures.

ii. Except as otherwise permitted, disclosures must be substantially similar in sequence and format to Models G-10(A), G-10(D) and G-17(A). While proper use of the model forms will be deemed in compliance with the regulation, card issuers and other creditors offering open-end (not home-secured) plans are permitted to disclose the annual percentage rates for purchases, cash advances, or balance transfers in the same row in the table for any transaction types for which the issuer or creditor charges the same annual percentage rate. Similarly, card issuer and other creditors offering open-end (not home-secured) plans are permitted to disclose fees of the same amount in the same row if the fees are in the same category. Fees in different categories may not be disclosed in the same row. For example, a transaction fee and a penalty fee that are of the same amount may not be disclosed in the same row. Card issuers and other creditors offering open-end (not home-secured) plans are also permitted to use headings other than those in the forms if they are clear and concise and are substantially similar to the headings contained in model forms, with the following exceptions. The heading "penalty APR" must be used when describing rates that may increase due to default or delinquency or as a penalty, and in relation to required insurance, or debt cancellation or suspension coverage, the term "required" and the name of the product must be used. (See also §§1026.60(b)(5) and 1026.6(b)(2)(v) for guidance on headings that must be used to describe the grace period, or lack of grace period, in the disclosures required under §1026.60 for applications and solicitations for credit cards other than charge cards, and the disclosures required under §1026.6(b)(2) for account-opening disclosures, respectively.)

iii. Models G-10(A) and G-17(A) contain two alternative headings ("Minimum Interest Charge" and "Minimum Charge") for disclosing a minimum interest or fixed finance charge under §§1026.60(b)(3) and 1026.6(b)(2)(ii). If a creditor imposes a minimum charge in lieu of interest in those months where a consumer would otherwise incur an interest charge but that interest charge is less than the minimum charge, the creditor should disclose this charge under

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the heading "Minimum Interest Charge" or a substantially similar heading. Other minimum or fixed finance charges should be disclosed under the heading "Minimum Charge" or a substantially similar heading.

iv. Models G-10(A), G-10(D) and G-17(A) contain two alternative headings ("Annual Fees" and "Set-up and Maintenance Fees") for disclosing fees for issuance or availability of credit under §1026.60(b)(2) or §1026.6(b)(2)(ii). If the only fee for issuance or availability of credit disclosed under §1026.60(b)(2) or §1026.6(b)(2)(ii) is an annual fee, a creditor should use the heading "Annual Fee" or a substantially similar heading to disclose this fee. If a creditor imposes fees for issuance or availability of credit disclosed under §1026.60(b)(2) or §1026.6(b)(2)(ii) other than, or in addition to, an annual fee, the creditor should use the heading "Set-up and Maintenance Fees" or a substantially similar heading to disclose fees for issuance or availability of credit, including the annual fee.

v. Although creditors are not required to use a certain paper size in disclosing the §§1026.60 or 1026.6(b)(1) and (2) disclosures, samples G-10(B), G-10(C), G-17(B), G-17(C) and G-17(D) are designed to be printed on an 8½ × 14 inch sheet of paper. A creditor may use a smaller sheet of paper, such as 8½ × 11 inch sheet of paper. If the table is not provided on a single side of a sheet of paper, the creditor must include a reference or references, such as "SEE BACK OF PAGE for more important information about your account." at the bottom of each page indicating that the table continues onto an additional page or pages. A creditor that splits the table onto two or more pages must disclose the table on consecutive pages and may not include any intervening information between portions of the table. In addition, the following formatting techniques were used in presenting the information in the sample tables to ensure that the information is readable:

A. A readable font style and font size (10-point Arial font style, except for the purchase annual percentage rate which is shown in 16-point type).

B. Sufficient spacing between lines of the text.

C. Adequate spacing between paragraphs when several pieces of information were included in the same row of the table, as appropriate. For example, in the samples in the row of the tables with the heading "APR for Balance Transfers," the forms disclose two components: The applicable balance transfer rate and a cross reference to the balance transfer fee. The samples show these two components on separate lines with adequate space between each component. On the other hand, in the samples, in the disclosure of the late payment fee, the forms disclose two components: The late payment fee, and the

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cross reference to the penalty rate. Because the disclosure of both these components is short, these components are disclosed on the same line in the tables.

D. Standard spacing between words and characters. In other words, the text was not compressed to appear smaller than 10-point type.

E. Sufficient white space around the text of the information in each row, by providing sufficient margins above, below and to the sides of the text.

F. Sufficient contrast between the text and the background. Generally, black text was used on white paper.

vi. While the Bureau is not requiring issuers to use the above formatting techniques in presenting information in the table (except for the 10-point and 16-point font requirement), the Bureau encourages issuers to consider these techniques when deciding how to disclose information in the table, to ensure that the information is presented in a readable format.

vii. Creditors are allowed to use color, shading and similar graphic techniques with respect to the table, so long as the table remains substantially similar to the model and sample forms in appendix G.

viii. Models G-10(A) and G-17(A) contain rows in the table with the prescribed language, “For Credit Card Tips from the Consumer Financial Protection Bureau” and calling for a “[Reference to the Bureau’s Web site]” next to that language. Until January 1, 2013, creditors may substitute “For Credit Card Tips from the Federal Reserve Board” for these two model forms’ prescribed language and may provide a reference to the Federal Reserve Board’s Web site rather than the Bureau’s Web site.

6. *Model G-11.* Model G-11 contains clauses that illustrate the general disclosures required under §1026.60(e) in applications and solicitations made available to the general public.

7. *Models G-13(A) and G-13(B).* These model forms illustrate the disclosures required under §1026.9(f) when the card issuer changes the entity providing insurance on a credit card account. Model G-13(A) contains the items set forth in §1026.9(f)(3) as examples of significant terms of coverage that may be affected by the change in insurance provider. The card issuer may either list all of these potential changes in coverage and place a check mark by the applicable changes, or list only the actual changes in coverage. Under either approach, the card issuer must either explain the changes or refer to an accompanying copy of the policy or group certificate for details of the new terms of coverage. Model G-13(A) also illustrates the permissible combination of the two notices required by §1026.9(f)—the notice required for a planned change in provider and the notice required once a change has occurred. This form

may be modified for use in providing only the disclosures required before the change if the card issuer chooses to send two separate notices. Thus, for example, the references to the attached policy or certificate would not be required in a separate notice prior to a change in the insurance provider since the policy or certificate need not be provided at that time. Model G-13(B) illustrates the disclosures required under §1026.9(f)(2) when the insurance provider is changed.

8. *Samples G-18(A)–(D).* For home-equity plans subject to the requirements of §1026.40, if a creditor chooses to comply with the requirements in §1026.7(b), the creditor may use Samples G-18(A) through G-18(D) to comply with these requirements, as applicable.

9. *Samples G-18(D).* Sample G-18(D) illustrates how credit card issuers may comply with proximity requirements for payment information on periodic statements. Creditors that offer card accounts with a charge card feature and a revolving feature may change the disclosure to make clear to which feature the disclosures apply.

10. *Forms G-18(F)–(G).* Forms G-18(F) and G-18(G) are intended as a compliance aid to illustrate front sides of a periodic statement, and how a periodic statement for open-end (not home-secured) plans might be designed to comply with the requirements of §1026.7. The samples contain information that is not required by Regulation Z. The samples also present information in additional formats that are not required by Regulation Z.

i. Creditors are not required to use a certain paper size in disclosing the §1026.7 disclosures. However, Forms G-18(F) and G-18(G) are designed to be printed on an 8 × 14 inch sheet of paper.

ii. The due date for a payment, if a late payment fee or penalty rate may be imposed, must appear on the front of the first page of the statement. See Sample G-18(D) that illustrates how a creditor may comply with proximity requirements for other disclosures. The payment information disclosures appear in the upper right-hand corner on Samples G-18(F) and G-18(G), but may be located elsewhere, as long as they appear on the front of the first page of the periodic statement. The summary of account activity presented on Samples G-18(F) and G-18(G) is not itself a required disclosure, although the previous balance and the new balance, presented in the summary, must be disclosed in a clear and conspicuous manner on periodic statements.

iii. Additional information not required by Regulation Z may be presented on the statement. The information need not be located in any particular place or be segregated from disclosures required by Regulation Z, although the effect of proximity requirements for required disclosures, such as the due date, may cause the additional information

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to be segregated from those disclosures required to be disclosed in close proximity to one another. Any additional information must be presented consistent with the creditor's obligation to provide required disclosures in a clear and conspicuous manner.

iv. Model Forms G-18(F) and G-18(G) demonstrate two examples of ways in which transactions could be presented on the periodic statement. Model Form G-18(G) presents transactions grouped by type and Model Form G-18(F) presents transactions in a list in chronological order. Neither of these approaches to presenting transactions is required; a creditor may present transactions differently, such as in a list grouped by authorized user or other means.

11. *Model Form G-19.* See §1026.9(b)(3) regarding the headings required to be disclosed when describing in the tabular disclosure a grace period (or lack of a grace period) offered on check transactions that access a credit card account.

12. *Sample G-24.* Sample G-24 includes two model clauses for use in complying with §1026.16(h)(4). Model clause (a) is for use in connection with credit card accounts under an open-end (not home-secured) consumer credit plan. Model clause (b) is for use in connection with other open-end credit plans.

APPENDIX H—CLOSED-END FORMS AND CLAUSES

1. *Models H-1 and H-2.* i. Creditors may make several types of changes to closed-end model forms H-1 (credit sale) and H-2 (loan) and still be deemed to be in compliance with the regulation, provided that the required disclosures are made clearly and conspicuously. Permissible changes include the addition of the information permitted by §1026.17(a)(1) and "directly related" information as set forth in the commentary to §1026.17(a).ii. The creditor may also delete or, on multi-purpose forms, indicate inapplicable disclosures, such as:

A. The itemization of the amount financed option. (See Samples H-12 through H-15.)

B. The credit life and disability insurance disclosures. (See Samples H-11 and H-12.)

C. The property insurance disclosures. (See Samples H-10 through H-12, and H-14.)

D. The "filing fees" and "non-filing insurance" disclosures. (See Samples H-11 and H-12.)

E. The prepayment penalty or rebate disclosures. (See Samples H-12 and H-14.)

F. The total sale price. (See Samples H-11 through H-15.)

iii. Other permissible changes include:

A. Adding the creditor's address or telephone number. (See the commentary to §1026.18(a).)

B. Combining required terms where several numerical disclosures are the same, for instance, if the "total of payments" equals the

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"total sale price." (See the commentary to §1026.18.)

C. Rearranging the sequence or location of the disclosures—for instance, by placing the descriptive phrases outside the boxes containing the corresponding disclosures, or by grouping the descriptors together as a glossary of terms in a separate section of the segregated disclosures; by placing the payment schedule at the top of the form; or by changing the order of the disclosures in the boxes, including the annual percentage rate and finance charge boxes.

D. Using brackets, instead of checkboxes, to indicate inapplicable disclosures.

E. Using a line for the consumer to initial, rather than a checkbox, to indicate an election to receive an itemization of the amount financed.

F. Deleting captions for disclosures.

G. Using a symbol, such as an asterisk, for estimated disclosures, instead of an "e."

H. Adding a signature line to the insurance disclosures to reflect joint policies.

I. Separately itemizing the filing fees.

J. Revising the late charge disclosure in accordance with the commentary to §1026.18(l).

2. *Model H-3.* Creditors have considerable flexibility in filling out Model H-3 (itemization of the amount financed). Appropriate revisions, such as those set out in the commentary to §1026.18(c), may be made to this form without loss of protection from civil liability for proper use of the model forms.

3. *Models H-4 through H-7.* The model clauses are not included in the model forms although they are mandatory for certain transactions. Creditors using the model clauses when applicable to a transaction are deemed to be in compliance with the regulation with regard to that disclosure.

4. *Model H-4(A).* This model contains the variable rate model clauses applicable to transactions subject to §1026.18(f)(1) and is intended to give creditors considerable flexibility in structuring variable rate disclosures to fit individual plans. The information about circumstances, limitations, and effects of an increase may be given in terms of the contract interest rate or the annual percentage rate. Clauses are shown for hypothetical examples based on the specific amount of the transaction and based on a representative amount. Creditors may preprint the variable rate disclosures based on a representative amount for similar types of transactions, instead of constructing an individualized example for each transaction. In both representative examples and transaction-specific examples, creditors may refer either to the incremental change in rate, payment amount, or number of payments, or to the resulting rate, payment amount, or number of payments. For example, creditors may state that the rate will increase by 2%, with

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a corresponding \$150 increase in the payment, or creditors may state that the rate will increase to 16%, with a corresponding payment of \$850.

5. *Model H-4(B)*. This model clause illustrates the variable-rate disclosure required under § 1026.18(f)(2), which would alert consumers to the fact that the transaction contains a variable-rate feature and that disclosures were provided earlier.

6. *Model H-4(C)*. This model clause illustrates the early disclosures required generally under § 1026.19(b). It includes information on how the consumer's interest rate is determined and how it can change over the term of the loan, and explains changes that may occur in the borrower's monthly payment. It contains an example of how to disclose historical changes in the index or formula values used to compute interest rates for the preceding 15 years. The model clause also illustrates the disclosure of the initial and maximum interest rates and payments based on 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 and illustrates how to provide consumers with a method for calculating the monthly payment for the loan amount to be borrowed.

7. *Models H-4(D) through H-4(J)*. These model clauses and sample and model forms illustrate certain notices, statements, and other disclosures required as follows:

i. Model H-4(D)(1) illustrates the interest rate adjustment notice required under § 1026.20(c) and Model H-4(D)(2) provides an example of a notice of interest rate adjustment with corresponding payment change. Model H-4(D)(3) illustrates the interest rate adjustment notice required under § 1026.20(d) and Model H-4(D)(4) provides an example of a notice of initial interest rate adjustment.

ii. Model H-4(E) illustrates the interest rate and payment summary table required under § 1026.18(s) for a fixed-rate mortgage transaction.

iii. Model H-4(F) illustrates the interest rate and payment summary table required under § 1026.18(s) for an adjustable-rate or a step-rate mortgage transaction.

iv. Model H-4(G) illustrates the interest rate and payment summary table required under § 1026.18(s) for a mortgage transaction with negative amortization.

v. Model H-4(H) illustrates the interest rate and payment summary table required under § 1026.18(s) for a fixed-rate, interest-only mortgage transaction.

vi. Model H-4(I) illustrates the introductory rate disclosure required by § 1026.18(s)(2)(iii) for an adjustable-rate mortgage transaction with an introductory rate.

vii. Model H-4(J) illustrates the balloon payment disclosure required by § 1026.18(s)(5)

for a mortgage transaction with a balloon payment term.

viii. Model H-4(K) illustrates the no-guarantee-to-refinance statement required by § 1026.18(t) for a mortgage transaction.

8. *Model H-5*. This contains the demand feature clause.

9. *Model H-6*. This contains the assumption clause.

10. *Model H-7*. This contains the required deposit clause.

11. *Models H-8 and H-9*. These models contain the rescission notices for a typical closed-end transaction and a refinancing, respectively. The last paragraph of each model form contains a blank for the date by which the consumer's notice of cancellation must be sent or delivered. A parenthetical is included to address the situation in which the consumer's right to rescind the transaction exists beyond 3 business days following the date of the transaction, for example, where the notice or material disclosures are delivered late or where the date of the transaction in paragraph 1 of the notice is an estimate. The language of the parenthetical is not optional. See the commentary to § 1026.2(a)(25) regarding the specificity of the security interest disclosure for model form H-9. The prior version of model form H-9 is substantially similar to the current version and creditors may continue to use it, as appropriate. Creditors are encouraged, however, to use the current version when reordering or reprinting forms.

12. *Sample forms*. The sample forms (H-10 through H-15) serve a different purpose than the model forms. The samples illustrate various ways of adapting the model forms to the individual transactions described in the commentary to appendix H. The deletions and rearrangements shown relate only to the specific transactions described. As a result, the samples do not provide the general protection from civil liability provided by the model forms and clauses.

13. *Sample H-10*. This sample illustrates an automobile credit sale. The cash price is \$7,500 with a downpayment of \$1,500. There is an 8% add-on interest rate and a term of 3 years, with 36 equal monthly payments. The credit life insurance premium and the filing fees are financed by the creditor. There is a \$25 credit report fee paid by the consumer before consummation, which is a prepaid finance charge.

14. *Sample H-11*. This sample illustrates an installment loan. The amount of the loan is \$5,000. There is a 12% simple interest rate and a term of 2 years. The date of the transaction is expected to be April 15, 1981, with the first payment due on June 1, 1981. The first payment amount is labeled as an estimate since the transaction date is uncertain. The odd days' interest (\$26.67) is collected with the first payment. The remaining 23 monthly payments are equal.

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15. *Sample H-12.* This sample illustrates a refinancing and consolidation loan. The amount of the loan is \$5,000. There is a 15% simple interest rate and a term of 3 years. The date of the transaction is April 1, 1981, with the first payment due on May 1, 1981. The first 35 monthly payments are equal, with an odd final payment. The credit disability insurance premium is financed. In calculating the annual percentage rate, the U.S. Rule has been used. Since an itemization of the amount financed is included with the disclosures, the statement regarding the consumer's option to receive an itemization is deleted.

16. *Samples H-13 through H-15.* These samples illustrate various closed-end transactions. Samples H-13 and H-15 are for transactions subject to §1026.17(a). Samples H-13 and H-15 do not illustrate the requirements of §1026.18(c) or (p) regarding the itemization of the amount financed and a reference to contract documents. See form H-2 for a model for these requirements.

17. *Sample H-13.* This sample illustrates a mortgage with a demand feature. The loan amount is \$44,900, payable in 360 monthly installments at a simple interest rate of 14.75%. The 15 days of interim interest (\$294.34) is collected as a prepaid finance charge at the time of consummation of the loan (April 15, 1981). In calculating the disclosure amounts, the minor irregularities provision in §1026.17(c)(4) has been used. The property insurance premiums are not included in the payment schedule. This disclosure statement could be used for notes with the 7-year call option required by the Federal National Mortgage Association (FNMA) in states where due-on-sale clauses are prohibited.

18. *Sample H-14.* This sample disclosure form illustrates the disclosures under §1026.19(b) for a variable-rate transaction secured by the consumer's principal dwelling with a term greater than one year. The sample form shows a creditor how to adapt the model clauses in appendix H-4(C) to the creditor's own particular variable-rate program. The sample disclosure form describes the features of a specific variable-rate mortgage program and alerts the consumer to the fact that information on the creditor's other closed-end variable-rate programs is available upon request. It includes information on how the interest rate is determined and how it can change over time. Section 1026.19(b)(2)(viii) permits creditors the option to provide either a historical example or an initial and maximum interest rates and payments disclosure; both are illustrated in the sample disclosure. The historical example explains how the monthly payment can change based on a \$10,000 loan amount, payable in 360 monthly installments, based on historical changes in the values for the weekly average yield on U.S. Treasury Secu-

rities adjusted to a constant maturity of one year. Index values are measured for 15 years, as of the first week ending in July. This reflects the requirement that the index history be based on values for the same date or period each year in the example. The sample disclosure also illustrates the alternative disclosure under §1026.19(b)(2)(viii)(B) that the initial and the maximum interest rates and payments be shown for a \$10,000 loan originated at an initial interest rate of 12.41 percent (which was in effect July 1996) and to have 2 percentage point annual (and 5 percentage point overall) interest rate limitations or caps. Thus, the maximum amount that the interest rate could rise under this program is 5 percentage points higher than the 12.41 percent initial rate to 17.41 percent, and the monthly payment could rise from \$106.03 to a maximum of \$145.34. The loan would not reach the maximum interest rate until its fourth year because of the 2 percentage point annual rate limitations, and the maximum payment disclosed reflects the amortization of the loan during that period. The sample form also illustrates how to provide consumers with a method for calculating their actual monthly payment for a loan amount other than \$10,000.

19. *Sample H-15.* This sample illustrates a graduated payment transaction subject to §1026.17(a) with a 5-year graduation period and a 7½ percent yearly increase in payments. The loan amount is \$44,900, payable in 360 monthly installments at a simple interest rate of 14.75%. Two points (\$898), as well as an initial guarantee insurance premium of \$225.00, are included in the prepaid finance charge. The guarantee insurance premiums are calculated on the basis of ¼ of 1% of the outstanding principal balance under an annual reduction plan. The abbreviated disclosure permitted under §1026.18(g)(2) is used for the payment schedule for years 6 through 30. The prepayment disclosure refers to both penalties and rebates because information about penalties is required for the simple interest portion of the obligation and information about rebates is required for the guarantee insurance portion of the obligation.

20. *Sample H-16.* This sample illustrates the disclosures required under §1026.32(c). The sample illustrates the amount borrowed and the disclosures about optional insurance that are required for mortgage refinancings under §1026.32(c)(5). Creditors may, at their option, include these disclosures for all loans subject to §1026.32. The sample also includes disclosures required under §1026.32(c)(3) when the legal obligation includes a balloon payment.

21. *HRSA-500-1 9-82.* Pursuant to section 113(a) of the Truth in Lending Act, Form HRSA-500-1 9-82 issued by the U.S. Department of Health and Human Services for certain student loans has been approved for use

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for loans made prior to the mandatory compliance date of the disclosures required under Subpart F. The form was approved for all Health Education Assistance Loans (HEAL) with a variable interest rate that were considered interim student credit extensions as defined in Regulation Z.

22. *HRSA-500-2 9-82*. Pursuant to section 113(a) of the Truth in Lending Act, Form HRSA-500-2 9-82 issued by the U.S. Department of Health and Human Services for certain student loans has been approved for use for loans made prior to the mandatory compliance date of the disclosures required under Subpart F. The form was approved for all HEAL loans with a fixed interest rate that were considered interim student credit extensions as defined in Regulation Z.23. *HRSA-502-1 9-82*. Pursuant to section 113(a) of the Truth in Lending Act, Form HRSA-502-1 9-82 issued by the U.S. Department of Health and Human Services for certain student loans has been approved for use for loans made prior to the mandatory compliance date of the disclosures required under Subpart F. The form was approved for all HEAL loans with a variable interest rate in which the borrower has reached repayment status and is making payments of both interest and principal.

24. *HRSA-502-2 9-82*. Pursuant to section 113(a) of the Truth in Lending Act, Form HRSA-502-2 9-82 issued by the U.S. Department of Health and Human Services for certain student loans has been approved for use for loans made prior to the mandatory compliance date of the disclosures required under Subpart F. The form was approved for all HEAL loans with a fixed interest rate in which the borrower has reached repayment status and is making payments of both interest and principal.

25. *Models H-18, H-19, H-20*. i. These model forms illustrate disclosures required under § 1026.47 on or with an application or solicitation, at approval, and after acceptance of a private education loan. Although use of the model forms is not required, creditors using them properly will be deemed to be in compliance with the regulation with regard to private education loan disclosures. Creditors may make certain types of changes to private education loan model forms H-18 (application and solicitation), H-19 (approval), and H-20 (final) and still be deemed to be in compliance with the regulation, provided that the required disclosures are made clearly and conspicuously. The model forms aggregate disclosures into groups under specific headings. Changes may not include rearranging the sequence of disclosures, for instance, by rearranging which disclosures are provided under each heading or by rearranging the sequence of the headings and grouping of disclosures. Changes to the model forms may not be so extensive as to affect the substance or clarity of the forms.

Creditors making revisions with that effect will lose their protection from civil liability.

ii. The creditor may delete inapplicable disclosures, such as:

A. The Federal student financial assistance alternatives disclosures.

B. The self-certification disclosure.

iii. Other permissible changes include, for example:

A. Adding the creditor's address, telephone number, or Web site.

B. Adding loan identification information, such as a loan identification number.

C. Adding the date on which the form was printed or produced.

D. Placing the notice of the right to cancel in the top left or top right of the disclosure to accommodate a window envelope.

E. Combining required terms where several numerical disclosures are the same. For instance, if the itemization of the amount financed is provided, the amount financed need not be separately disclosed.

F. Combining the disclosure of loan term and payment deferral options required in § 1026.47(a)(3) with the disclosure of cost estimates required in § 1026.47(a)(4) in the same chart or table (See comment 47(a)(3)-4.)

G. Using the first person, instead of the second person, in referring to the borrower.

H. Using "borrower" and "creditor" instead of pronouns.

I. Incorporating certain state "plain English" requirements.

J. Deleting inapplicable disclosures by whiting out, blocking out, filling in "N/A" (not applicable) or "0," crossing out, leaving blanks, checking a box for applicable items, or circling applicable items.

iv. Although creditors are not required to use a certain paper size in disclosing the §§ 1026.47(a), (b) and (c) disclosures, samples H-21, H-22, and H-23 are designed to be printed on two 8½ × 11 inch sheets of paper. A creditor may use a larger sheet of paper, such as 8½ × 14 inch sheets of paper, or may use multiple pages. If the disclosures are provided on two sides of a single sheet of paper, the creditor must include a reference or references, such as "SEE BACK OF PAGE" at the bottom of each page indicating that the disclosures continue onto the back of the page. If the disclosures are on two or more pages, a creditor may not include any intervening information between portions of the disclosure. In addition, the following formatting techniques were used in presenting the information in the sample tables to ensure that the information is readable:

A. A readable font style and font size (10-point Helvetica font style for body text).

B. Sufficient spacing between lines of the text.

C. Standard spacing between words and characters. In other words, the body text was not compressed to appear smaller than the 10-point type size.

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D. Sufficient white space around the text of the information in each row, by providing sufficient margins above, below and to the sides of the text.

E. Sufficient contrast between the text and the background. Generally, black text was used on white paper.

v. While the Bureau is not requiring issuers to use the above formatting techniques in presenting information in the disclosure, the Bureau encourages issuers to consider these techniques when deciding how to disclose information in the disclosure to ensure that the information is presented in a readable format.

vi. Creditors are allowed to use color, shading and similar graphic techniques in the disclosures, so long as the disclosures remain substantially similar to the model and sample forms in appendix H.

26. *Sample H-21.* This sample illustrates a disclosure required under §1026.47(a). The sample assumes a range of interest rates between 7.375% and 17.375%. The sample assumes a variable interest rate that will never exceed 25% over the life of the loan. The term of the sample loan is 20 years for an amount up to \$20,000 and 30 years for an amount more than \$20,000. The repayment options and sample costs have been combined into a single table, as permitted in the commentary to §1026.47(a)(3). It demonstrates the loan amount, interest rate, and total paid when a consumer makes loan payments while in school, pays only interest while in school, and defers all payments while in school.

27. *Sample H-22.* This sample illustrates a disclosure required under §1026.47(b). The sample assumes the consumer financed \$10,000 at an 8.23% annual percentage rate. The sample assumes a variable interest rate that will never exceed 25% over the life of the loan. The payment schedule and terms assumes a 20-year loan term and that the consumer elected to defer payments while enrolled in school. This includes a sample disclosure of a total loan amount of \$10,600 and prepaid finance charges totaling \$600, for a total amount financed of \$10,000.

28. *Sample H-22.* This sample illustrates a disclosure required under §1026.47(c). The sample assumes the consumer financed \$10,000 at an 8.23% annual percentage rate. The sample assumes a variable annual percentage rate in an instance where there is no maximum interest rate. The sample demonstrates disclosure of an assumed maximum rate, and the statement that the consumer's actual maximum rate and payment amount could be higher. The payment schedule and terms assumes a 20-year loan term, the assumed maximum interest rate, and that the consumer elected to defer payments while enrolled in school. This includes a sample disclosure of a total loan amount of \$10,600

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and prepaid finance charges totaling \$600, for a total amount financed of \$10,000.

29. *Model Form H-29.* Model form H-29 contains the disclosures for the cancellation of an escrow account established in connection with a closed-end transaction secured by a first lien on real property or a dwelling.

i. This model form illustrates the disclosures required by §1026.20(e).

ii. A creditor or servicer satisfies §1026.20(e) if it provides model form H-29 or a substantially similar notice, which is properly completed with the disclosures required by §1026.20(e).

iii. Although creditors and servicers are not required to use a certain paper size in disclosing the information under §1026.20(e), model form H-29 is designed to be printed on an 8½ × 1- inch sheet of paper. In addition, the following formatting techniques were used in presenting the information in the model form to ensure that the information is readable:

A. A readable font style and font size (10-point minimum font size);

B. Sufficient spacing between lines of the text;

C. Standard spacing between words and characters. In other words, the text was not compressed to appear smaller than 10-point type;

D. Sufficient white space around the text of the information in each row, by providing sufficient margins above, below and to the sides of the text;

E. Sufficient contrast between the text and the background. Generally, black text was used on white paper.

iv. While the regulation does not require creditors or servicers to use the above formatting techniques in presenting information in the tabular format (except for the 10-point minimum font size requirement), creditors and servicers are encouraged to consider these techniques when deciding how to disclose information in the notice to ensure that the information is presented in a readable format.

v. Creditors and servicers may use color, shading and similar graphic techniques with respect to the notice, so long as the notice remains substantially similar to model form H-29.

30. *Standard Loan Estimate and Closing Disclosure forms.* Forms H-24(A) through (G), H-25(A) through (J), and H-28(A) through (J) are model forms for the disclosures required under §§1026.37 and 1026.38. However, pursuant to §§1026.37(o)(3) and 1026.38(t)(3), for federally related mortgage loans forms H-24(A) through (G) and H-25(A) through (J) are standard forms required to be used for the disclosures required under §§1026.37 and 1026.38, respectively.

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APPENDIX J—ANNUAL PERCENTAGE RATE COMPUTATIONS FOR CLOSED-END CREDIT TRANSACTIONS

1. *Use of appendix J.* Appendix J sets forth the actuarial equations and instructions for calculating the annual percentage rate in closed-end credit transactions. While the formulas contained in this appendix may be directly applied to calculate the annual percentage rate for an individual transaction, they may also be utilized to program calculators and computers to perform the calculations.

2. *Relation to Bureau tables.* The Bureau's Annual Percentage Rate Tables also provide creditors with a calculation tool that applies the technical information in appendix J. An annual percentage rate computed in accordance with the instructions in the tables is deemed to comply with the regulation. Volume I of the tables may be used for credit transactions involving equal payment amounts and periods, as well as for transactions involving any of the following irregularities: odd first period, odd first payment and odd last payment. Volume II of the tables may be used for transactions that involve any type of irregularities. These tables may be obtained from the Bureau, 1700 G Street NW, Washington, DC 20552, upon request. The tables are also available on the Bureau's website at: <https://www.consumerfinance.gov/compliance/compliance-resources/other-applicable-requirements/annual-percentage-rate-tables/>.

APPENDIX K—TOTAL ANNUAL LOAN COST RATE COMPUTATIONS FOR REVERSE MORTGAGE TRANSACTIONS

1. *General.* The calculation of total annual loan cost rates under appendix K is based on the principles set forth and the estimation or “iteration” procedure used to compute annual percentage rates under appendix J. Rather than restate this iteration process in full, the regulation cross-references the procedures found in appendix J. In other aspects the appendix reflects the special nature of reverse mortgage transactions. Special definitions and instructions are included where appropriate.

- (b) Instructions and equations for the total annual loan cost rate
- (b)(5) Number of unit-periods between two given dates

1. *Assumption as to when transaction begins.* The computation of the total annual loan cost rate is based on the assumption that the reverse mortgage transaction begins on the first day of the month in which consummation is estimated to occur. Therefore, fractional unit-periods (used under appendix J for calculating annual percentage rates) are not used.

(b)(9) Assumption for discretionary cash advances

1. *Amount of credit.* Creditors should compute the total annual loan cost rates for transactions involving discretionary cash advances by assuming that 50 percent of the initial amount of the credit available under the transaction is advanced at closing or, in an open-end transaction, when the consumer becomes obligated under the plan. (For the purposes of this assumption, the initial amount of the credit is the principal loan amount less any costs to the consumer under § 1026.33(c)(1).)

(b)(10) Assumption for variable-rate reverse mortgage transactions

1. *Initial discount or premium rate.* Where a variable-rate reverse mortgage transaction includes an initial discount or premium rate, the creditor should apply the same rules for calculating the total annual loan cost rate as are applied when calculating the annual percentage rate for a loan with an initial discount or premium rate (see the commentary to § 1026.17(c)).

(d) Reverse mortgage model form and sample form

(d)(2) Sample form

1. *General.* The “clear and conspicuous” standard for reverse mortgage disclosures does not require disclosures to be printed in any particular type size. Disclosures may be made on more than one page, and use both the front and the reverse sides, as long as the pages constitute an integrated document and the table disclosing the total annual loan cost rates is on a single page.

APPENDIX L—ASSUMED LOAN PERIODS FOR COMPUTATIONS OF TOTAL ANNUAL LOAN COST RATES

1. *General.* The life expectancy figures used in appendix L are those found in the U.S. Decennial Life Tables for women, as rounded to the nearest whole year and as published by the U.S. Department of Health and Human Services. The figures contained in appendix L must be used by creditors for all consumers (men and women). Appendix L will be revised periodically by the Bureau to incorporate revisions to the figures made in the Decennial Tables.

APPENDIX O—ILLUSTRATIVE WRITTEN SOURCE DOCUMENTS FOR HIGHER-PRICED MORTGAGE LOAN APPRAISAL RULES

1. *Title commitment report.* The “title commitment report” is a document from a title insurance company describing the property interest and status of its title, parties with interests in the title and the nature of their

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claims, issues with the title that must be resolved prior to closing of the transaction between the parties to the transfer, amount and disposition of the premiums, and endorsements on the title policy. This document is issued by the title insurance company prior to the company's issuance of an actual title insurance policy to the property's transferee and/or creditor financing the transaction. In different jurisdictions, this instrument may be referred to by different terms, such as a title commitment, title binder, title opinion, or title report.

[76 FR 79772, Dec. 22, 2011]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting supplement I to part 1026, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.govinfo.gov.

**PART 1030—TRUTH IN SAVINGS
(REGULATION DD)**

Sec.

- 1030.1 Authority, purpose, coverage, and effect on state laws.
- 1030.2 Definitions.
- 1030.3 General disclosure requirements.
- 1030.4 Account disclosures.
- 1030.5 Subsequent disclosures.
- 1030.6 Periodic statement disclosures.
- 1030.7 Payment of interest.
- 1030.8 Advertising.
- 1030.9 Enforcement and record retention.
- 1030.10 [Reserved]
- 1030.11 Additional disclosure requirements for overdraft services.

APPENDIX A TO PART 1030—ANNUAL PERCENTAGE YIELD CALCULATION

APPENDIX B TO PART 1030—MODEL CLAUSES AND SAMPLE FORMS

APPENDIX C TO PART 1030—EFFECT ON STATE LAWS

APPENDIX D TO PART 1030—ISSUANCE OF OFFICIAL INTERPRETATIONS

SUPPLEMENT I TO PART 1030—OFFICIAL INTERPRETATIONS

AUTHORITY: 12 U.S.C. 4302–4304, 4308, 5512, 5581.

SOURCE: 76 FR 79278, Dec. 21, 2011, unless otherwise noted.

§ 1030.1 Authority, purpose, coverage, and effect on state laws.

(a) *Authority.* This part, known as Regulation DD, is issued by the Bureau of Consumer Financial Protection to implement the Truth in Savings Act of 1991 (the act), contained in the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 3201 *et seq.*, Public Law 102–242, 105 Stat. 2236),

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as amended by title X, section 1100B of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1376). Information-collection requirements contained in this part have been approved by the Office of Management and Budget under the provisions of 44 U.S.C. 3501 *et seq.* and have been assigned OMB No. 3170–0004.

(b) *Purpose.* The purpose of this part is to enable consumers to make informed decisions about accounts at depository institutions. This part requires depository institutions to provide disclosures so that consumers can make meaningful comparisons among depository institutions.

(c) *Coverage.* This part applies to depository institutions except for credit unions. In addition, the advertising rules in § 1030.8 of this part apply to any person who advertises an account offered by a depository institution, including deposit brokers.

(d) *Effect on state laws.* State law requirements that are inconsistent with the requirements of the act and this part are preempted to the extent of the inconsistency. Additional information on inconsistent state laws and the procedures for requesting a preemption determination from the Bureau are set forth in appendix C of this part.

(e) *Relationship to Regulation CC.* The Director of the Bureau and the Board of Governors of the Federal Reserve System jointly issue regulations under sections 603(d)(1), 604, 605, and 609(a) of the Expedited Funds Availability Act (12 U.S.C. 4002(d)(1), 4003, 4004, 4008(a)) that are codified within Regulation CC (12 CFR part 229).

[76 FR 79278, Dec. 21, 2011, as amended at 84 FR 31698, July 3, 2019]

§ 1030.2 Definitions.

For purposes of this part, the following definitions apply:

(a) *Account* means a deposit account at a depository institution that is held by or offered to a consumer. It includes time, demand, savings, and negotiable order of withdrawal accounts. For purposes of the advertising requirements in § 1030.8 of this part, the term also includes an account at a depository institution that is held by or on behalf of a deposit broker, if any interest in the

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account is held by or offered to a consumer.

(b) *Advertisement* means a commercial message, appearing in any medium, that promotes directly or indirectly:

(1) The availability or terms of, or a deposit in, a new account; and

(2) For purposes of §§ 1030.8(a) and 1030.11 of this part, the terms of, or a deposit in, a new or existing account.

(c) *Annual percentage yield* means a percentage rate reflecting the total amount of interest paid on an account, based on the interest rate and the frequency of compounding for a 365-day period and calculated according to the rules in appendix A of this part.

(d) *Average daily balance method* means the application of a periodic rate to the average daily balance in the account for the period. The average daily balance is determined by adding the full amount of principal in the account for each day of the period and dividing that figure by the number of days in the period.

(e) *Bureau* means the Bureau of Consumer Financial Protection.

(f) *Bonus* means a premium, gift, award, or other consideration worth more than \$10 (whether in the form of cash, credit, merchandise, or any equivalent) given or offered to a consumer during a year in exchange for opening, maintaining, renewing, or increasing an account balance. The term does not include interest, other consideration worth \$10 or less given during a year, the waiver or reduction of a fee, or the absorption of expenses.

(g) *Business day* means a calendar day other than a Saturday, a Sunday, or any of the legal public holidays specified in 5 U.S.C. 6103(a).

(h) *Consumer* means a natural person who holds an account primarily for personal, family, or household purposes, or to whom such an account is offered. The term does not include a natural person who holds an account for another in a professional capacity.

(i) *Daily balance method* means the application of a daily periodic rate to the full amount of principal in the account each day.

(j) *Depository institution* and *institution* mean an institution defined in section 19(b)(1)(A)(i) through (vi) of the Federal Reserve Act (12 U.S.C. 461), ex-

cept credit unions defined in section 19(b)(1)(A)(iv).

(k) *Deposit broker* means any person who is a deposit broker as defined in section 29(g) of the Federal Deposit Insurance Act (12 U.S.C. 1831f(g)).

(l) *Fixed-rate account* means an account for which the institution contracts to give at least 30 calendar days advance written notice of decreases in the interest rate.

(m) *Grace period* means a period following the maturity of an automatically renewing time account during which the consumer may withdraw funds without being assessed a penalty.

(n) *Interest* means any payment to a consumer or to an account for the use of funds in an account, calculated by application of a periodic rate to the balance. The term does not include the payment of a bonus or other consideration worth \$10 or less given during a year, the waiver or reduction of a fee, or the absorption of expenses.

(o) *Interest rate* means the annual rate of interest paid on an account which does not reflect compounding. For the purposes of the account disclosures in § 1030.4(b)(1)(i) of this part, the interest rate may, but need not, be referred to as the “annual percentage rate” in addition to being referred to as the “interest rate.”

(p) *Passbook savings account* means a savings account in which the consumer retains a book or other document in which the institution records transactions on the account.

(q) *Periodic statement* means a statement setting forth information about an account (other than a time account or passbook savings account) that is provided to a consumer on a regular basis four or more times a year.

(r) *State* means a state, the District of Columbia, the commonwealth of Puerto Rico, and any territory or possession of the United States.

(s) *Stepped-rate account* means an account that has two or more interest rates that take effect in succeeding periods and are known when the account is opened.

(t) *Tiered-rate account* means an account that has two or more interest rates that are applicable to specified balance levels.

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(u) *Time account* means an account with a maturity of at least seven days in which the consumer generally does not have a right to make withdrawals for six days after the account is opened, unless the deposit is subject to an early withdrawal penalty of at least seven days' interest on amounts withdrawn.

(v) *Variable-rate account* means an account in which the interest rate may change after the account is opened, unless the institution contracts to give at least 30 calendar days advance written notice of rate decreases.

§ 1030.3 General disclosure requirements.

(a) *Form.* Depository institutions shall make the disclosures required by §§ 1030.4 through 1030.6 of this part, as applicable, clearly and conspicuously, in writing, and in a form the consumer may keep. The disclosures required by this part may be provided to the consumer in electronic form, subject to 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.*). The disclosures required by §§ 1030.4(a)(2) and 1030.8 may be provided to the consumer in electronic form without regard to the consumer consent or other provisions of the E-Sign Act in the circumstances set forth in those sections. Disclosures for each account offered by an institution may be presented separately or combined with disclosures for the institution's other accounts, as long as it is clear which disclosures are applicable to the consumer's account.

(b) *General.* The disclosures shall reflect the terms of the legal obligation of the account agreement between the consumer and the depository institution. Disclosures may be made in languages other than English, provided the disclosures are available in English upon request.

(c) *Relation to Regulation E (12 CFR Part 1005).* Disclosures required by and provided in accordance with the Electronic Fund Transfer Act (15 U.S.C. 1693 *et seq.*) and its implementing Regulation E (12 CFR Part 1005) that are also required by this part may be sub-

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stituted for the disclosures required by this part.

(d) *Multiple consumers.* If an account is held by more than one consumer, disclosures may be made to any one of the consumers.

(e) *Oral response to inquiries.* In an oral response to a consumer's inquiry about interest rates payable on its accounts, the depository institution shall state the annual percentage yield. The interest rate may be stated in addition to the annual percentage yield. No other rate may be stated.

(f) *Rounding and accuracy rules for rates and yields—(1) Rounding.* The annual percentage yield, the annual percentage yield earned, and the interest rate shall be rounded to the nearest one-hundredth of one percentage point (.01%) and expressed to two decimal places. For account disclosures, the interest rate may be expressed to more than two decimal places.

(2) *Accuracy.* The annual percentage yield (and the annual percentage yield earned) will be considered accurate if not more than one-twentieth of one percentage point (.05%) above or below the annual percentage yield (and the annual percentage yield earned) determined in accordance with the rules in appendix A of this part.

§ 1030.4 Account disclosures.

(a) *Delivery of account disclosures—(1) Account opening—(i) General.* A depository institution shall provide account disclosures to a consumer before an account is opened or a service is provided, whichever is earlier. An institution is deemed to have provided a service when a fee required to be disclosed is assessed. Except as provided in paragraph (a)(1)(ii) of this section, if the consumer is not present at the institution when the account is opened or the service is provided and has not already received the disclosures, the institution shall mail or deliver the disclosures no later than 10 business days after the account is opened or the service is provided, whichever is earlier.

(ii) *Timing of electronic disclosures.* If a consumer who is not present at the institution uses electronic means (for example, an Internet Web site) to open an account or request a service, the disclosures required under paragraph

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(a)(1) of this section must be provided before the account is opened or the service is provided.

(2) *Requests.* (i) A depository institution shall provide account disclosures to a consumer upon request. If a consumer who is not present at the institution makes a request, the institution shall mail or deliver the disclosures within a reasonable time after it receives the request and may provide the disclosures in paper form, or electronically if the consumer agrees.

(ii) In providing disclosures upon request, the institution may:

(A) Specify an interest rate and annual percentage yield that were offered within the most recent seven calendar days; state that the rate and yield are accurate as of an identified date; and provide a telephone number consumers may call to obtain current rate information.

(B) State the maturity of a time account as a term rather than a date.

(b) *Content of account disclosures.* Account disclosures shall include the following, as applicable:

(1) *Rate information*—(i) *Annual percentage yield and interest rate.* The “annual percentage yield” and the “interest rate,” using those terms, and for fixed-rate accounts the period of time the interest rate will be in effect.

(ii) *Variable rates.* For variable-rate accounts:

(A) The fact that the interest rate and annual percentage yield may change;

(B) How the interest rate is determined;

(C) The frequency with which the interest rate may change; and

(D) Any limitation on the amount the interest rate may change.

(2) *Compounding and crediting*—(i) *Frequency.* The frequency with which interest is compounded and credited.

(ii) *Effect of closing an account.* If consumers will forfeit interest if they close the account before accrued interest is credited, a statement that interest will not be paid in such cases.

(3) *Balance information*—(i) *Minimum balance requirements.* (A) Any minimum balance required to:

(1) Open the account;

(2) Avoid the imposition of a fee; or

(3) Obtain the annual percentage yield disclosed.

(B) Except for the balance to open the account, the disclosure shall state how the balance is determined for these purposes.

(ii) *Balance computation method.* An explanation of the balance computation method specified in § 1030.7 of this part used to calculate interest on the account.

(iii) *When interest begins to accrue.* A statement of when interest begins to accrue on noncash deposits.

(4) *Fees.* The amount of any fee that may be imposed in connection with the account (or an explanation of how the fee will be determined) and the conditions under which the fee may be imposed.

(5) *Transaction limitations.* Any limitations on the number or dollar amount of withdrawals or deposits.

(6) *Features of time accounts.* For time accounts:

(i) *Time requirements.* The maturity date.

(ii) *Early withdrawal penalties.* A statement that a penalty will or may be imposed for early withdrawal, how it is calculated, and the conditions for its assessment.

(iii) *Withdrawal of interest prior to maturity.* If compounding occurs during the term and interest may be withdrawn prior to maturity, a statement that the annual percentage yield assumes interest remains on deposit until maturity and that a withdrawal will reduce earnings. For accounts with a stated maturity greater than one year that do not compound interest on an annual or more frequent basis, that require interest payouts at least annually, and that disclose an APY determined in accordance with section E of appendix A of this part, a statement that interest cannot remain on deposit and that payout of interest is mandatory.

(iv) *Renewal policies.* A statement of whether or not the account will renew automatically at maturity. If it will, a statement of whether or not a grace period will be provided and, if so, the length of that period must be stated. If the account will not renew automatically, a statement of whether interest

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will be paid after maturity if the consumer does not renew the account must be stated.

(7) *Bonuses.* The amount or type of any bonus, when the bonus will be provided, and any minimum balance and time requirements to obtain the bonus.

(c) *Notice to existing account holders—*

(1) *Notice of availability of disclosures.* Depository institutions shall provide a notice to consumers who receive periodic statements and who hold existing accounts of the type offered by the institution on June 21, 1993. The notice shall be included on or with the first periodic statement sent on or after June 21, 1993 (or on or with the first periodic statement for a statement cycle beginning on or after that date). The notice shall state that consumers may request account disclosures containing terms, fees, and rate information for their account. In responding to such a request, institutions shall provide disclosures in accordance with paragraph (a)(2) of this section.

(2) *Alternative to notice.* As an alternative to the notice described in paragraph (c)(1) of this section, institutions may provide account disclosures to consumers. The disclosures may be provided either with a periodic statement or separately, but must be sent no later than when the periodic statement described in paragraph (c)(1) is sent.

§ 1030.5 Subsequent disclosures.

(a) *Change in terms—(1) Advance notice required.* A depository institution shall give advance notice to affected consumers of any change in a term required to be disclosed under § 1030.4(b) of this part if the change may reduce the annual percentage yield or adversely affect the consumer. The notice shall include the effective date of the change. The notice shall be mailed or delivered at least 30 calendar days before the effective date of the change.

(2) *No notice required.* No notice under this section is required for:

(i) *Variable-rate changes.* Changes in the interest rate and corresponding changes in the annual percentage yield in variable-rate accounts.

(ii) *Check printing fees.* Changes in fees assessed for check printing.

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(iii) *Short-term time accounts.* Changes in any term for time accounts with maturities of one month or less.

(b) *Notice before maturity for time accounts longer than one month that renew automatically.* For time accounts with a maturity longer than one month that renew automatically at maturity, institutions shall provide the disclosures described below before maturity. The disclosures shall be mailed or delivered at least 30 calendar days before maturity of the existing account. Alternatively, the disclosures may be mailed or delivered at least 20 calendar days before the end of the grace period on the existing account, provided a grace period of at least five calendar days is allowed.

(1) *Maturities of longer than one year.* If the maturity is longer than one year, the institution shall provide account disclosures set forth in § 1030.4(b) of this part for the new account, along with the date the existing account matures. If the interest rate and annual percentage yield that will be paid for the new account are unknown when disclosures are provided, the institution shall state that those rates have not yet been determined, the date when they will be determined, and a telephone number consumers may call to obtain the interest rate and the annual percentage yield that will be paid for the new account.

(2) *Maturities of one year or less but longer than one month.* If the maturity is one year or less but longer than one month, the institution shall either:

(i) Provide disclosures as set forth in paragraph (b)(1) of this section; or

(ii) Disclose to the consumer:

(A) The date the existing account matures and the new maturity date if the account is renewed;

(B) The interest rate and the annual percentage yield for the new account if they are known (or that those rates have not yet been determined, the date when they will be determined, and a telephone number the consumer may call to obtain the interest rate and the annual percentage yield that will be paid for the new account); and

(C) Any difference in the terms of the new account as compared to the terms required to be disclosed under § 1030.4(b) of this part for the existing account.

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(c) *Notice before maturity for time accounts longer than one year that do not renew automatically.* For time accounts with a maturity longer than one year that do not renew automatically at maturity, institutions shall disclose to consumers the maturity date and whether interest will be paid after maturity. The disclosures shall be mailed or delivered at least 10 calendar days before maturity of the existing account.

§ 1030.6 Periodic statement disclosures.

(a) *General rule.* If a depository institution mails or delivers a periodic statement, the statement shall include the following disclosures:

(1) *Annual percentage yield earned.* The “annual percentage yield earned” during the statement period, using that term, calculated according to the rules in appendix A of this part.

(2) *Amount of interest.* The dollar amount of interest earned during the statement period.

(3) *Fees imposed.* Fees required to be disclosed under § 1030.4(b)(4) of this part that were debited to the account during the statement period. The fees shall be itemized by type and dollar amounts. Except as provided in § 1030.11(a)(1) of this part, when fees of the same type are imposed more than once in a statement period, a depository institution may itemize each fee separately or group the fees together and disclose a total dollar amount for all fees of that type.

(4) *Length of period.* The total number of days in the statement period, or the beginning and ending dates of the period.

(5) *Aggregate fee disclosure.* If applicable, the total overdraft and returned item fees required to be disclosed by § 1030.11(a).

(b) *Special rule for average daily balance method.* In making the disclosures described in paragraph (a) of this section, institutions that use the average daily balance method and that calculate interest for a period other than the statement period shall calculate and disclose the annual percentage yield earned and amount of interest earned based on that period rather than the statement period. The infor-

mation in paragraph (a)(4) of this section shall be stated for that period as well as for the statement period.

§ 1030.7 Payment of interest.

(a) *Permissible methods—(1) Balance on which interest is calculated.* Institutions shall calculate interest on the full amount of principal in an account for each day by use of either the daily balance method or the average daily balance method. Institutions shall calculate interest by use of a daily rate of at least $\frac{1}{365}$ of the interest rate. In a leap year a daily rate of $\frac{1}{366}$ of the interest rate may be used.

(2) *Determination of minimum balance to earn interest.* An institution shall use the same method to determine any minimum balance required to earn interest as it uses to determine the balance on which interest is calculated. An institution may use an additional method that is unequivocally beneficial to the consumer.

(b) *Compounding and crediting policies.* This section does not require institutions to compound or credit interest at any particular frequency.

(c) *Date interest begins to accrue.* Interest shall begin to accrue not later than the business day specified for interest-bearing accounts in section 606 of the Expedited Funds Availability Act (12 U.S.C. 4005) and in § 229.14 of that act's implementing Regulation CC (12 CFR part 229). Interest shall accrue until the day funds are withdrawn.

[76 FR 79278, Dec. 21, 2011, as amended at 84 FR 31698, July 3, 2019]

§ 1030.8 Advertising.

(a) *Misleading or inaccurate advertisements.* An advertisement shall not:

(1) Be misleading or inaccurate or misrepresent a depository institution's deposit contract; or

(2) Refer to or describe an account as “free” or “no cost” (or contain a similar term) if any maintenance or activity fee may be imposed on the account. The word “profit” shall not be used in referring to interest paid on an account.

(b) *Permissible rates.* If an advertisement states a rate of return, it shall state the rate as an “annual percentage yield” using that term. (The abbreviation “APY” may be used provided

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the term “annual percentage yield” is stated at least once in the advertisement.) The advertisement shall not state any other rate, except that the “interest rate,” using that term, may be stated in conjunction with, but not more conspicuously than, the annual percentage yield to which it relates.

(c) *When additional disclosures are required.* Except as provided in paragraph (e) of this section, if the annual percentage yield is stated in an advertisement, the advertisement shall state the following information, to the extent applicable, clearly and conspicuously:

(1) *Variable rates.* For variable-rate accounts, a statement that the rate may change after the account is opened.

(2) *Time annual percentage yield is offered.* The period of time the annual percentage yield will be offered, or a statement that the annual percentage yield is accurate as of a specified date.

(3) *Minimum balance.* The minimum balance required to obtain the advertised annual percentage yield. For tiered-rate accounts, the minimum balance required for each tier shall be stated in close proximity and with equal prominence to the applicable annual percentage yield.

(4) *Minimum opening deposit.* The minimum deposit required to open the account, if it is greater than the minimum balance necessary to obtain the advertised annual percentage yield.

(5) *Effect of fees.* A statement that fees could reduce the earnings on the account.

(6) *Features of time accounts.* For time accounts:

(i) *Time requirements.* The term of the account.

(ii) *Early withdrawal penalties:* A statement that a penalty will or may be imposed for early withdrawal.

(iii) *Required interest payouts.* For noncompounding time accounts with a stated maturity greater than one year that do not compound interest on an annual or more frequent basis, that require interest payouts at least annually, and that disclose an APY determined in accordance with section E of appendix A of this part, a statement that interest cannot remain on deposit

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and that payout of interest is mandatory.

(d) *Bonuses.* Except as provided in paragraph (e) of this section, if a bonus is stated in an advertisement, the advertisement shall state the following information, to the extent applicable, clearly and conspicuously:

(1) The “annual percentage yield,” using that term;

(2) The time requirement to obtain the bonus;

(3) The minimum balance required to obtain the bonus;

(4) The minimum balance required to open the account, if it is greater than the minimum balance necessary to obtain the bonus; and

(5) When the bonus will be provided.

(e) *Exemption for certain advertisements—(1) Certain media.* If an advertisement is made through one of the following media, it need not contain the information in paragraphs (c)(1), (c)(2), (c)(4), (c)(5), (c)(6)(ii), (d)(4), and (d)(5) of this section:

(i) Broadcast or electronic media, such as television or radio;

(ii) Outdoor media, such as billboards; or

(iii) Telephone response machines.

(2) *Indoor signs.* (i) Signs inside the premises of a depository institution (or the premises of a deposit broker) are not subject to paragraphs (b), (c), (d) or (e)(1) of this section.

(ii) If a sign exempt by paragraph (e)(2) of this section states a rate of return, it shall:

(A) State the rate as an “annual percentage yield,” using that term or the term “APY.” The sign shall not state any other rate, except that the interest rate may be stated in conjunction with the annual percentage yield to which it relates.

(B) Contain a statement advising consumers to contact an employee for further information about applicable fees and terms.

(f) *Additional disclosures in connection with the payment of overdrafts.* Institutions that promote the payment of overdrafts in an advertisement shall include in the advertisement the disclosures required by §1030.11(b) of this part.

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§ 1030.9 Enforcement and record retention.

(a) *Administrative enforcement.* Section 270 of the act (12 U.S.C. 4309) contains the provisions relating to administrative sanctions for failure to comply with the requirements of the act and this part. Compliance is enforced by the agencies listed in that section.

(b) [Reserved]

(c) *Record retention.* A depository institution shall retain evidence of compliance with this part for a minimum of two years after the date disclosures are required to be made or action is required to be taken. The administrative agencies responsible for enforcing this part may require depository institutions under their jurisdiction to retain records for a longer period if necessary to carry out their enforcement responsibilities under section 270 of the act.

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§ 1030.11 Additional disclosure requirements for overdraft services.

(a) *Disclosure of total fees on periodic statements—(1) General.* A depository institution must separately disclose on each periodic statement, as applicable:

(i) The total dollar amount for all fees or charges imposed on the account for paying checks or other items when there are insufficient or unavailable funds and the account becomes overdrawn, using the term “Total Overdraft Fees;” and

(ii) The total dollar amount for all fees or charges imposed on the account for returning items unpaid.

(2) *Totals required.* The disclosures required by paragraph (a)(1) of this section must be provided for the statement period and for the calendar year-to-date;

(3) *Format requirements.* The aggregate fee disclosures required by paragraph (a) of this section must be disclosed in close proximity to fees identified under § 1030.6(a)(3), using a format substantially similar to Sample Form B-10 in appendix B to this part.

(b) *Advertising disclosures for overdraft services—(1) Disclosures.* Except as provided in paragraphs (b)(2) through (4) of this section, any advertisement promoting the payment of overdrafts shall

disclose in a clear and conspicuous manner:

(i) The fee or fees for the payment of each overdraft;

(ii) The categories of transactions for which a fee for paying an overdraft may be imposed;

(iii) The time period by which the consumer must repay or cover any overdraft; and

(iv) The circumstances under which the institution will not pay an overdraft.

(2) *Communications about the payment of overdrafts not subject to additional advertising disclosures.* Paragraph (b)(1) of this section does not apply to:

(i) An advertisement promoting a service where the institution’s payment of overdrafts will be agreed upon in writing and subject to Regulation Z (12 CFR part 1026);

(ii) A communication by an institution about the payment of overdrafts in response to a consumer-initiated inquiry about deposit accounts or overdrafts. Providing information about the payment of overdrafts in response to a balance inquiry made through an automated system, such as a telephone response machine, ATM, or an institution’s Internet site, is not a response to a consumer-initiated inquiry for purposes of this paragraph;

(iii) An advertisement made through broadcast or electronic media, such as television or radio;

(iv) An advertisement made on outdoor media, such as billboards;

(v) An ATM receipt;

(vi) An in-person discussion with a consumer;

(vii) Disclosures required by federal or other applicable law;

(viii) Information included on a periodic statement or a notice informing a consumer about a specific overdrawn item or the amount the account is overdrawn;

(ix) A term in a deposit account agreement discussing the institution’s right to pay overdrafts;

(x) A notice provided to a consumer, such as at an ATM, that completing a requested transaction may trigger a fee for overrawing an account, or a general notice that items overrawing an account may trigger a fee;

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(xi) Informational or educational materials concerning the payment of overdrafts if the materials do not specifically describe the institution's overdraft service; or

(xii) An opt-out or opt-in notice regarding the institution's payment of overdrafts or provision of discretionary overdraft services.

(3) *Exception for ATM screens and telephone response machines.* The disclosures described in paragraphs (b)(1)(ii) and (iv) of this section are not required in connection with any advertisement made on an ATM screen or using a telephone response machine.

(4) *Exception for indoor signs.* Paragraph (b)(1) of this section does not apply to advertisements for the payment of overdrafts on indoor signs as described by §1030.8(e)(2) of this part, provided that the sign contains a clear and conspicuous statement that fees may apply and that consumers should contact an employee for further information about applicable fees and terms. For purposes of this paragraph (b)(4), an indoor sign does not include an ATM screen.

(c) *Disclosure of account balances.* If an institution discloses balance information to a consumer through an automated system, the balance may not include additional amounts that the institution may provide to cover an item when there are insufficient or unavailable funds in the consumer's account, whether under a service provided in its discretion, a service subject to Regulation Z (12 CFR part 1026), or a service to transfer funds from another account of the consumer. The institution may, at its option, disclose additional account balances that include such additional amounts, if the institution prominently states that any such balance includes such additional amounts and, if applicable, that additional amounts are not available for all transactions.

APPENDIX A TO PART 1030—ANNUAL PERCENTAGE YIELD CALCULATION

The annual percentage yield measures the total amount of interest paid on an account based on the interest rate and the frequency of compounding. The annual percentage yield reflects only interest and does not include the value of any bonus (or other consideration worth \$10 or less) that may be pro-

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vided to the consumer to open, maintain, increase or renew an account. Interest or other earnings are not to be included in the annual percentage yield if such amounts are determined by circumstances that may or may not occur in the future. The annual percentage yield is expressed as an annualized rate, based on a 365-day year. Institutions may calculate the annual percentage yield based on a 365-day or a 366-day year in a leap year. Part I of this appendix discusses the annual percentage yield calculations for account disclosures and advertisements, while part II discusses annual percentage yield earned calculations for periodic statements.

PART I. ANNUAL PERCENTAGE YIELD FOR ACCOUNT DISCLOSURES AND ADVERTISING PURPOSES

In general, the annual percentage yield for account disclosures under §§1030.4 and 1030.5 and for advertising under §1030.8 is an annualized rate that reflects the relationship between the amount of interest that would be earned by the consumer for the term of the account and the amount of principal used to calculate that interest. Special rules apply to accounts with tiered and stepped interest rates, and to certain time accounts with a stated maturity greater than one year.

A. General Rules

Except as provided in part I.E. of this appendix, the annual percentage yield shall be calculated by the formula shown below. Institutions shall calculate the annual percentage yield based on the actual number of days in the term of the account. For accounts without a stated maturity date (such as a typical savings or transaction account), the calculation shall be based on an assumed term of 365 days. In determining the total interest figure to be used in the formula, institutions shall assume that all principal and interest remain on deposit for the entire term and that no other transactions (deposits or withdrawals) occur during the term. This assumption shall not be used if an institution requires, as a condition of the account, that consumers withdraw interest during the term. In such a case, the interest (and annual percentage yield calculation) shall reflect that requirement. For time accounts that are offered in multiples of months, institutions may base the number of days on either the actual number of days during the applicable period, or the number of days that would occur for any actual sequence of that many calendar months. If institutions choose to use the latter rule, they must use the same number of days to calculate the dollar amount of interest earned on the account that is used in the annual percentage yield formula (where "Interest" is divided by "Principal").

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The annual percentage yield is calculated by use of the following general formula ("APY" is used for convenience in the formulas):

$$APY=100 \cdot [(1+Interest/Principal)^{(365/Days \text{ in term})} - 1]$$

"Principal" is the amount of funds assumed to have been deposited at the beginning of the account.

"Interest" is the total dollar amount of interest earned on the Principal for the term of the account.

"Days in term" is the actual number of days in the term of the account. When the "days in term" is 365 (that is, where the stated maturity is 365 days or where the account does not have a stated maturity), the annual percentage yield can be calculated by use of the following simple formula:

$$APY=100 \cdot (Interest/Principal)$$

Examples:

(1) If an institution pays \$61.68 in interest for a 365-day year on \$1,000 deposited into a NOW account, using the general formula above, the annual percentage yield is 6.17%:
 $APY=100[(1+61.68/1,000)^{(365/365)} - 1]$
 $APY=6.17\%$

Or, using the simple formula above (since, as an account without a stated term, the term is deemed to be 365 days):

$$APY=100(61.68/1,000)$$

 $APY=6.17\%$

(2) If an institution pays \$30.37 in interest on a \$1,000 six-month certificate of deposit (where the six-month period used by the institution contains 182 days), using the general formula above, the annual percentage yield is 6.18%:
 $APY=100[(1+30.37/1,000)^{(365/182)} - 1]$
 $APY=6.18\%$

B. Stepped-Rate Accounts (Different Rates Apply in Succeeding Periods)

For accounts with two or more interest rates applied in succeeding periods (where the rates are known at the time the account is opened), an institution shall assume each interest rate is in effect for the length of time provided for in the deposit contract.

Examples:

(1) If an institution offers a \$1,000 6-month certificate of deposit on which it pays a 5% interest rate, compounded daily, for the first three months (which contain 91 days), and a 5.5% interest rate, compounded daily, for the next three months (which contain 92 days), the total interest for six months is \$26.68 and, using the general formula above, the annual percentage yield is 5.39%:
 $APY=100[(1+26.68/1,000)^{(365/183)} - 1]$
 $APY=5.39\%$

(2) If an institution offers a \$1,000 two-year certificate of deposit on which it pays a 6% interest rate, compounded daily, for the first

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year, and a 6.5% interest rate, compounded daily, for the next year, the total interest for two years is \$133.13, and, using the general formula above, the annual percentage yield is 6.45%:

$$APY=100[(1+133.13/1,000)^{(365/730)} - 1]$$

$$APY=6.45\%$$

C. Variable-Rate Accounts

For variable-rate accounts without an introductory premium or discounted rate, an institution must base the calculation only on the initial interest rate in effect when the account is opened (or advertised), and assume that this rate will not change during the year.

Variable-rate accounts with an introductory premium (or discount) rate must be calculated like a stepped-rate account. Thus, an institution shall assume that:

(1) The introductory interest rate is in effect for the length of time provided for in the deposit contract; and

(2) The variable interest rate that would have been in effect when the account is opened or advertised (but for the introductory rate) is in effect for the remainder of the year. If the variable rate is tied to an index, the index-based rate in effect at the time of disclosure must be used for the remainder of the year. If the rate is not tied to an index, the rate in effect for existing consumers holding the same account (who are not receiving the introductory interest rate) must be used for the remainder of the year.

For example, if an institution offers an account on which it pays a 7% interest rate, compounded daily, for the first three months (which, for example, contain 91 days), while the variable interest rate that would have been in effect when the account was opened was 5%, the total interest for a 365-day year for a \$1,000 deposit is \$56.52 (based on 91 days at 7% followed by 274 days at 5%). Using the simple formula, the annual percentage yield is 5.65%:

$$APY=100(56.52/1,000)$$

$$APY=5.65\%$$

D. Tiered-Rate Accounts (Different Rates Apply to Specified Balance Levels)

For accounts in which two or more interest rates paid on the account are applicable to specified balance levels, the institution must calculate the annual percentage yield in accordance with the method described below that it uses to calculate interest. In all cases, an annual percentage yield (or a range of annual percentage yields, if appropriate) must be disclosed for each balance tier.

For purposes of the examples discussed below, assume the following:

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Interest rate (percent)	Deposit balance required to earn rate
5.25	Up to but not exceeding \$2,500.
5.50	Above \$2,500 but not exceeding \$15,000.
5.75	Above \$15,000.

Tiering Method A. (1) Under this method, an institution pays on the full balance in the account the stated interest rate that corresponds to the applicable deposit tier. For example, if a consumer deposits \$8,000, the institution pays the 5.50% interest rate on the entire \$8,000.

When this method is used to determine interest, only one annual percentage yield will apply to each tier. Within each tier, the annual percentage yield will not vary with the amount of principal assumed to have been deposited.

For the interest rates and deposit balances assumed above, the institution will state three annual percentage yields—one corresponding to each balance tier. Calculation of each annual percentage yield is similar for this type of account as for accounts with a single interest rate. Thus, the calculation is based on the total amount of interest that would be received by the consumer for each tier of the account for a year and the principal assumed to have been deposited to earn that amount of interest.

First tier. Assuming daily compounding, the institution will pay \$53.90 in interest on a \$1,000 deposit. Using the general formula, for the first tier, the annual percentage yield is 5.39%:

$$\text{APY} = 100[(1+53.90/1,000)^{(365/365)} - 1]$$

$$\text{APY} = 5.39\%$$

Using the simple formula:

$$\text{APY} = 100(53.90/1,000)$$

$$\text{APY} = 5.39\%$$

Second tier. The institution will pay \$452.29 in interest on an \$8,000 deposit. Thus, using the simple formula, the annual percentage yield for the second tier is 5.65%:

$$\text{APY} = 100(452.29/8,000)$$

$$\text{APY} = 5.65\%$$

Third tier. The institution will pay \$1,183.61 in interest on a \$20,000 deposit. Thus, using the simple formula, the annual percentage yield for the third tier is 5.92%:

$$\text{APY} = 100(1,183.61/20,000)$$

$$\text{APY} = 5.92\%$$

Tiering Method B. Under this method, an institution pays the stated interest rate only on that portion of the balance within the specified tier. For example, if a consumer deposits \$8,000, the institution pays 5.25% on \$2,500 and 5.50% on \$5,500 (the difference between \$8,000 and the first tier cut-off of \$2,500).

The institution that computes interest in this manner must provide a range that shows the lowest and the highest annual percent-

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age yields for each tier (other than for the first tier, which, like the tiers in Method A, has the same annual percentage yield throughout). The low figure for an annual percentage yield range is calculated based on the total amount of interest earned for a year assuming the minimum principal required to earn the interest rate for that tier. The high figure for an annual percentage yield range is based on the amount of interest the institution would pay on the highest principal that could be deposited to earn that same interest rate. If the account does not have a limit on the maximum amount that can be deposited, the institution may assume any amount.

For the tiering structure assumed above, the institution would state a total of five annual percentage yields—one figure for the first tier and two figures stated as a range for the other two tiers.

First tier. Assuming daily compounding, the institution would pay \$53.90 in interest on a \$1,000 deposit. For this first tier, using the simple formula, the annual percentage yield is 5.39%:

$$\text{APY} = 100(53.90/1,000)$$

$$\text{APY} = 5.39\%$$

Second tier. For the second tier, the institution would pay between \$134.75 and \$841.45 in interest, based on assumed balances of \$2,500.01 and \$15,000, respectively. For \$2,500.01, interest would be figured on \$2,500 at 5.25% interest rate plus interest on \$.01 at 5.50%. For the low end of the second tier, therefore, the annual percentage yield is 5.39%, using the simple formula:

$$\text{APY} = 100(134.75/2,500)$$

$$\text{APY} = 5.39\%$$

For \$15,000, interest is figured on \$2,500 at 5.25% interest rate plus interest on \$12,500 at 5.50% interest rate. For the high end of the second tier, the annual percentage yield, using the simple formula, is 5.61%:

$$\text{APY} = 100(841.45/15,000)$$

$$\text{APY} = 5.61\%$$

Thus, the annual percentage yield range for the second tier is 5.39% to 5.61%.

Third tier. For the third tier, the institution would pay \$841.45 in interest on the low end of the third tier (a balance of \$15,000.01). For \$15,000.01, interest would be figured on \$2,500 at 5.25% interest rate, plus interest on \$12,500 at 5.50% interest rate, plus interest on \$.01 at 5.75% interest rate. For the low end of the third tier, therefore, the annual percentage yield (using the simple formula) is 5.61%:

$$\text{APY} = 100(841.45/15,000)$$

$$\text{APY} = 5.61\%$$

Since the institution does not limit the account balance, it may assume any maximum amount for the purposes of computing the annual percentage yield for the high end of the third tier. For an assumed maximum balance amount of \$100,000, interest would be

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figured on \$2,500 at 5.25% interest rate, plus interest on \$12,500 at 5.50% interest rate, plus interest on \$85,000 at 5.75% interest rate. For the high end of the third tier, therefore, the annual percentage yield, using the simple formula, is 5.87%.

$$\text{APY}=100 \left(\frac{5.871.79}{100,000} \right)$$
$$\text{APY}=5.87\%$$

Thus, the annual percentage yield range that would be stated for the third tier is 5.61% to 5.87%.

If the assumed maximum balance amount is \$1,000,000 instead of \$100,000, the institution would use \$985,000 rather than \$85,000 in the last calculation. In that case, for the high end of the third tier the annual percentage yield, using the simple formula, is 5.91%:

$$\text{APY}=100 \left(\frac{5.9134.22}{1,000,000} \right)$$
$$\text{APY}=5.91\%$$

Thus, the annual percentage yield range that would be stated for the third tier is 5.61% to 5.91%.

E. Time Accounts With a Stated Maturity Greater Than One Year That Pay Interest at Least Annually

1. For time accounts with a stated maturity greater than one year that do not compound interest on an annual or more frequent basis, and that require the consumer to withdraw interest at least annually, the annual percentage yield may be disclosed as equal to the interest rate.

Example

(1) If an institution offers a \$1,000 two-year certificate of deposit that does not compound and that pays out interest semi-annually by check or transfer at a 6.00% interest rate, the annual percentage yield may be disclosed as 6.00%.

(2) For time accounts covered by this paragraph that are also stepped-rate accounts, the annual percentage yield may be disclosed as equal to the composite interest rate.

Example

(1) If an institution offers a \$1,000 three-year certificate of deposit that does not compound and that pays out interest annually by check or transfer at a 5.00% interest rate for the first year, 6.00% interest rate for the second year, and 7.00% interest rate for the third year, the institution may compute the composite interest rate and APY as follows:

- (a) Multiply each interest rate by the number of days it will be in effect;
- (b) Add these figures together; and
- (c) Divide by the total number of days in the term.

(2) Applied to the example, the products of the interest rates and days the rates are in effect are $(5.00\% \times 365 \text{ days})$ 1825, $(6.00\% \times 365 \text{ days})$ 2190, and $(7.00\% \times 365 \text{ days})$ 2555, respectively. The sum of these products, 6570, is di-

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vided by 1095, the total number of days in the term. The composite interest rate and APY are both 6.00%.

PART II. ANNUAL PERCENTAGE YIELD EARNED FOR PERIODIC STATEMENTS

The annual percentage yield earned for periodic statements under § 1030.6(a) is an annualized rate that reflects the relationship between the amount of interest actually earned on the consumer's account during the statement period and the average daily balance in the account for the statement period. Pursuant to § 1030.6(b), however, if an institution uses the average daily balance method and calculates interest for a period other than the statement period, the annual percentage yield earned shall reflect the relationship between the amount of interest earned and the average daily balance in the account for that other period.

The annual percentage yield earned shall be calculated by using the following formulas ("APY Earned" is used for convenience in the formulas):

A. General Formula

$$\text{APY Earned}=100 \left[\left(\frac{\text{Interest earned}}{\text{Balance}} \right)^{(365/\text{Days in period})} - 1 \right]$$

"Balance" is the average daily balance in the account for the period.

"Interest earned" is the actual amount of interest earned on the account for the period.

"Days in period" is the actual number of days for the period.

Examples

(1) Assume an institution calculates interest for the statement period (and uses either the daily balance or the average daily balance method), and the account has a balance of \$1,500 for 15 days and a balance of \$500 for the remaining 15 days of a 30-day statement period. The average daily balance for the period is \$1,000. The interest earned (under either balance computation method) is \$5.25 during the period. The annual percentage yield earned (using the formula above) is 6.58%:

$$\text{APY Earned}=100 \left[\left(\frac{5.25}{1,000} \right)^{(365/30)} - 1 \right]$$
$$\text{APY Earned}=6.58\%$$

(2) Assume an institution calculates interest on the average daily balance for the calendar month and provides periodic statements that cover the period from the 16th of one month to the 15th of the next month. The account has a balance of \$2,000 September 1 through September 15 and a balance of \$1,000 for the remaining 15 days of September. The average daily balance for the month of September is \$1,500, which results in \$6.50 in interest earned for the month. The annual percentage yield earned for the month of September would be shown on the periodic statement covering September 16

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through October 15. The annual percentage yield earned (using the formula above) is 5.40%:

$$\text{APY Earned} = 100 [(6.50/1,500)^{(365/30)} - 1]$$

$$\text{APY Earned} = 5.40\%$$

(3) Assume an institution calculates interest on the average daily balance for a quarter (for example, the calendar months of September through November), and provides monthly periodic statements covering calendar months. The account has a balance of \$1,000 throughout the 30 days of September, a balance of \$2,000 throughout the 31 days of October, and a balance of \$3,000 throughout the 30 days of November. The average daily balance for the quarter is \$2,000, which re-

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sults in \$21 in interest earned for the quarter. The annual percentage yield earned would be shown on the periodic statement for November. The annual percentage yield earned (using the formula above) is 4.28%:

$$\text{APY Earned} = 100 [(1+21/2,000)^{(365/91)} - 1]$$

$$\text{APY Earned} = 4.28\%$$

B. Special Formula for Use Where Periodic Statement Is Sent More Often Than the Period for Which Interest Is Compounded

Institutions that use the daily balance method to accrue interest and that issue periodic statements more often than the period for which interest is compounded shall use the following special formula:

$$\text{APY Earned} = 100 \left\{ \left[1 + \frac{(\text{Interest earned}/\text{Balance})}{\text{Days in period}} (\text{Compounding}) \right]^{(365/\text{Compounding})} - 1 \right\}$$

The following definition applies for use in this formula (all other terms are defined under part II):

“Compounding” is the number of days in each compounding period.

Assume an institution calculates interest for the statement period using the daily balance method, pays a 5.00% interest rate,

compounded annually, and provides periodic statements for each monthly cycle. The account has a daily balance of \$1,000 for a 30-day statement period. The interest earned is \$4.11 for the period, and the annual percentage yield earned (using the special formula above) is 5.00%:

$$\text{APY Earned} = 100 \left\{ \left[1 + \frac{(4.11/1,000)}{30} (365) \right]^{(365/365)} - 1 \right\}$$

APY Earned=5.00%

[84 FR 31698, July 3, 2019]

APPENDIX B TO PART 1030—MODEL CLAUSES AND SAMPLE FORMS

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and Returned Item Fees)**

**B-1—MODEL CLAUSES FOR ACCOUNT
DISCLOSURES**

(a) Rate Information

(i) Fixed-Rate Accounts

The interest rate on your account is ____% with an annual percentage yield of ____%. You will be paid this rate [for (time period)/until (date)/for at least 30 calendar days].

(ii) Variable-Rate Accounts

The interest rate on your account is ____% with an annual percentage yield of ____%.

Your interest rate and annual percentage yield may change.

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Determination of Rate

The interest rate on your account is based on (name of index) [plus/minus a margin of ____]; or
—At our discretion, we may change the interest rate on your account.

Frequency of Rate Changes

We may change the interest rate on your account [every (time period)/at any time].

Limitations on Rate Changes

The interest rate for your account will never change by more than ____% each (time period).

The interest rate will never be [less/more] than ____%; or

The interest rate will never [exceed ____% above/drop more than ____% below] the interest rate initially disclosed to you.

(iii) Stepped-Rate Accounts

The initial interest rate for your account is ____%. You will be paid this rate [for (time period)/until (date)]. After that time, the interest rate for your account will be ____%, and you will be paid this rate [for (time period)/until (date)]. The annual percentage yield for your account is ____%.

(iv) Tiered-Rate Accounts

Tiering Method A

- If your [daily balance/average daily balance] is \$____ or more, the interest rate paid on the entire balance in your account will be ____% with an annual percentage yield of ____%.

- If your [daily balance/average daily balance] is more than \$____, but less than \$____, the interest rate paid on the entire balance in your account will be ____% with an annual percentage yield of ____%.

- If your [daily balance/average daily balance] is \$____ or less, the interest rate paid on the entire balance will be ____% with an annual percentage yield of ____%.

Tiering Method B

- An interest rate of ____% will be paid only for that portion of your [daily balance/average daily balance] that is greater than \$____. The annual percentage yield for this tier will range from ____% to ____%, depending on the balance in the account.

- An interest rate of ____% will be paid only for that portion of your [daily balance/average daily balance] that is greater than \$____. The annual percentage yield for this tier will range from ____% to ____%, depending on the balance in the account.

- If your [daily balance/average daily balance] is \$____ or less, the interest rate paid on the entire balance will be ____% with an annual percentage yield of ____%.

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(b) Compounding and Crediting

(i) Frequency

Interest will be compounded [on a basis/every (time period)]. Interest will be credited to your account [on a ____ basis/every (time period)].

(ii) Effect of Closing an Account

If you close your account before interest is credited, you will not receive the accrued interest.

(c) Minimum Balance Requirements

(i) To Open the Account

You must deposit \$____ to open this account.

(ii) To Avoid Imposition of Fees

A minimum balance fee of \$____ will be imposed every (time period) if the balance in the account falls below \$____ any day of the (time period).

A minimum balance fee of \$____ will be imposed every (time period) if the average daily balance for the (time period) falls below \$____. The average daily balance is calculated by adding the principal in the account for each day of the period and dividing that figure by the number of days in the period.

(iii) To Obtain the Annual Percentage Yield Disclosed

You must maintain a minimum balance of \$____ in the account each day to obtain the disclosed annual percentage yield.

You must maintain a minimum average daily balance of \$____ to obtain the disclosed annual percentage yield. The average daily balance is calculated by adding the principal in the account for each day of the period and dividing that figure by the number of days in the period.

(d) Balance Computation Method

(i) Daily Balance Method

We use the daily balance method to calculate the interest on your account. This method applies a daily periodic rate to the principal in the account each day.

(ii) Average Daily Balance Method

We use the average daily balance method to calculate interest on your account. This method applies a periodic rate to the average daily balance in the account for the period. The average daily balance is calculated by adding the principal in the account for each day of the period and dividing that figure by the number of days in the period.

Pt. 1030, App. B*(e) Accrual of Interest on Noncash Deposits*

Interest begins to accrue no later than the business day we receive credit for the deposit of noncash items (for example, checks); or

Interest begins to accrue on the business day you deposit noncash items (for example, checks).

(f) Fees

The following fees may be assessed against your account:

(conditions for imposing fee) \$ ____
____% of ____.

(g) Transaction Limitations

The minimum amount you may [withdraw/write a check for] is \$ ____.

You may make ____ [deposits into/withdrawals from] your account each (time period).

You may not make [deposits into/withdrawals from] your account until the maturity date.

*(h) Disclosures Relating to Time Accounts**(i) Time Requirements*

Your account will mature on (date).

Your account will mature in (time period).

(ii) Early Withdrawal Penalties

We [will/may] impose a penalty if you withdraw [any/all] of the [deposited funds/principal] before the maturity date. The fee imposed will equal ____ days/week[s]/month[s] of interest; or

We [will/may] impose a penalty of \$ ____ if you withdraw [any/all] of the [deposited funds/principal] before the maturity date.

If you withdraw some of your funds before maturity, the interest rate for the remaining funds in your account will be ____% with an annual percentage yield of ____%.

(iii) Withdrawal of Interest Prior to Maturity

The annual percentage yield assumes interest will remain on deposit until maturity. A withdrawal will reduce earnings.

*(iv) Renewal Policies**(1) Automatically Renewable Time Accounts*

This account will automatically renew at maturity.

You will have ____ calendar/business] days after the maturity date to withdraw funds without penalty; or

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There is no grace period following the maturity of this account to withdraw funds without penalty.

(2) Non-Automatically Renewable Time Accounts

This account will not renew automatically at maturity. If you do not renew the account, your deposit will be placed in [an interest-bearing/a noninterest-bearing] account.

(v) Required Interest Distribution

This account requires the distribution of interest and does not allow interest to remain in the account.

(i) Bonuses

You will [be paid/receive] [\$ ____/(description of item)] as a bonus [when you open the account/on (date) ____].

You must maintain a minimum [daily balance/average daily balance] of \$ ____ to obtain the bonus.

To earn the bonus, [\$ ____/your entire principal] must remain on deposit [for (time period)/until (date) ____].

B-2—MODEL CLAUSES FOR CHANGE IN TERMS

On (date), the cost of (type of fee) will increase to \$ ____.

On (date), the interest rate on your account will decrease to ____% with an annual percentage yield of ____%.

On (date), the minimum [daily balance/average daily balance] required to avoid imposition of a fee will increase to \$ ____.

B-3—MODEL CLAUSES FOR PRE-MATURITY NOTICES FOR TIME ACCOUNTS*(a) Automatically Renewable Time Accounts With Maturities of One Year or Less But Longer Than One Month*

Your account will mature on (date). If the account renews, the new maturity date will be (date).

The interest rate for the renewed account will be ____% with an annual percentage yield of ____%; or

The interest rate and annual percentage yield have not yet been determined. They will be available on (date). Please call (phone number) to learn the interest rate and annual percentage yield for your new account.

(b) Non-Automatically Renewable Time Accounts With Maturities Longer Than One Year

Your account will mature on (date). If you do not renew the account, interest [will/will not] be paid after maturity.

B-4 – SAMPLE FORM (MULTIPLE ACCOUNTS)

BANK ABC

DISCLOSURE OF ACCOUNT TERMS

This disclosure contains information about your:

X NOW Account

- Your interest rate and annual percentage yield may change.
At our discretion, we may change the interest rate on your account daily.
The interest rate for your account will never be less than 2.00%.
- Interest begins to accrue on the business day you deposit noncash items
(for example, checks).
- Interest is compounded daily and credited on the last day of each month.
If you close your account before interest is credited, you will not receive the accrued interest.
- We use the daily balance method to calculate the interest on your account.
This method applies a daily periodic rate to the principal in the account each day.

— Passbook Savings Account

- The interest rate on your account will be paid for at least 30 days.
- Interest begins to accrue on the business day you deposit noncash items
(for example, checks).
- Interest is compounded daily and credited on the last day of each month.
If you close your account before interest is credited, you will not receive the accrued interest.
- We use the daily balance method to calculate the interest on your account.
This method applies a daily periodic rate to the principal in the account each day.

Additional disclosures for your account are included on the attached sheets.

Money Market Account

- Your interest rate and annual percentage yield may change. At our discretion, we may change the interest rate on your account daily. The interest rate on your account will never be less than 3.00%.
- You may make six (6) transfers from your account, but only three (3) may be payments by check to third parties.
- Interest begins to accrue on the business day you deposit noncash items (for example, checks).
- Interest is compounded daily and credited on the last day of each month. If you close your account before interest is credited, you will not receive the accrued interest.
- We use the daily balance method to calculate the interest on your account. This method applies a daily periodic rate to the principal in the account each day.

Certificates of Deposit

- The interest rate for your account will be paid until the maturity date of your certificate ().
- Interest is compounded daily and will be credited to your account monthly.
- Interest begins to accrue on the business day you deposit noncash items (for example, checks).
- This account will automatically renew at maturity. You will have ten (10) calendar days from the maturity date to withdraw your funds without being charged a penalty.
- After the account is opened, you may not make deposits into or withdrawals from this account until the maturity date.
- We use the daily balance method to calculate the interest on your account. This method applies a daily periodic rate to the principal in the account each day.
- If any of the deposit is withdrawn before the maturity date, a penalty as shown below will be imposed:

<u>Term</u>	<u>Early Withdrawal Penalty</u>
3-month CD	30 days interest
6-month CD	90 days interest
1-year CD	120 days interest
2-year CD	180 days interest

Additional disclosures for your account are included on the attached sheets.

(Fee Schedule Insert)

**BANK ABC
FEE SCHEDULE**

NOW Account

- Monthly minimum balance fee if the daily balance drops below \$ 500 any day of the month \$ 7.50

Passbook Savings Account

- Monthly minimum balance fee if the daily balance drops below \$ 100 any day of the month \$ 6.00
- You may make three (3) withdrawals per quarter
Each subsequent withdrawal \$ 2.00

Money Market Account

- Monthly minimum balance fee if the daily balance drops below \$ 1,000 any day of the month \$ 5.00

Other Account Fees

- Deposited checks returned \$ 5.00
- Balance inquiries (at a branch or at an ATM) \$ 1.00
- Check printing ♦ (Fee depends on style of check ordered)
- Your check returned for insufficient funds (per check)♦ \$ 16.00
- Stop payment request (per request)♦ \$ 12.50
- Certified check (per check)♦ \$ 10.00

♦ Fee does not apply to Passbook Savings Accounts or Certificates of Deposit.

Additional disclosures for your account are included on the attached sheet.

BANK ABC
RATE SHEET

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<u>ACCOUNT TYPE</u>	<u>MINIMUM DEPOSIT TO OPEN ACCOUNT</u>	<u>MINIMUM BALANCE* ANNUAL PERCENTAGE YIELD</u>	<u>INTEREST RATE</u>	<u>ANNUAL PERCENTAGE YIELD</u>
NOW	\$ 500	\$ 2,500	4.00%	4.08%
PASSBOOK SAVINGS	\$ 100	\$ 500	3.50%	3.56%
MONEY MARKET	\$ 1,000	\$ 1,000	4.15%	4.24%
3-MONTH CD	\$ 1,000	\$ 1,000	4.20%	4.29%
6-MONTH CD	\$ 1,000	\$ 1,000	4.25%	4.34%
1-YEAR CD	\$ 1,000	\$ 1,000	5.20%	5.34%
2-YEAR CD	\$ 1,000	\$ 1,000	5.80%	5.97%

* Daily balance (the amount of principal in the account each day)

B-5 – SAMPLE FORM (NOW ACCOUNT)**BANK XYZ****DISCLOSURE OF INTEREST, FEES AND ACCOUNT TERMS****NOW ACCOUNT****Fee schedule**

- Monthly minimum balance fee if the daily balance drops below \$1,000 any day of the month \$ 7.00
 - Fee to stop payment of a check \$ 12.50
 - Fee for check returns (insufficient funds -- per check) \$ 16.00
 - Certified check (per check) \$ 10.00
 - Fee for initial check printing (per 200) \$ 12.00
- (Cost for check printing varies depending on the style of checks ordered.)

Rate information

- The interest rate for your account is 4.00 % with an annual percentage yield of 4.08 %. Your interest rate and annual percentage yield may change. At our discretion, we may change the interest rate for your account at any time. The interest rate for your account will never be less than 2% each year.

Minimum balance requirements

- You must deposit \$500 to open this account.
- You must maintain a minimum balance of \$2,500 in the account each day to obtain the annual percentage yield listed above.

Balance computation method

- We use the daily balance method to calculate the interest on your account. This method applies a daily periodic rate to the principal in the account each day.

Compounding and crediting

- Interest for your account will be compounded daily and credited to your account on the last day of each month.

Accrual of interest on deposits other than cash

- Interest begins to accrue on the business day you deposit noncash items (for example, checks).

B-6 -- SAMPLE FORM (TIERED-RATE MONEY MARKET ACCOUNT)**BANK ABC****DISCLOSURE OF INTEREST, FEES AND ACCOUNT TERMS****MONEY MARKET ACCOUNT****Fee schedule**

- | | |
|---------------------------------------------------------------|------------------------------------------|
| ■ Check returned for insufficient funds (per check) | \$16.00 |
| ■ Stop payment request (per request) | \$12.50 |
| ■ Certified check (per check) | \$10.00 |
| ■ Check printing | (Fee depends on style of checks ordered) |

Rate information

- If your daily balance is \$15,000 or more, the interest rate paid on the entire balance in your account will be 5.75 % with an annual percentage yield of 5.92 %.
- If your daily balance is more than \$2,500, but less than \$15,000, the interest rate paid on the entire balance in your account will be 5.50 % with an annual percentage yield of 5.65 %.
- If your daily balance is \$2,500 or less, the interest rate paid on the entire balance will be 5.25 % with an annual percentage yield of 5.39 %.
- Your interest rate and annual percentage yield may change. At our discretion, we may change the interest rate for your account at any time. The interest rate for your account will never be less than 2.00%.
- Interest begins to accrue on the business day you deposit noncash items (for example, checks).
- Interest is compounded daily and credited on the last day of each month.

Minimum balance requirements

- You must deposit \$1,000 to open this account.
- A minimum balance fee of \$5.00 will be imposed every month if the balance in your account falls below \$1,000 any day of the month.

Balance computation method

- We use the daily balance method to calculate the interest on your account. This method applies a daily periodic rate to the principal in the account each day.

Transaction limitations

- You may make six (6) transfers from your account, but only three (3) may be payments by check to third parties.

B-7 -- SAMPLE FORM (CERTIFICATE OF DEPOSIT)

**XYZ SAVINGS BANK
1 YEAR CERTIFICATE OF DEPOSIT**

Rate information

The interest rate for your account is .5.20 % with an annual percentage yield of .5.34 %. You will be paid this rate until the maturity date of the certificate. Your certificate will mature on September 30, 1993. The annual percentage yield assumes interest remains on deposit until maturity. A withdrawal will reduce earnings.

Interest for your account will be compounded daily and credited to your account on the last day of each month.

Interest begins to accrue on the business day you deposit any noncash item (for example, checks).

Minimum balance requirements

You must deposit \$1,000 to open this account.

You must maintain a minimum balance of \$1,000 in your account every day to obtain the annual percentage yield listed above.

Balance computation method

We use the daily balance method to calculate the interest on your account. This method applies a daily periodic rate to the principal in the account each day.

Transaction limitations

After the account is opened, you may not make deposits into or withdrawals from the account until the maturity date.

Early withdrawal penalty

If you withdraw any principal before the maturity date, a penalty equal to three months interest will be charged to your account.

Renewal policy

This account will be automatically renewed at maturity. You have a grace period of ten (10) calendar days after the maturity date to withdraw the funds without being charged a penalty.

B-8 -- SAMPLE FORM (CERTIFICATE OF DEPOSIT ADVERTISEMENT)**BANK XYZ****ALWAYS OFFERS YOU COMPETITIVE CD RATES!!**

CERTIFICATES OF DEPOSIT	ANNUAL PERCENTAGE YIELD (APY)
5 YEAR	6.31%
4 YEAR	6.07%
3 YEAR	5.72%
2 YEAR	5.52%
1 YEAR	4.54%
6 MONTH	4.34%
90 DAY	4.21%
	APYs are offered on accounts opened from 5/9/93 through 5/18/93.

The minimum balance to open an account and obtain the APY is \$1,000.
A penalty may be imposed for early withdrawal.

For more information call:

202-123-1234

B-9 -- SAMPLE FORM (MONEY MARKET ACCOUNT ADVERTISEMENT)**BANK XYZ****ALWAYS OFFERS YOU COMPETITIVE RATES!!**

MONEY MARKET ACCOUNTS	ANNUAL PERCENTAGE YIELD (APY)
Accounts with a balance of \$5,000 or less	5.07%*
Accounts with a balance over \$5,000	5.57%*
APYs are accurate as of April 30, 1993	*The rates may change after the account is opened.

Fees could reduce the earnings on the account.

For more information call:**202-123-1234****B-10 Aggregate Overdraft and Returned Item Fees Sample Form**

	Total For This Period	Total Year-to-Date
Total Overdraft Fees	\$60.00	\$150.00
Total Returned Item Fees	\$0.00	\$30.00

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APPENDIX C TO PART 1030—EFFECT ON STATE LAWS

(a) INCONSISTENT REQUIREMENTS

State law requirements that are inconsistent with the requirements of the act and this part are preempted to the extent of the inconsistency. A state law is inconsistent if it requires a depository institution to make disclosures or take actions that contradict the requirements of the federal law. A state law is also contradictory if it requires the use of the same term to represent a different amount or a different meaning than the federal law, requires the use of a term different from that required in the federal law to describe the same item, or permits a method of calculating interest on an account different from that required in the federal law.

(b) PREEMPTION DETERMINATIONS

A depository institution, state, or other interested party may request the Bureau to determine whether a state law requirement is inconsistent with the federal requirements. A request for a determination shall be in writing and addressed to the Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20552. Notice that the Bureau intends to make a determination (either on request or on its own motion) will be published in the *FEDERAL REGISTER*, with an opportunity for public comment unless the Bureau finds that notice and opportunity for comment would be impracticable, unnecessary, or contrary to the public interest and publishes its reasons for such decision. Notice of a final determination will be published in the *FEDERAL REGISTER* and furnished to the party who made the request and to the appropriate state official.

(c) EFFECT OF PREEMPTION DETERMINATIONS

After the Bureau determines that a state law is inconsistent, a depository institution may not make disclosures using the inconsistent term or take actions relying on the inconsistent law.

(d) REVERSAL OF DETERMINATION

The Bureau reserves the right to reverse a determination for any reason bearing on the coverage or effect of state or federal law. Notice of reversal of a determination will be published in the *FEDERAL REGISTER* and a copy furnished to the appropriate state official.

[76 FR 79278, Dec. 21, 2011, as amended at 88 FR 16543, Mar. 20, 2023]

APPENDIX D TO PART 1030—ISSUANCE OF OFFICIAL INTERPRETATIONS

Except in unusual circumstances, interpretations will not be issued separately but will

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be incorporated in an official commentary to this part, which will be amended periodically. No interpretations will be issued approving depository institutions' forms, statements, or calculation tools or methods.

SUPPLEMENT I TO PART 1030—OFFICIAL INTERPRETATIONS

INTRODUCTION

1. *Official status.* This commentary is the means by which the Bureau of Consumer Financial Protection issues official interpretations of Regulation DD.

Section 1030.1 Authority, purpose, coverage, and effect on state laws

(c) Coverage

1. *Foreign applicability.* Regulation DD applies to all depository institutions, except credit unions, that offer deposit accounts to residents (including resident aliens) of any state as defined in §1030.2(r). Accounts held in an institution located in a state are covered, even if funds are transferred periodically to a location outside the United States. Accounts held in an institution located outside the United States are not covered, even if held by a U.S. resident.

2. *Persons who advertise accounts.* Persons who advertise accounts are subject to the advertising rules. For example, if a deposit broker places an advertisement offering consumers an interest in an account at a depository institution, the advertising rules apply to the advertisement, whether the account is to be held by the broker or directly by the consumer.

Section 1030.2—Definitions

(a) Account.

1. *Covered accounts.* Examples of accounts subject to the regulation are:

- i. Interest-bearing and noninterest-bearing accounts.
- ii. Deposit accounts opened as a condition of obtaining a credit card.
- iii. Accounts denominated in a foreign currency.
- iv. Individual retirement accounts (IRAs) and simplified employee pension (SEP) accounts.

v. Payable on death (POD) or “Totten trust” accounts.

2. *Other accounts.* Examples of accounts not subject to the regulation are:

- i. Mortgage escrow accounts for collecting taxes and property insurance premiums.
- ii. Accounts established to make periodic disbursements on construction loans.
- iii. Trust accounts opened by a trustee pursuant to a formal written trust agreement (not merely declarations of trust on a signature card such as a “Totten trust,” or an IRA and SEP account).

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iv. Accounts opened by an executor in the name of a decedent's estate.

3. *Other investments.* The term "account" does not apply to all products of a depository institution. Examples of products not covered are:

- i. Government securities.
- ii. Mutual funds.
- iii. Annuities.

iv. Securities or obligations of a depository institution.

v. Contractual arrangements such as repurchase agreements, interest rate swaps, and bankers acceptances.

(b) *Advertisement.*

1. *Covered messages.* Advertisements include commercial messages in visual, oral, or print media that invite, offer, or otherwise announce generally to prospective customers the availability of consumer accounts—such as:

- i. Telephone solicitations.
- ii. Messages on automated teller machine (ATM) screens.

iii. Messages on a computer screen in an institution's lobby (including any printout other than a screen viewed solely by the institution's employee).

iv. Messages in a newspaper, magazine, or promotional flyer or on radio.

v. Messages that are provided along with information about the consumer's existing account and that promote another account at the institution.

2. *Other messages.* Examples of messages that are not advertisements are:

i. Rate sheets in a newspaper, periodical, or trade journal (unless the depository institution, or a deposit broker offering accounts at the institution, pays a fee for or otherwise controls publication).

ii. In-person discussions with consumers about the terms for a specific account.

iii. For purposes of §1030.8(b) of this part through §1030.8(e) of this part, information given to consumers about existing accounts, such as current rates recorded on a voice-response machine or notices for automatically renewable time account sent before renewal.

iv. Information about a particular transaction in an existing account.

v. Disclosures required by federal or other applicable law.

- vi. A deposit account agreement.

(f) *Bonus.*

1. *Examples.* Bonuses include items of value, other than interest, offered as incentives to consumers, such as an offer to pay the final installment deposit for a holiday club account. Items that are not a bonus include discount coupons for goods or services at restaurants or stores.

2. *De minimis rule.* Items with a *de minimis* value of \$10 or less are not bonuses. Institutions may rely on the valuation standard used by the Internal Revenue Service to de-

termine if the value of the item is *de minimis*. Examples of items of *de minimis* value are:

i. Disability insurance premiums valued at an amount of \$10 or less per year.

ii. Coffee mugs, T-shirts or other merchandise with a market value of \$10 or less.

3. *Aggregation.* In determining if an item valued at \$10 or less is a bonus, institutions must aggregate per account per calendar year items that may be given to consumers. In making this determination, institutions aggregate per account only the market value of items that may be given for a specific promotion. To illustrate, assume an institution offers in January to give consumers an item valued at \$7 for each calendar quarter during the year that the average account balance in a negotiable order of withdrawal (NOW) account exceeds \$10,000. The bonus rules are triggered, since consumers are eligible under the promotion to receive up to \$28 during the year. However, the bonus rules are not triggered if an item valued at \$7 is offered to consumers opening a NOW account during the month of January, even though in November the institution introduces a new promotion that includes, for example, an offer to existing NOW account holders for an item valued at \$8 for maintaining an average balance of \$5,000 for the month.

4. *Waiver or reduction of a fee or absorption of expenses.* Bonuses do not include value that consumers receive through the waiver or reduction of fees (even if the fees waived exceed \$10) for banking-related services such as the following:

i. A safe deposit box rental fee for consumers who open a new account.

ii. Fees for travelers checks for account holders.

iii. Discounts on interest rates charged for loans at the institution.

(h) *Consumer.*

1. *Professional capacity.* Examples of accounts held by a natural person in a professional capacity for another are attorney-client trust accounts and landlord-tenant security rights accounts.

2. *Other accounts.* Accounts not held in a professional capacity include accounts held by an individual for a child under the Uniform Gifts to Minors Act.

3. *Sole proprietors.* Accounts held by individuals as sole proprietors are not covered.

4. *Retirement plans.* IRAs and SEP accounts are consumer accounts to the extent that funds are invested in covered accounts. Keogh accounts are not subject to the regulation.

(j) *Depository institution and institution.*

1. *Foreign institutions.* Branches of foreign institutions located in the United States are subject to the regulation if they offer deposit accounts to consumers. Edge Act and Agreement corporations, and agencies of foreign institutions, are not depository institutions for purposes of this part.

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(k) Deposit broker.

1. *General.* A deposit broker is a person who is in the business of placing or facilitating the placement of deposits in an institution, as defined by the Federal Deposit Insurance Act (12 U.S.C. 29(g)).

(n) Interest.

1. *Relation to bonuses.* Bonuses are not interest for purposes of this part.

(p) Passbook savings account.

1. *Relation to Regulation E.* Passbook savings accounts include accounts accessed by preauthorized electronic fund transfers to the account (as defined in 12 CFR 1005.2(j)), such as an account that receives direct deposit of social security payments. Accounts permitting access by other electronic means are not "passbook saving accounts" and must comply with the requirements of §1030.6 if statements are sent four or more times a year.

(q) Periodic statement.

1. *Examples.* Periodic statements do not include:

- i. Additional statements provided solely upon request.
- ii. General service information such as a quarterly newsletter or other correspondence describing available services and products.

(t) Tiered-rate account.

1. *Time accounts.* Time accounts paying different rates based solely on the amount of the initial deposit are not tiered-rate accounts.

2. *Minimum balance requirements.* A requirement to maintain a minimum balance to earn interest does not make an account a tiered-rate account.

(u) Time account.

1. *Club accounts.* Although club accounts typically have a maturity date, they are not time accounts unless they also require a penalty of at least seven days' interest for withdrawals during the first six days after the account is opened.² *Relation to Regulation D.* Regulation D of the Board of Governors of the Federal Reserve System (12 CFR part 204) permits in limited circumstances the withdrawal of funds without penalty during the first six days after a "time deposit" is opened. (See 12 CFR 204.2(c)(1)(i).) But the fact that a consumer makes a withdrawal as permitted by Regulation D does not disqualify the account from being a time account for purposes of this part.

(v) Variable-rate account.

1. *General.* A certificate of deposit permitting one or more rate adjustments prior to maturity at the consumer's option is a variable-rate account.

Section 1030.3—General Disclosure Requirements

(a) Form.

1. *Design requirements.* Disclosures must be presented in a format that allows consumers to readily understand the terms of their account. Institutions are not required to use a

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particular type size or typeface, nor are institutions required to state any term more conspicuously than any other term. Disclosures may be made:

- i. In any order.
- ii. In combination with other disclosures or account terms.
- iii. In combination with disclosures for other types of accounts, as long as it is clear to consumers which disclosures apply to their account.
- iv. On more than one page and on the front and reverse sides.
- v. By using inserts to a document or filling in blanks.
- vi. On more than one document, as long as the documents are provided at the same time.

2. *Consistent terminology.* Institutions must use consistent terminology to describe terms or features required to be disclosed. For example, if an institution describes a monthly fee (regardless of account activity) as a "monthly service fee" in account-opening disclosures, the periodic statement and change-in-term notices must use the same terminology so that consumers can readily identify the fee.

(b) General.

1. *Specificity of legal obligation.* Institutions may refer to the calendar month or to roughly equivalent intervals during a calendar year as a "month."

(c) Relation to Regulation E.

1. *General rule.* Compliance with Regulation E (12 CFR Part 1005) is deemed to satisfy the disclosure requirements of this part, such as when:

i. An institution changes a term that triggers a notice under Regulation E, and uses the timing and disclosure rules of Regulation E for sending change-in-term notices.

ii. Consumers add an ATM access feature to an account, and the institution provides disclosures pursuant to Regulation E, including disclosure of fees (see 12 CFR 1005.7.)

iii. An institution complying with the timing rules of Regulation E discloses at the same time fees for electronic services (such as for balance inquiry fees at ATMs) required to be disclosed by this part but not by Regulation E.

iv. An institution relies on Regulation E's rules regarding disclosure of limitations on the frequency and amount of electronic fund transfers, including security-related exceptions. But any limitations on "intra-institutional transfers" to or from the consumer's other accounts during a given time period must be disclosed, even though intra-institutional transfers are exempt from Regulation E.

(e) Oral response to inquiries.

1. *Application of rule.* Institutions are not required to provide rate information orally.

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2. *Relation to advertising.* The advertising rules do not cover an oral response to a question about rates.

3. *Existing accounts.* This paragraph does not apply to oral responses about rate information for existing accounts. For example, if a consumer holding a one-year certificate of deposit (CD) requests interest rate information about the CD during the term, the institution need not disclose the annual percentage yield.

(f) *Rounding and accuracy rules for rates and yields*

(f)(1) *Rounding.*

1. *Permissible rounding.* Examples of permissible rounding are an annual percentage yield calculated to be 5.644%, rounded down and disclosed as 5.64%; 5.645% rounded up and disclosed as 5.65%.

(f)(2) *Accuracy.*

1. *Annual percentage yield and annual percentage yield earned.* The tolerance for annual percentage yield and annual percentage yield earned calculations is designed to accommodate inadvertent errors. Institutions may not purposely incorporate the tolerance into their calculation of yields.

Section 1030.4—Account Disclosures

(a) *Delivery of account disclosures.*

(a)(1) *Account opening.*

1. *New accounts.* New account disclosures must be provided when:

i. A time account that does not automatically rollover is renewed by a consumer.

ii. A consumer changes a term for a renewable time account (see comment 5(b)-5 regarding disclosure alternatives.)

iii. An institution transfers funds from an account to open a new account not at the consumer's request, unless the institution previously gave account disclosures and any change-in-term notices for the new account.

iv. An institution accepts a deposit from a consumer to an account that the institution had deemed closed for the purpose of treating accrued but uncredited interest as forfeited interest (see comment 7(b)-3.)

2. *Acquired accounts.* New account disclosures need not be given when an institution acquires an account through an acquisition or of merger with another institution (but see §1030.5(a) of this part regarding advance notice requirements if terms are changed).

(a)(2) *Requests.*

Paragraph (a)(2)(i).

1. *Inquiries versus requests.* A response to an oral inquiry (by telephone or in person) about rates and yields or fees does not trigger the duty to provide account disclosures. But when consumers ask for written information about an account (whether by telephone, in person, or by other means), the institution must provide disclosures unless the account is no longer offered to the public.

2. *General requests.* When responding to a consumer's general request for disclosures

about a type of account (a NOW account, for example), an institution that offers several variations may provide disclosures for any one of them.

3. *Timing for response.* Ten business days is a reasonable time for responding to requests for account information that consumers do not make in person, including requests made by electronic means (such as by electronic mail).

4. *Use of electronic means.* If a consumer who is not present at the institution makes a request for account disclosures, including a request made by telephone, email, or via the institution's Web site, the institution may send the disclosures in paper form or, if the consumer agrees, may provide the disclosures electronically, such as to an email address that the consumer provides for that purpose, or on the institution's Web site, without regard to the consumer consent or other provisions of the E-Sign Act. The regulation does not require an institution to provide, nor a consumer to agree to receive, the disclosures required by §1030.4(a)(2) in electronic form.

Paragraph (a)(2)(ii)(A).

1. *Recent rates.* Institutions comply with this paragraph if they disclose an interest rate and annual percentage yield accurate within the seven calendar days preceding the date they send the disclosures.

Paragraph (a)(2)(ii)(B).

1. *Term.* Describing the maturity of a time account as "1 year" or "6 months," for example, illustrates a statement of the maturity of a time account as a term rather than a date ("January 10, 1995").

(b) *Content of account disclosures.*

(b)(1) *Rate information.*

(b)(1)(i) *Annual percentage yield and interest rate.*

1. *Rate disclosures.* In addition to the interest rate and annual percentage yield, institutions may disclose a periodic rate corresponding to the interest rate. No other rate or yield (such as "tax effective yield") is permitted. If the annual percentage yield is the same as the interest rate, institutions may disclose a single figure but must use both terms.

2. *Fixed-rate accounts.* For fixed-rate time accounts paying the opening rate until maturity, institutions may disclose the period of time the interest rate will be in effect by stating the maturity date. (See appendix B, B-7—Sample Form.) For other fixed-rate accounts, institutions may use a date ("This rate will be in effect through May 4, 1995") or a period ("This rate will be in effect for at least 30 days").

3. *Tiered-rate accounts.* Each interest rate, along with the corresponding annual percentage yield for each specified balance level (or range of annual percentage yields, if appropriate), must be disclosed for tiered-rate

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accounts. (See appendix A, Part I, Paragraph D.)

4. *Stepped-rate accounts.* A single composite annual percentage yield must be disclosed for stepped-rate accounts. (See appendix A, Part I, Paragraph B.) The interest rates and the period of time each will be in effect also must be provided. When the initial rate offered for a specified time on a variable-rate account is higher or lower than the rate that would otherwise be paid on the account, the calculation of the annual percentage yield must be made as if for a stepped-rate account. (See appendix A, Part I, Paragraph C.)

(b)(1)(ii) *Variable rates.*

Paragraph (b)(1)(ii)(B).

1. *Determining interest rates.* To disclose how the interest rate is determined, institutions must:

- i. Identify the index and specific margin, if the interest rate is tied to an index.
- ii. State that rate changes are within the institution's discretion, if the institution does not tie changes to an index.

Paragraph (b)(1)(ii)(C).

1. *Frequency of rate changes.* An institution reserving the right to change rates at its discretion must state the fact that rates may change at any time.

Paragraph (b)(1)(ii)(D).

1. *Limitations.* A floor or ceiling on rates or on the amount the rate may decrease or increase during any time period must be disclosed. Institutions need not disclose the absence of limitations on rate changes.

(b)(2) *Compounding and crediting.*

(b)(2)(ii) *Effect of closing an account.*

1. *Deeming an account closed.* An institution may, subject to state or other law, provide in its deposit contracts the actions by consumers that will be treated as closing the account and that will result in the forfeiture of accrued but uncredited interest. An example is the withdrawal of all funds from the account prior to the date that interest is credited.

(b)(3) *Balance information.*

(b)(3)(ii) *Balance computation method.*

1. *Methods and periods.* Institutions may use different methods or periods to calculate minimum balances for purposes of imposing a fee (the daily balance for a calendar month, for example) and accruing interest (the average daily balance for a statement period, for example). Each method and corresponding period must be disclosed.

(b)(3)(iii) *When interest begins to accrue.*

1. *Additional information.* Institutions may disclose additional information such as the time of day after which deposits are treated as having been received the following business day, and may use additional descriptive terms such as "ledger" or "collected" balances to disclose when interest begins to accrue.

(b)(4) *Fees.*

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1. *Covered fees.* The following are types of fees that must be disclosed:

- i. Maintenance fees, such as monthly service fees.
- ii. Fees to open or to close an account.
- iii. Fees related to deposits or withdrawals, such as fees for use of the institution's ATMs.

iv. Fees for special services, such as stop-payment fees, fees for balance inquiries or verification of deposits, fees associated with checks returned unpaid, and fees for regularly sending to consumers checks that otherwise would be held by the institution.

2. *Other fees.* Institutions need not disclose fees such as the following:

- i. Fees for services offered to account and nonaccount holders alike, such as travelers checks and wire transfers (even if different amounts are charged to account and non-account holders).

ii. Incidental fees, such as fees associated with state escheat laws, garnishment or attorneys fees, and fees for photocopying.

3. *Amount of fees.* Institutions must state the amount and conditions under which a fee may be imposed. Naming and describing the fee (such as "\$4.00 monthly service fee") will typically satisfy these requirements.

4. *Tied-accounts.* Institutions must state if fees that may be assessed against an account are tied to other accounts at the institution. For example, if an institution ties the fees payable on a NOW account to balances held in the NOW account and a savings account, the NOW account disclosures must state that fact and explain how the fee is determined.

5. *Fees for overdrawing an account.* Under §1030.4(b)(4) of this part, institutions must disclose the conditions under which a fee may be imposed. In satisfying this requirement institutions must specify the categories of transactions for which an overdraft fee may be imposed. An exhaustive list of transactions is not required. It is sufficient for an institution to state that the fee applies to overdrafts "created by check, in-person withdrawal, ATM withdrawal, or other electronic means," as applicable. Disclosing a fee "for overdraft items" would not be sufficient.

(b)(5) *Transaction limitations.*

1. *General rule.* Examples of limitations on the number or dollar amount of deposits or withdrawals that institutions must disclose are:

i. Limits on the number of checks that may be written on an account within a given time period.

ii. Limits on withdrawals or deposits during the term of a time account.

iii. Limitations required by Regulation D of the Board of Governors of the Federal Reserve System (12 CFR part 204) on the number of withdrawals permitted from money market deposit accounts by check to third parties each month. Institutions need not

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disclose reservations of right to require notices for withdrawals from accounts required by federal or state law.

(b)(6) *Features of time accounts.*

(b)(6)(i) *Time requirements.*

1. “*Callable*” time accounts. In addition to the maturity date, an institution must state the date or the circumstances under which it may redeem a time account at the institution’s option (a “callable” time account).

(b)(6)(ii) *Early withdrawal penalties.*

1. *General.* The term “penalty” may but need not be used to describe the loss of interest that consumers may incur for early withdrawal of funds from time accounts.

2. *Examples.* Examples of early withdrawal penalties are:

i. Monetary penalties, such as “\$10.00” or “seven days’ interest plus accrued but uncredited interest.”

ii. Adverse changes to terms such as a lowering of the interest rate, annual percentage yield, or compounding frequency for funds remaining on deposit.

iii. Reclamation of bonuses.

3. *Relation to rules for IRAs or similar plans.* Penalties imposed by the Internal Revenue Code for certain withdrawals from IRAs or similar pension or savings plans are not early withdrawal penalties for purposes of this part.

4. *Disclosing penalties.* Penalties may be stated in months, whether institutions assess the penalty using the actual number of days during the period or using another method such as a number of days that occurs in any actual sequence of the total calendar months involved. For example, stating “one month’s interest” is permissible, whether the institution assesses 30 days’ interest during the month of April, or selects a time period between 28 and 31 days for calculating the interest for all early withdrawals regardless of when the penalty is assessed.

(b)(6)(iv) *Renewal policies.*

1. *Rollover time accounts.* Institutions offering a grace period on time accounts that automatically renew need not state whether interest will be paid if the funds are withdrawn during the grace period.

2. *Nonrollover time accounts.* Institutions paying interest on funds following the maturity of time accounts that do not renew automatically need not state the rate (or annual percentage yield) that may be paid. (See appendix B, Model Clause B-1(h)(iv)(2).)

Section 1030.5—Subsequent Disclosures

(a) *Change in terms.*

(a)(I) *Advance notice required.*

1. *Form of notice.* Institutions may provide a change-in-term notice on or with a periodic statement or in another mailing. If an institution provides notice through revised account disclosures, the changed term must be highlighted in some manner. For example, institutions may note that a particular fee

has been changed (also specifying the new amount) or use an accompanying letter that refers to the changed term.

2. *Effective date.* An example of language for disclosing the effective date of a change is “As of November 21, 1994.”

3. *Terms that change upon the occurrence of an event.* An institution offering terms that will automatically change upon the occurrence of a stated event need not send an advance notice of the change provided the institution fully describes the conditions of the change in the account opening disclosures (and sends any change-in-term notices regardless of whether the changed term affects that consumer’s account at that time).

4. *Examples.* Examples of changes not requiring an advance change-in-terms notice are:

i. The termination of employment for consumers for whom account maintenance or activity fees were waived during their employment by the depository institution.

ii. The expiration of one year in a promotion described in the account opening disclosures to “waive \$4.00 monthly service charges for one year.”

(a)(2) *No notice required.*

(a)(2)(ii) *Check printing fees.*

1. *Increase in fees.* A notice is not required for an increase in fees for printing checks (or deposit and withdrawal slips) even if the institution adds some amount to the price charged by the vendor.

(b) *Notice before maturity for time accounts longer than one month that renew automatically.*

1. *Maturity dates on nonbusiness days.* In determining the term of a time account, institutions may disregard the fact that the term will be extended beyond the disclosed number of days because the disclosed maturity falls on a nonbusiness day. For example, a holiday or weekend may cause a “one-year” time account to extend beyond 365 days (or 366, in a leap year) or a “one-month” time account to extend beyond 31 days.

2. *Disclosing when rates will be determined.* Ways to disclose when the annual percentage yield will be available include the use of:

i. A specific date, such as “October 28.”

ii. A date that is easily determinable, such as “the Tuesday before the maturity date stated on this notice” or “as of the maturity date stated on this notice.”

3. *Alternative timing rule.* Under the alternative timing rule, an institution offering a 10-day grace period would have to provide the disclosures at least 10 days prior to the scheduled maturity date.

4. *Club accounts.* If consumers have agreed to the transfer of payments from another account to a club time account for the next club period, the institution must comply with the requirements for automatically renewable time accounts—even though consumers may withdraw funds from the club

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account at the end of the current club period.

5. *Renewal of a time account.* In the case of a change in terms that becomes effective if a rollover time account is subsequently renewed:

i. If the change is initiated by the institution, the disclosure requirements of this paragraph apply. (Paragraph 1030.5(a) applies if the change becomes effective prior to the maturity of the existing time account.)

ii. If the change is initiated by the consumer, the account opening disclosure requirements of §1030.4(b) apply. (If the notice required by this paragraph has been provided, institutions may give new account disclosures or disclosures highlighting only the new term.)

6. *Example.* If a consumer receives a premature notice on a one-year time account and requests a rollover to a six-month account, the institution must provide either account opening disclosures including the new maturity date or, if all other terms previously disclosed in the premature notice remain the same, only the new maturity date.

(b)(1) *Maturities of longer than one year.*

1. *Highlighting changed terms.* Institutions need not highlight terms that changed since the last account disclosures were provided.

(c) *Notice before maturity for time accounts longer than one year that do not renew automatically.*

1. *Subsequent account.* When funds are transferred following maturity of a nonrollover time account, institutions need not provide account disclosures unless a new account is established.

Section 1030.6—Periodic Statement Disclosures

(a) *General rule.*

1. *General.* Institutions are not required to provide periodic statements. If they do provide statements, disclosures need only be furnished to the extent applicable. For example, if no interest is earned for a statement period, institutions need not state that fact. Or, institutions may disclose “\$0” interest earned and “0%” annual percentage yield earned.

2. *Regulation E interim statements.* When an institution provides regular quarterly statements, and in addition provides a monthly interim statement to comply with Regulation E, the interim statement need not comply with this section unless it states interest or rate information. (See 12 CFR 1005.9(b).)

3. *Combined statements.* Institutions may provide information about an account (such as a MMDA) on the periodic statement for another account (such as a NOW account) without triggering the disclosures required by this section, as long as:

i. The information is limited to the account number, the type of account, or balance information, and

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ii. The institution also provides a periodic statement complying with this section for each account.

4. *Other information.* Additional information that may be given on or with a periodic statement includes:

i. Interest rates and corresponding periodic rates applied to balances during the statement period.

ii. The dollar amount of interest earned year-to-date.

iii. Bonuses paid (or any *de minimis* consideration of \$10 or less).

iv. Fees for products such as safe deposit boxes.

(a)(1) *Annual percentage yield earned.*

1. *Ledger and collected balances.* Institutions that accrue interest using the collected balance method may use either the ledger or the collected balance in determining the annual percentage yield earned.

(a)(2) *Amount of interest.*

1. *Accrued interest.* Institutions must state the amount of interest that accrued during the statement period, even if it was not credited.

2. *Terminology.* In disclosing interest earned for the period, institutions must use the term “interest” or terminology such as:

i. “Interest paid,” to describe interest that has been credited.

ii. “Interest accrued” or “interest earned,” to indicate that interest is not yet credited.

3. *Closed accounts.* If consumers close an account between crediting periods and forfeits accrued interest, the institution may not show any figures for interest earned or annual percentage yield earned for the period (other than zero, at the institution’s option).

(a)(3) *Fees imposed.*

1. *General.* Periodic statements must state fees disclosed under §1030.4(b) that were debited to the account during the statement period, even if assessed for an earlier period.

2. *Itemizing fees by type.* In itemizing fees imposed more than once in the period, institutions may group fees if they are the same type. (See §1030.11(a)(1) of this part regarding certain fees that are required to be grouped.) When fees of the same type are grouped together, the description must make clear that the dollar figure represents more than a single fee, for example, “total fees for checks written this period.” Examples of fees that may not be grouped together are—

i. Monthly maintenance and excess-activity fees.

ii. “Transfer” fees, if different dollar amounts are imposed, such as \$.50 for deposits and \$1.00 for withdrawals.

iii. Fees for electronic fund transfers and fees for other services, such as balance-inquiry or maintenance fees.

iv. Fees for paying overdrafts and fees for returning checks or other items unpaid.

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3. *Identifying fees.* Statement details must enable consumers to identify the specific fee. For example:

i. Institutions may use a code to identify a particular fee if the code is explained on the periodic statement or in documents accompanying the statement.

ii. Institutions using debit slips may disclose the date the fee was debited on the periodic statement and show the amount and type of fee on the dated debit slip.

4. *Relation to Regulation E.* Disclosure of fees in compliance with Regulation E complies with this section for fees related to electronic fund transfers (for example, totaling all electronic funds transfer fees in a single figure).

(a)(4) *Length of period.*

1. *General.* Institutions providing the beginning and ending dates of the period must make clear whether both dates are included in the period.

2. *Opening or closing an account mid-cycle.* If an account is opened or closed during the period for which a statement is sent, institutions must calculate the annual percentage yield earned based on account balances for each day the account was open.

(b) *Special rule for average daily balance method.*

1. *Monthly statements and quarterly compounding.* This rule applies, for example, when an institution calculates interest on a quarterly average daily balance and sends monthly statements. In this case, the first two monthly statements would omit annual percentage yield earned and interest earned figures; the third monthly statement would reflect the interest earned and the annual percentage yield earned for the entire quarter.

2. *Length of the period.* Institutions must disclose the length of both the interest calculation period and the statement period. For example, a statement could disclose a statement period of April 16 through May 15 and further state that "the interest earned and the annual percentage yield earned are based on your average daily balance for the period April 1 through April 30."

3. *Quarterly statements and monthly compounding.* Institutions that use the average daily balance method to calculate interest on a monthly basis and that send statements on a quarterly basis may disclose a single interest (and annual percentage yield earned) figure. Alternatively, an institution may disclose three interest and three annual percentage yield earned figures, one for each month in the quarter, as long as the institution states the number of days (or beginning and ending dates) in the interest period if different from the statement period.

Section 1030.7—Payment of Interest

(a)(1) Permissible methods.

1. *Prohibited calculation methods.* Calculation methods that do not comply with the requirement to pay interest on the full amount of principal in the account each day include:

i. Paying interest on the balance in the account at the end of the period (the "ending balance" method).

ii. Paying interest for the period based on the lowest balance in the account for any day in that period (the "low balance" method).

iii. Paying interest on a percentage of the balance, excluding the amount set aside for reserve requirements (the "investable balance" method).

2. *Use of 365-day basis.* Institutions may apply a daily periodic rate greater than $\frac{1}{365}$ of the interest rate—such as $\frac{1}{360}$ of the interest rate—as long as it is applied 365 days a year.

3. *Periodic interest payments.* An institution can pay interest each day on the account and still make uniform interest payments. For example, for a one-year certificate of deposit an institution could make monthly interest payments equal to $\frac{1}{12}$ of the amount of interest that will be earned for a 365-day period (or 11 uniform monthly payments—each equal to roughly $\frac{1}{12}$ of the total amount of interest—and one payment that accounts for the remainder of the total amount of interest earned for the period).

4. *Leap year.* Institutions may apply a daily rate of $\frac{1}{366}$ or $\frac{1}{365}$ of the interest rate for 366 days in a leap year, if the account will earn interest for February 29.

5. *Maturity of time accounts.* Institutions are not required to pay interest after time accounts mature. (See 12 CFR Part 217, Regulation Q of the Board of Governors of the Federal Reserve System, for limitations on duration of interest payments.) Examples include:

i. During a grace period offered for an automatically renewable time account, if consumers decide during that period not to renew the account.

ii. Following the maturity of nonrollover time accounts.

iii. When the maturity date falls on a holiday, and consumers must wait until the next business day to obtain the funds.

6. *Dormant accounts.* Institutions must pay interest on funds in an account, even if inactivity or the infrequency of transactions would permit the institution to consider the account to be "inactive" or "dormant" (or similar status) as defined by state or other law or the account contract.

(a)(2) *Determination of minimum balance to earn interest.*

1. *Daily balance accounts.* Institutions that require a minimum balance may choose not to pay interest for days when the balance drops below the required minimum, if they

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use the daily balance method to calculate interest.

2. *Average daily balance accounts.* Institutions that require a minimum balance may choose not to pay interest for the period in which the balance drops below the required minimum, if they use the average daily balance method to calculate interest.

3. *Beneficial method.* Institutions may not require that consumers maintain both a minimum daily balance and a minimum average daily balance to earn interest, such as by requiring consumers to maintain a \$500 daily balance and a prescribed average daily balance (whether higher or lower). But an institution could offer a minimum balance to earn interest that includes an additional method that is "unequivocally beneficial" to consumers such as the following: An institution using the daily balance method to calculate interest and requiring a \$500 minimum daily balance could offer to pay interest on the account for those days the minimum balance is not met as long as consumers maintain an average daily balance throughout the month of \$400.

4. *Paying on full balance.* Institutions must pay interest on the full balance in the account that meets the required minimum balance. For example, if \$300 is the minimum daily balance required to earn interest, and a consumer deposits \$500, the institution must pay the stated interest rate on the full \$500 and not just on \$200.

5. *Negative balances prohibited.* Institutions must treat a negative account balance as zero to determine:

i. The daily or average daily balance on which interest will be paid.

ii. Whether any minimum balance to earn interest is met.

6. *Club accounts.* Institutions offering club accounts (such as a "holiday" or "vacation" club) cannot impose a minimum balance requirement for interest based on the total number or dollar amount of payments required under the club plan. For example, if a plan calls for \$10 weekly payments for 50 weeks, the institution cannot set a \$500 "minimum balance" and then pay interest only if the consumer has made all 50 payments.

7. *Minimum balances not affecting interest.* Institutions may use the daily balance, average daily balance, or any other computation method to calculate minimum balance requirements not involving the payment of interest—such as to compute minimum balances for assessing fees.

(b) *Compounding and crediting policies.*

1. *General.* Institutions choosing to compound interest may compound or credit interest annually, semi-annually, quarterly, monthly, daily, continuously, or on any other basis.

2. *Withdrawals prior to crediting date.* If consumers withdraw funds (without closing the

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account) prior to a scheduled crediting date, institutions may delay paying the accrued interest on the withdrawn amount until the scheduled crediting date, but may not avoid paying interest.

3. *Closed accounts.* Subject to state or other law, an institution may choose not to pay accrued interest if consumers close an account prior to the date accrued interest is credited, as long as the institution has disclosed that fact.

(c) *Date interest begins to accrue.*

1. *Relation to Regulation CC.* Institutions may rely on the Expedited Funds Availability Act (EFAA) and Regulation CC (12 CFR part 229) to determine, for example, when a deposit is considered made for purposes of interest accrual, or when interest need not be paid on funds because a deposited check is later returned unpaid.

2. *Ledger and collected balances.* Institutions may calculate interest by using a "ledger" or "collected" balance method, as long as the crediting requirements of the EFAA are met (12 CFR 229.14).

3. *Withdrawal of principal.* Institutions must accrue interest on funds until the funds are withdrawn from the account. For example, if a check is debited to an account on a Tuesday, the institution must accrue interest on those funds through Monday.

Section 1030.8—Advertising

(a) *Misleading or inaccurate advertisements.*

1. *General.* All advertisements are subject to the rule against misleading or inaccurate advertisements, even though the disclosures applicable to various media differ.

2. *Indoor signs.* An indoor sign advertising an annual percentage yield is not misleading or inaccurate when:

i. For a tiered-rate account, it also provides the lower dollar amount of the tier corresponding to the advertised annual percentage yield.

ii. For a time account, it also provides the term required to obtain the advertised annual percentage yield.

3. *Fees affecting "free" accounts.* For purposes of determining whether an account can be advertised as "free" or "no cost," maintenance and activity fees include:

i. Any fee imposed when a minimum balance requirement is not met, or when consumers exceed a specified number of transactions.

ii. Transaction and service fees that consumers reasonably expect to be imposed on a regular basis.

iii. A flat fee, such as a monthly service fee.

iv. Fees imposed to deposit, withdraw, or transfer funds, including per-check or per-transaction charges (for example, \$.25 for each withdrawal, whether by check or in person).

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4. *Other fees.* Examples of fees that are not maintenance or activity fees include:

- i. Fees not required to be disclosed under § 1030.4(b)(4).
- ii. Check printing fees.
- iii. Balance inquiry fees.
- iv. Stop-payment fees and fees associated with checks returned unpaid.
- v. Fees assessed against a dormant account.

vi. Fees for ATM or electronic transfer services (such as preauthorized transfers or home banking services) not required to obtain an account.

5. *Similar terms.* An advertisement may not use the term “fees waived” if a maintenance or activity fee may be imposed because it is similar to the terms “free” or “no cost.”

6. *Specific account services.* Institutions may advertise a specific account service or feature as free if no fee is imposed for that service or feature. For example, institutions offering an account that is free of deposit or withdrawal fees could advertise that fact, as long as the advertisement does not mislead consumers by implying that the account is free and that no other fee (a monthly service fee, for example) may be charged.

7. *Free for limited time.* If an account (or a specific account service) is free only for a limited period of time—for example, for one year following the account opening—the account (or service) may be advertised as free if the time period is also stated.

8. *Conditions not related to deposit accounts.* Institutions may advertise accounts as “free” for consumers meeting conditions not related to deposit accounts, such as the consumer’s age. For example, institutions may advertise a NOW account as “free for persons over 65 years old,” even though a maintenance or activity fee is assessed on accounts held by consumers 65 or younger.

9. *Electronic advertising.* If an electronic advertisement (such as an advertisement appearing on an Internet Web site) displays a triggering term (such as a bonus or annual percentage yield) the advertisement must clearly refer the consumer to the location where the additional required information begins. For example, an advertisement that includes a bonus or annual percentage yield may be accompanied by a link that directly takes the consumer to the additional information.

10. *Examples.* Examples of advertisements that would ordinarily be misleading, inaccurate, or misrepresent the deposit contract are:

- i. Representing an overdraft service as a “line of credit,” unless the service is subject to Regulation Z, 12 CFR part 1026.
- ii. Representing that the institution will honor all checks or authorize payment of all transactions that overdraw an account, with or without a specified dollar limit, when the institution retains discretion at any time

not to honor checks or authorize transactions.

iii. Representing that consumers with an overdrawn account are allowed to maintain a negative balance when the terms of the account’s overdraft service require consumers promptly to return the deposit account to a positive balance.

iv. Describing an institution’s overdraft service solely as protection against bounced checks when the institution also permits overdrafts for a fee for overrawing their accounts by other means, such as ATM withdrawals, debit card transactions, or other electronic fund transfers.

v. Advertising an account-related service for which the institution charges a fee in an advertisement that also uses the word “free” or “no cost” (or a similar term) to describe the account, unless the advertisement clearly and conspicuously indicates that there is a cost associated with the service. If the fee is a maintenance or activity fee under § 1030.8(a)(2) of this part, however, an advertisement may not describe the account as “free” or “no cost” (or contain a similar term) even if the fee is disclosed in the advertisement.

11. *Additional disclosures in connection with the payment of overdrafts.* The rule in § 1030.3(a), providing that disclosures required by § 1030.8 may be provided to the consumer in electronic form without regard to E-Sign Act requirements, applies to the disclosures described in § 1030.11(b), which are incorporated by reference in § 1030.8(f).

(b) Permissible rates.

1. *Tiered-rate accounts.* An advertisement for a tiered-rate account that states an annual percentage yield must also state the annual percentage yield for each tier, along with corresponding minimum balance requirements. Any interest rates stated must appear in conjunction with the applicable annual percentage yields for each tier.

2. *Stepped-rate accounts.* An advertisement that states an interest rate for a stepped-rate account must state all the interest rates and the time period that each rate is in effect.

3. *Representative examples.* An advertisement that states an annual percentage yield for a given type of account (such as a time account for a specified term) need not state the annual percentage yield applicable to other time accounts offered by the institution or indicate that other maturity terms are available. In an advertisement stating that rates for an account may vary depending on the amount of the initial deposit or the term of a time account, institutions need not list each balance level and term offered. Instead, the advertisement may:

- i. Provide a representative example of the annual percentage yields offered, clearly described as such. For example, if an institution offers a \$25 bonus on all time accounts

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and the annual percentage yield will vary depending on the term selected, the institution may provide a disclosure of the annual percentage yield as follows: "For example, our 6-month certificate of deposit currently pays a 3.15% annual percentage yield."

ii. Indicate that various rates are available, such as by stating short-term and longer-term maturities along with the applicable annual percentage yields: "We offer certificates of deposit with annual percentage yields that depend on the maturity you choose. For example, our one-month CD earns a 2.75% APY. Or, earn a 5.25% APY for a three-year CD."

(c) When additional disclosures are required.

1. Trigger terms. The following are examples of information stated in advertisements that are not "trigger" terms:

i. "One, three, and five year CDs available."

ii. "Bonus rates available."

iii. "1% over our current rates," so long as the rates are not determinable from the advertisement.

(c)(2) Time annual percentage yield is offered.

1. Specified date. If an advertisement discloses an annual percentage yield as of a specified date, that date must be recent in relation to the publication or broadcast frequency of the media used, taking into account the particular circumstances or production deadlines involved. For example, the printing date of a brochure printed once for a deposit account promotion that will be in effect for six months would be considered "recent," even though rates change during the six-month period. Rates published in a daily newspaper or on television must reflect rates offered shortly before (or on) the date the rates are published or broadcast.

2. Reference to date of publication. An advertisement may refer to the annual percentage yield as being accurate as of the date of publication, if the date is on the publication itself. For instance, an advertisement in a periodical may state that a rate is "current through the date of this issue," if the periodical shows the date.

(c)(5) Effect of fees.

1. Scope. This requirement applies only to maintenance or activity fees described in comment 8(a).

(c)(6) Features of time accounts.

(c)(6)(i) Time requirements.

1. Club accounts. If a club account has a maturity date but the term may vary depending on when the account is opened, institutions may use a phrase such as: "The maturity date of this club account is November 15; its term varies depending on when the account is opened."

(c)(6)(ii) Early withdrawal penalties.

1. Discretionary penalties. Institutions imposing early withdrawal penalties on a case-by-case basis may disclose that they "may" (rather than "will") impose a penalty if such

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a disclosure accurately describes the account terms.

(d) Bonuses.

1. General reference to "bonus." General statements such as "bonus checking" or "get a bonus when you open a checking account" do not trigger the bonus disclosures.

(e) Exemption for certain advertisements.

(e)(1) Certain media.

Paragraph (e)(1)(i).

1. Internet advertisements. The exemption for advertisements made through broadcast or electronic media does not extend to advertisements posted on the Internet or sent by email.

Paragraph (e)(1)(iii).

1. Tiered-rate accounts. Solicitations for a tiered-rate account made through telephone response machines must provide the annual percentage yields and the balance requirements applicable to each tier.

(e)(2) Indoor signs.

Paragraph (e)(2)(i).

1. General. Indoor signs include advertisements displayed on computer screens, banners, preprinted posters, and chalk or peg boards. Any advertisement inside the premises that can be retained by a consumer (such as a brochure or a printout from a computer) is not an indoor sign.

Section 1030.9—Enforcement and Record Retention

(c) Record retention.

1. Evidence of required actions. Institutions comply with the regulation by demonstrating that they have done the following:

i. Established and maintained procedures for paying interest and providing timely disclosures as required by the regulation, and

ii. Retained sample disclosures for each type of account offered to consumers, such as account-opening disclosures, copies of advertisements, and change-in-term notices; and information regarding the interest rates and annual percentage yields offered.² Methods of retaining evidence. Institutions must be able to reconstruct the required disclosures or other actions. They need not keep disclosures or other business records in hard copy. Records evidencing compliance may be retained on microfilm, microfiche, or by other methods that reproduce records accurately (including computer files).

3. Payment of interest. Institutions must retain sufficient rate and balance information to permit the verification of interest paid on an account, including the payment of interest on the full principal balance.

Section 1030.10 [Reserved]

Section 1030.11—Additional Disclosures Regarding the Payment of Overdrafts

(a) Disclosure of total fees on periodic statements.

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(a)(1) General.

1. *Transfer services.* The overdraft services covered by §1030.11(a)(1) of this part do not include a service providing for the transfer of funds from another deposit account of the consumer to permit the payment of items without creating an overdraft, even if a fee is charged for the transfer.

2. *Fees for paying overdrafts.* Institutions must disclose on periodic statements a total dollar amount for all fees or charges imposed on the account for paying overdrafts. The institution must disclose separate totals for the statement period and for the calendar year-to-date. The total dollar amount for each of these periods includes per-item fees as well as interest charges, daily or other periodic fees, or fees charged for maintaining an account in overdraft status, whether the overdraft is by check, debit card transaction, or by any other transaction type. It also includes fees charged when there are insufficient funds because previously deposited funds are subject to a hold or are uncollected. It does not include fees for transferring funds from another account of the consumer to avoid an overdraft, or fees charged under a service subject to Regulation Z (12 CFR part 1026). See also comment 11(c)-2. Under §1030.11(a)(1)(i), the disclosure must describe the total dollar amount for all fees or charges imposed on the account for the statement period and calendar year-to-date for paying overdrafts using the term "Total Overdraft Fees." This requirement applies notwithstanding comment 3(a)-2.3. *Fees for returning items unpaid.* The total dollar amount for all fees for returning items unpaid must include all fees charged to the account for dishonoring or returning checks or other items drawn on the account. The institution must disclose separate totals for the statement period and for the calendar year-to-date. Fees imposed when deposited items are returned are not included. Institutions may use terminology such as "returned item fee" or "NSF fee" to describe fees for returning items unpaid.

4. *Waived fees.* In some cases, an institution may provide a statement for the current period reflecting that fees imposed during a previous period were waived and credited to the account. Institutions may, but are not required to, reflect the adjustment in the total for the calendar year-to-date and in the applicable statement period. For example, if an institution assesses a fee in January and refunds the fee in February, the institution could disclose a year-to-date total reflecting the amount credited, but it should not affect the total disclosed for the February statement period, because the fee was not assessed in the February statement period. If an institution assesses and then waives and credits a fee within the same cycle, the institution may, at its option, reflect the adjustment in the total disclosed for fees imposed

during the current statement period and for the total for the calendar year-to-date. Thus, if the institution assesses and waives the fee in the February statement period, the February fee total could reflect a total net of the waived fee.

5. *Totals for the calendar year to date.* Some institutions' statement periods do not coincide with the calendar month. In such cases, the institution may disclose a calendar year-to-date total by aggregating fees for 12 monthly cycles, starting with the period that begins during January and finishing with the period that begins during December. For example, if statement periods begin on the 10th day of each month, the statement covering December 10, 2006 through January 9, 2007 may disclose the year-to-date total for fees imposed from January 10, 2006 through January 9, 2007. Alternatively, the institution could provide a statement for the cycle ending January 9, 2007 showing the year-to-date total for fees imposed January 1, 2006 through December 31, 2006.

6. *Itemization of fees.* An institution may itemize each fee in addition to providing the disclosures required by §1030.11(a)(1) of this part.

(a)(3) Format requirements.

1. *Time period covered by periodic statement disclosures.* The disclosures under §1030.11(a) must be included on periodic statements provided by an institution starting the first statement period that begins after January 1, 2010. For example, if a consumer's statement period typically closes on the 15th of each month, an institution must provide the disclosures required by §1030.11(a)(1) on subsequent periodic statements for that consumer beginning with the statement reflecting the period from January 16, 2010 to February 15, 2010.

(b) Advertising disclosures for overdraft services.

1. *Examples of institutions promoting the payment of overdrafts.* A depository institution would be required to include the advertising disclosures in §1030.11(b)(1) of this part if the institution:

i. Promotes the institution's policy or practice of paying overdrafts (unless the service would be subject to Regulation Z (12 CFR part 1026)). This includes advertisements using print media such as newspapers or brochures, telephone solicitations, electronic mail, or messages posted on an Internet site. (But see §1030.11(b)(2) of this part for communications that are not subject to the additional advertising disclosures.)

ii. Includes a message on a periodic statement informing the consumer of an overdraft limit or the amount of funds available for overdrafts. For example, an institution that includes a message on a periodic statement informing the consumer of a \$500 overdraft

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limit or that the consumer has \$300 remaining on the overdraft limit, is promoting an overdraft service.

iii. Discloses an overdraft limit or includes the dollar amount of an overdraft limit in a balance disclosed on an automated system, such as a telephone response machine, ATM screen or the institution's Internet site. (See, however, § 1030.11(b)(3) of this part.)

2. *Transfer services.* The overdraft services covered by § 1030.11(b)(1) of this part do not include a service providing for the transfer of funds from another deposit account of the consumer to permit the payment of items without creating an overdraft, even if a fee is charged for the transfer.

3. *Electronic media.* The exception for advertisements made through broadcast or electronic media, such as television or radio, does not apply to advertisements posted on an institution's Internet site, on an ATM screen, provided on telephone response machines, or sent by electronic mail.

4. *Fees.* The fees that must be disclosed under § 1030.11(b)(1) of this part include item fees as well as interest charges, daily or other periodic fees, and fees charged for maintaining an account in overdraft status, whether the overdraft is by check or by other means. The fees also include fees charged when there are insufficient funds because previously deposited funds are subject to a hold or are uncollected. The fees do not include fees for transferring funds from another account to avoid an overdraft, or fees charged when the institution has previously agreed in writing to pay items that overdraw the account and the service is subject to Regulation Z, 12 CFR Part 1026.

5. *Categories of transactions.* An exhaustive list of transactions is not required. Disclosing that a fee may be imposed for covering overdrafts "created by check, in-person withdrawal, ATM withdrawal, or other electronic means" would satisfy the requirements of § 1030.11(b)(1)(ii) of this part where the fee may be imposed in these circumstances. See comment 4(b)(4)-5 of this part.

6. *Time period to repay.* If a depository institution reserves the right to require a consumer to pay an overdraft immediately or on demand instead of affording consumers a specific time period to establish a positive balance in the account, an institution may comply with § 1030.11(b)(1)(iii) of this part by disclosing this fact.

7. *Circumstances for nonpayment.* An institution must describe the circumstances under which it will not pay an overdraft. It is sufficient to state, as applicable: "Whether your overdrafts will be paid is discretionary and we reserve the right not to pay. For example, we typically do not pay overdrafts if your account is not in good standing, or you are not making regular deposits, or you have too many overdrafts."

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8. *Advertising an account as "free."* If the advertised account-related service is an overdraft service subject to the requirements of § 1030.11(b)(1) of this part, institutions must disclose the fee or fees for the payment of each overdraft, not merely that a cost is associated with the overdraft service, as well as other required information. Compliance with comment 8(a)-10.v. is not sufficient.

(c) *Disclosure of account balances.*

1. *Balance that does not include additional amounts.* For purposes of the balance disclosure requirement in § 1030.11(c), if an institution discloses balance information to a consumer through an automated system, it must disclose a balance that excludes any funds that the institution may provide to cover an overdraft pursuant to a discretionary overdraft service, that will be paid by the institution under a service subject to Regulation Z (12 CFR Part 1026), or that will be transferred from another account held individually or jointly by a consumer. The balance may, but need not, include funds that are deposited in the consumer's account, such as from a check, that are not yet made available for withdrawal in accordance with the funds availability rules under Regulation CC of the Board of Governors of the Federal Reserve System (12 CFR part 229). In addition, the balance may, but need not, include funds that are held by the institution to satisfy a prior obligation of the consumer (for example, to cover a hold for an ATM or debit card transaction that has been authorized but for which the bank has not settled).

2. *Retail sweep programs.* In a retail sweep program, an institution establishes two legally distinct subaccounts, a transaction subaccount and a savings subaccount, which together make up the consumer's account. The institution allocates and transfers funds between the two subaccounts in order to maximize the balance in the savings account while complying with the monthly limitations on transfers out of savings accounts under Regulation D of the Board of Governors of the Federal Reserve System (12 CFR 204.2(d)(2)). Retail sweep programs are generally not established for the purpose of covering overdrafts. Rather, institutions typically establish retail sweep programs by agreement with the consumer, in order for the institution to minimize its transaction account reserve requirements and, in some cases, to provide a higher interest rate than the consumer would earn on a transaction account alone. Section 1030.11(c) does not require an institution to exclude from the consumer's balance funds that may be transferred from another account pursuant to a retail sweep program that is established for such purposes and that has the following characteristics:

i. The account involved complies with Regulation D of the Board of Governors of the Federal Reserve System (12 CFR 204.2(d)(2));

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ii. The consumer does not have direct access to the non-transaction subaccount that is part of the retail sweep program; and

iii. The consumer's periodic statements show the account balance as the combined balance in the subaccounts.

3. *Additional balance.* The institution may disclose additional balances supplemented by funds that may be provided by the institution to cover an overdraft, whether pursuant to a discretionary overdraft service, a service subject to Regulation Z (12 CFR Part 1026), or a service that transfers funds from another account held individually or jointly by the consumer, so long as the institution prominently states that any additional balance includes these additional overdraft amounts. The institution may not simply state, for instance, that the second balance is the consumer's "available balance," or contains "available funds." Rather, the institution should provide enough information to convey that the second balance includes these amounts. For example, the institution may state that the balance includes "overdraft funds." Where a consumer has not opted into, or as applicable, has opted out of the institution's discretionary overdraft service, any additional balance disclosed should not include funds that otherwise might be available under that service. Where a consumer has not opted into, or as applicable, has opted out of, the institution's discretionary overdraft service for some, but not all transactions (e.g., the consumer has not opted into overdraft services for ATM and one-time debit card transactions), an institution that includes these additional overdraft funds in the second balance should convey that the overdraft funds are not available for all transactions. For example, the institution could state that overdraft funds are not available for ATM and one-time (or everyday) debit card transactions. Similarly, if funds are not available for all transactions pursuant to a service subject to Regulation Z (12 CFR part 1026) or a service that transfers funds from another account, a second balance that includes such funds should also indicate this fact.

4. *Automated systems.* The balance disclosure requirement in § 1030.11(c) applies to any automated system through which the consumer requests a balance, including, but not limited to, a telephone response system, the institution's Internet site, or an ATM. The requirement applies whether the institution discloses a balance through an ATM owned or operated by the institution or through an ATM not owned or operated by the institution (including an ATM operated by a non-depository institution). If the balance is obtained at an ATM, the requirement also applies whether the balance is disclosed on the ATM screen or on a paper receipt.

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Appendix A to Part 1030—Annual Percentage Yield Calculation

Part I. Annual Percentage Yield for Account Disclosures and Advertising Purposes

1. *Rounding for calculations.* The following are examples of permissible rounding for calculating interest and the annual percentage yield:

- i. The daily rate applied to a balance carried to five or more decimal places
- ii. The daily interest earned carried to five or more decimal places

Part II. Annual Percentage Yield Earned for Periodic Statements

1. *Balance method.* The interest figure used in the calculation of the annual percentage yield earned may be derived from the daily balance method or the average daily balance method. The balance used in the formula for the annual percentage yield earned is the sum of the balances for each day in the period divided by the number of days in the period.

2. *Negative balances prohibited.* Institutions must treat a negative account balance as zero to determine the balance on which the annual percentage yield earned is calculated. (See commentary to § 1030.7(a)(2).)

A. General Formula

1. *Accrued but uncredited interest.* To calculate the annual percentage yield earned, accrued but uncredited interest:

i. May not be included in the balance for statements issued at the same time or less frequently than the account's compounding and crediting frequency. For example, if monthly statements are sent for an account that compounds interest daily and credits interest monthly, the balance may not be increased each day to reflect the effect of daily compounding.

ii. Must be included in the balance for succeeding statements if a statement is issued more frequently than compounded interest is credited on an account. For example, if monthly statements are sent for an account that compounds interest daily and credits interest quarterly, the balance for the second monthly statement would include interest that had accrued for the prior month.

2. *Rounding.* The interest earned figure used to calculate the annual percentage yield earned must be rounded to two decimals and reflect the amount actually paid. For example, if the interest earned for a statement period is \$20.074 and the institution pays the consumer \$20.07, the institution must use \$20.07 (not \$20.074) to calculate the annual percentage yield earned. For accounts paying interest based on the daily balance method that compound and credit interest quarterly, and send monthly statements, the institution may, but need not,

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round accrued interest to two decimals for calculating the annual percentage yield earned on the first two monthly statements issued during the quarter. However, on the quarterly statement the interest earned figure must reflect the amount actually paid.

B. Special Formula for Use Where Periodic Statement Is Sent More Often Than the Period for Which Interest Is Compounded

1. *Statements triggered by Regulation E.* Institutions may, but need not, use this formula to calculate the annual percentage yield earned for accounts that receive quarterly statements and are subject to Regulation E's rule calling for monthly statements when an electronic fund transfer has occurred. They may do so even though no monthly statement was issued during a specific quarter. But institutions must use this formula for accounts that compound and credit interest quarterly and receive monthly statements that, while triggered by Regulation E, comply with the provisions of § 1030.6.

2. *Days in compounding period.* Institutions using the special annual percentage yield earned formula must use the actual number of days in the compounding period.

Appendix B to Part 1030—Model Clauses and Sample Forms

1. *Modifications.* Institutions that modify the model clauses will be deemed in compliance as long as they do not delete required information or rearrange the format in a way that affects the substance or clarity of the disclosures.

2. *Format.* Institutions may use inserts to a document (see Sample Form B-4) or fill-in blanks (see Sample Forms B-5, B-6 and B-7, which use underlining to indicate terms that have been filled in) to show current rates, fees, or other terms.

3. *Disclosures for opening accounts.* The sample forms illustrate the information that must be provided to consumers when an account is opened, as required by § 1030.4(a)(1). (See § 1030.4(a)(2), which states the requirements for disclosing the annual percentage yield, the interest rate, and the maturity of a time account in responding to a consumer's request.)

4. *Compliance with Regulation E.* Institutions may satisfy certain requirements under Regulation DD with disclosures that meet the requirements of Regulation E. (See § 1030.3(c).) For disclosures covered by both this part and Regulation E (such as the amount of fees for ATM usage, institutions should consult appendix A to Regulation E for appropriate model clauses.

5. *Duplicate disclosures.* If a requirement such as a minimum balance applies to more than one account term (to obtain a bonus and determine the annual percentage yield,

for example), institutions need not repeat the requirement for each term, as long as it is clear which terms the requirement applies to.

6. *Sample forms.* The sample forms (B-4 through B-8) serve a purpose different from the model clauses. They illustrate ways of adapting the model clauses to specific accounts. The clauses shown relate only to the specific transactions described.

B-1 Model Clauses for Account Disclosures

B-1(h) Disclosures Relating to Time Accounts

1. *Maturity.* The disclosure in Clause (h)(i) stating a specific date may be used in all cases. The statement describing a time period is appropriate only when providing disclosures in response to a consumer's request.

B-2 MODEL CLAUSES FOR CHANGE IN TERMS

1. *General.* The second clause, describing a future decrease in the interest rate and annual percentage yield, applies to fixed-rate accounts only.

B-4 Sample Form (Multiple Accounts)

1. *Rate sheet insert.* In the rate sheet insert, the calculations of the annual percentage yield for the three-month and six-month certificates are based on 92 days and 181 days respectively. All calculations in the insert assume daily compounding.

B-6 Sample Form (Tiered-Rate Money Market Account)

1. *General.* Sample Form B-6 uses Tiering Method A (discussed in appendix A and Clause (a)(iv)) to calculate interest. It gives a narrative description of a tiered-rate account; institutions may use different formats (for example, a chart similar to the one in Sample Form B-4), as long as all required information for each tier is clearly presented. The form does not contain a separate disclosure of the minimum balance required to obtain the annual percentage yield; the tiered-rate disclosure provides that information.

[76 FR 79278, Dec. 21, 2011, as amended at 84 FR 31701, July 3, 2019]

PART 1041—PAYDAY, VEHICLE TITLE, AND CERTAIN HIGH-COST INSTALLMENT LOANS

Subpart A—General

Sec.

- 1041.1 Authority and purpose.
- 1041.2 Definitions.
- 1041.3 Scope of coverage; exclusions; exemptions.

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Subpart B [Reserved]

Subpart C—Payments

- 1041.7 Identification of unfair and abusive practice.
1041.8 Prohibited payment transfer attempts.
1041.9 Disclosure of payment transfer attempts.

Subpart D—Recordkeeping, Anti-Evasion, Severability, and Dates

- 1041.10–1041.11 [Reserved]
1041.12 Compliance program and record retention.
1041.13 Prohibition against evasion.
1041.14 Severability.
1041.15 Effective and compliance dates.

APPENDIX A TO PART 1041—MODEL FORMS
SUPPLEMENT I TO PART 1041—OFFICIAL INTERPRETATIONS

AUTHORITY: 12 U.S.C. 5511, 5512, 5514(b), 5531(b), (c), and (d), 5532.

SOURCE: 82 FR 54871, Nov. 17, 2017, unless otherwise noted.

Subpart A—General

§ 1041.1 Authority and purpose.

(a) *Authority*. The regulation in this part is issued by the Bureau of Consumer Financial Protection (Bureau) pursuant to Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5481, *et seq.*).

(b) *Purpose*. The purpose of this part is to identify certain unfair and abusive acts or practices in connection with certain consumer credit transactions and to set forth requirements for preventing such acts or practices. This part also prescribes requirements to ensure that the features of those consumer credit transactions are fully, accurately, and effectively disclosed to consumers.

[82 FR 54871, Nov. 17, 2017, as amended at 85 FR 44444, July 22, 2020]

§ 1041.2 Definitions.

(a) *Definitions*. For the purposes of this part, the following definitions apply:

- (1) *Account* has the same meaning as in Regulation E, 12 CFR 1005.2(b).
(2) *Affiliate* has the same meaning as in 12 U.S.C. 5481(1).
(3) *Closed-end credit* means an extension of credit to a consumer that is not

open-end credit under paragraph (a)(16) of this section.

(4) *Consumer* has the same meaning as in 12 U.S.C. 5481(4).

(5) *Consummation* means the time that a consumer becomes contractually obligated on a new loan or a modification that increases the amount of an existing loan.

(6) *Cost of credit* means the cost of consumer credit as expressed as a per annum rate and is determined as follows:

(i) *Charges included in the cost of credit*. The cost of credit includes all finance charges as set forth by Regulation Z, 12 CFR 1026.4, but without regard to whether the credit is consumer credit, as that term is defined in 12 CFR 1026.2(a)(12), or is extended to a consumer, as that term is defined in 12 CFR 1026.2(a)(11).

(ii) *Calculation of the cost of credit*—
(A) *Closed-end credit*. For closed-end credit, the cost of credit must be calculated according to the requirements of Regulation Z, 12 CFR 1026.22.

(B) *Open-end credit*. For open-end credit, the cost of credit must be calculated according to the rules for calculating the effective annual percentage rate for a billing cycle as set forth in Regulation Z, 12 CFR 1026.14(c) and (d).

(7) *Covered longer-term balloon-payment loan* means a loan described in § 1041.3(b)(2).

(8) *Covered longer-term loan* means a loan described in § 1041.3(b)(3).

(9) [Reserved]

(10) *Covered short-term loan* means a loan described in § 1041.3(b)(1).

(11) *Credit* has the same meaning as in Regulation Z, 12 CFR 1026.2(a)(14).

(12) *Electronic fund transfer* has the same meaning as in Regulation E, 12 CFR 1005.3(b).

(13) *Lender* means a person who regularly extends credit to a consumer primarily for personal, family, or household purposes.

(14) [Reserved]

(15) *Motor vehicle* means any self-propelled vehicle primarily used for on-road transportation. The term does not include motor homes, recreational vehicles, golf carts, and motor scooters.

(16) *Open-end credit* means an extension of credit to a consumer that is an

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open-end credit plan as defined in Regulation Z, 12 CFR 1026.2(a)(20), but without regard to whether the credit is consumer credit, as defined in 12 CFR 1026.2(a)(12), is extended by a creditor, as defined in 12 CFR 1026.2(a)(17), is extended to a consumer, as defined in 12 CFR 1026.2(a)(11), or permits a finance charge to be imposed from time to time on an outstanding balance as defined in 12 CFR 1026.4.

(17) *Outstanding loan* means a loan that the consumer is legally obligated to repay, regardless of whether the loan is delinquent or is subject to a repayment plan or other workout arrangement, except that a loan ceases to be an outstanding loan if the consumer has not made at least one payment on the loan within the previous 180 days.

(18) *Service provider* has the same meaning as in the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5481(26).

(19) [Reserved]

(b) *Rule of construction.* For purposes of this part, where definitions are incorporated from other statutes or regulations, the terms have the meaning and incorporate the embedded definitions, appendices, and commentary from those other laws except to the extent that this part provides a different definition for a parallel term.

[82 FR 54871, Nov. 17, 2017, as amended at 84 FR 27929, June 17, 2019; 85 FR 44444, July 22, 2020]

§ 1041.3 Scope of coverage; exclusions; exemptions.

(a) *General.* This part applies to a lender that extends credit by making covered loans.

(b) *Covered loan.* Covered loan means closed-end or open-end credit that is extended to a consumer primarily for personal, family, or household purposes that is not excluded under paragraph (d) of this section or conditionally exempted under paragraph (e) or (f) of this section; and:

(1) For closed-end credit that does not provide for multiple advances to consumers, the consumer is required to repay substantially the entire amount of the loan within 45 days of consummation, or for all other loans, the consumer is required to repay substan-

tially the entire amount of any advance within 45 days of the advance;

(2) For loans not otherwise covered by paragraph (b)(1) of this section:

(i) For closed-end credit that does not provide for multiple advances to consumers, the consumer is required to repay substantially the entire balance of the loan in a single payment more than 45 days after consummation or to repay such loan through at least one payment that is more than twice as large as any other payment(s).

(ii) For all other loans, either:

(A) The consumer is required to repay substantially the entire amount of an advance in a single payment more than 45 days after the advance is made or is required to make at least one payment on the advance that is more than twice as large as any other payment(s); or

(B) A loan with multiple advances is structured such that paying the required minimum payments may not fully amortize the outstanding balance by a specified date or time, and the amount of the final payment to repay the outstanding balance at such time could be more than twice the amount of other minimum payments under the plan; or

(3) For loans not otherwise covered by paragraph (b)(1) or (2) of this section, if both of the following conditions are satisfied:

(i) The cost of credit for the loan exceeds 36 percent per annum, as measured:

(A) At the time of consummation for closed-end credit; or

(B) At the time of consummation and, if the cost of credit at consummation is not more than 36 percent per annum, again at the end of each billing cycle for open-end credit, except that:

(I) Open-end credit meets the condition set forth in this paragraph (b)(3)(i)(B) in any billing cycle in which a lender imposes a finance charge, and the principal balance is \$0; and

(2) Once open-end credit meets the condition set forth in this paragraph (b)(3)(i)(B), it meets the condition set forth in paragraph (b)(3)(i)(B) for the duration of the plan.

(ii) The lender or service provider obtains a leveraged payment mechanism

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as defined in paragraph (c) of this section.

(c) *Leveraged payment mechanism.* For purposes of paragraph (b) of this section, a lender or service provider obtains a leveraged payment mechanism if it has the right to initiate a transfer of money, through any means, from a consumer's account to satisfy an obligation on a loan, except that the lender or service provider does not obtain a leveraged payment mechanism by initiating a single immediate payment transfer at the consumer's request.

(d) *Exclusions for certain types of credit.* This part does not apply to the following:

(1) *Certain purchase money security interest loans.* Credit extended for the sole and express purpose of financing a consumer's initial purchase of a good when the credit is secured by the property being purchased, whether or not the security interest is perfected or recorded.

(2) *Real estate secured credit.* Credit that is secured by any real property, or by personal property used or expected to be used as a dwelling, and the lender records or otherwise perfects the security interest within the term of the loan.

(3) *Credit cards.* Any credit card account under an open-end (not home-secured) consumer credit plan as defined in Regulation Z, 12 CFR 1026.2(a)(15)(ii).

(4) *Student loans.* Credit made, insured, or guaranteed pursuant to a program authorized by subchapter IV of the Higher Education Act of 1965, 20 U.S.C. 1070 through 1099d, or a private education loan as defined in Regulation Z, 12 CFR 1026.46(b)(5).

(5) *Non-recourse pawn loans.* Credit in which the lender has sole physical possession and use of the property securing the credit for the entire term of the loan and for which the lender's sole recourse if the consumer does not elect to redeem the pawned item and repay the loan is the retention of the property securing the credit.

(6) *Overdraft services and lines of credit.* Overdraft services as defined in 12 CFR 1005.17(a), and overdraft lines of credit otherwise excluded from the definition of overdraft services under 12 CFR 1005.17(a)(1).

(7) *Wage advance programs.* Advances of wages that constitute credit if made

by an employer, as defined in the Fair Labor Standards Act, 29 U.S.C. 203(d), or by the employer's business partner, to the employer's employees, provided that:

(i) The advance is made only against the accrued cash value of any wages the employee has earned up to the date of the advance; and

(ii) Before any amount is advanced, the entity advancing the funds warrants to the consumer as part of the contract between the parties on behalf of itself and any business partners, that it or they, as applicable:

(A) Will not require the consumer to pay any charges or fees in connection with the advance, other than a charge for participating in the wage advance program;

(B) Has no legal or contractual claim or remedy against the consumer based on the consumer's failure to repay in the event the amount advanced is not repaid in full; and

(C) With respect to the amount advanced to the consumer, will not engage in any debt collection activities if the advance is not deducted directly from wages or otherwise repaid on the scheduled date, place the amount advanced as a debt with or sell it to a third party, or report to a consumer reporting agency concerning the amount advanced.

(8) *No-cost advances.* Advances of funds that constitute credit if the consumer is not required to pay any charge or fee to be eligible to receive or in return for receiving the advance, provided that before any amount is advanced, the entity advancing the funds warrants to the consumer as part of the contract between the parties:

(i) That it has no legal or contractual claim or remedy against the consumer based on the consumer's failure to repay in the event the amount advanced is not repaid in full; and

(ii) That, with respect to the amount advanced to the consumer, such entity will not engage in any debt collection activities if the advance is not repaid on the scheduled date, place the amount advanced as a debt with or sell it to a third party, or report to a consumer reporting agency concerning the amount advanced.

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(e) *Alternative loan.* Alternative loans are conditionally exempt from the requirements of this part. *Alternative loan* means a covered loan that satisfies the following conditions and requirements:

(1) *Loan term conditions.* An alternative loan must satisfy the following conditions:

(i) The loan is not structured as open-end credit, as defined in § 1041.2(a)(16);

(ii) The loan has a term of not less than one month and not more than six months;

(iii) The principal of the loan is not less than \$200 and not more than \$1,000;

(iv) The loan is repayable in two or more payments, all of which payments are substantially equal in amount and fall due in substantially equal intervals, and the loan amortizes completely during the term of the loan; and

(v) The lender does not impose any charges other than the rate and application fees permissible for Federal credit unions under regulations issued by the National Credit Union Administration at 12 CFR 701.21(c)(7)(iii).

(2) *Borrowing history condition.* Prior to making an alternative loan under this paragraph (e), the lender must determine from its records that the loan would not result in the consumer being indebted on more than three outstanding loans made under this paragraph (e) from the lender within a period of 180 days. The lender must also make no more than one alternative loan under this paragraph (e) at a time to a consumer.

(3) *Income documentation condition.* In making an alternative loan under this paragraph (e), the lender must maintain and comply with policies and procedures for documenting proof of recurring income.

(4) *Safe harbor.* Loans made by Federal credit unions in compliance with the conditions set forth by the National Credit Union Administration at 12 CFR 701.21(c)(7)(iii) for a Payday Alternative Loan are deemed to be in compliance with the requirements and conditions of paragraphs (e)(1), (2), and (3) of this section.

(f) *Accommodation loans.* Accommodation loans are conditionally exempt from the requirements of this part. *Acc-*

commodation loan means a covered loan if at the time that the loan is consummated:

(1) The lender and its affiliates collectively have made 2,500 or fewer covered loans in the current calendar year, and made 2,500 or fewer such covered loans in the preceding calendar year; and

(2)(i) During the most recent completed tax year in which the lender was in operation, if applicable, the lender and any affiliates that were in operation and used the same tax year derived no more than 10 percent of their receipts from covered loans; or

(ii) If the lender was not in operation in a prior tax year, the lender reasonably anticipates that the lender and any of its affiliates that use the same tax year will derive no more than 10 percent of their receipts from covered loans during the current tax year.

(3) Provided, however, that covered longer-term loans for which all transfers meet the conditions in § 1041.8(a)(1)(ii), and receipts from such loans, are not included for the purpose of determining whether the conditions of paragraphs (f)(1) and (2) of this section have been satisfied.

(g) *Receipts.* For purposes of paragraph (f) of this section, receipts means “total income” (or in the case of a sole proprietorship “gross income”) plus “cost of goods sold” as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; and Form 1040, Schedule C for sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers but excluding taxes levied on the entity or its employees; or amounts collected for another (but fees earned in connection with such collections are receipts). Items such as subcontractor costs, reimbursements for purchases a contractor makes at a customer’s request, and employee-based costs such as payroll taxes are included in receipts.

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(h) *Tax year.* For purposes of paragraph (f) of this section, “tax year” has the meaning attributed to it by the IRS as set forth in IRS Publication 538, which provides that a “tax year” is an annual accounting period for keeping records and reporting income and expenses.

[82 FR 54871, Nov. 17, 2017, as amended at 84 FR 27929, June 17, 2019]

Subpart B [Reserved]**Subpart C—Payments****§ 1041.7 Identification of unfair and abusive practice.**

It is an unfair and abusive practice for a lender to make attempts to withdraw payment from consumers' accounts in connection with a covered loan after the lender's second consecutive attempts to withdraw payments from the accounts from which the prior attempts were made have failed due to a lack of sufficient funds, unless the lender obtains the consumers' new and specific authorization to make further withdrawals from the accounts.

§ 1041.8 Prohibited payment transfer attempts.

(a) *Definitions.* For purposes of this section and § 1041.9:

(1) *Payment transfer* means any lender-initiated debit or withdrawal of funds from a consumer's account for the purpose of collecting any amount due or purported to be due in connection with a covered loan.

(i) *Means of transfer.* A debit or withdrawal meeting the description in paragraph (a)(1) of this section is a payment transfer regardless of the means through which the lender initiates it, including but not limited to a debit or withdrawal initiated through any of the following means:

(A) Electronic fund transfer, including a preauthorized electronic fund transfer as defined in Regulation E, 12 CFR 1005.2(k).

(B) Signature check, regardless of whether the transaction is processed through the check network or another network, such as the automated clearing house (ACH) network.

(C) Remotely created check as defined in Regulation CC, 12 CFR 229.2(fff).

(D) Remotely created payment order as defined in 16 CFR 310.2(cc).

(E) When the lender is also the account-holder, an account-holding institution's transfer of funds from a consumer's account held at the same institution, other than such a transfer meeting the description in paragraph (a)(1)(ii) of this section.

(ii) *Conditional exclusion for certain transfers by account-holding institutions.* When the lender is also the account-holder, an account-holding institution's transfer of funds from a consumer's account held at the same institution is not a payment transfer if all of the conditions in this paragraph (a)(1)(ii) are met, notwithstanding that the transfer otherwise meets the description in paragraph (a)(1) of this section.

(A) The lender, pursuant to the terms of the loan agreement or account agreement, does not charge the consumer any fee, other than a late fee under the loan agreement, in the event that the lender initiates a transfer of funds from the consumer's account in connection with the covered loan for an amount that the account lacks sufficient funds to cover.

(B) The lender, pursuant to the terms of the loan agreement or account agreement, does not close the consumer's account in response to a negative balance that results from a transfer of funds initiated in connection with the covered loan.

(2) *Single immediate payment transfer at the consumer's request* means:

(i) A payment transfer initiated by a one-time electronic fund transfer within one business day after the lender obtains the consumer's authorization for the one-time electronic fund transfer.

(ii) A payment transfer initiated by means of processing the consumer's signature check through the check system or through the ACH system within one business day after the consumer provides the check to the lender.

(b) *Prohibition on initiating payment transfers from a consumer's account after*

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two consecutive failed payment transfers—(1) General. A lender must not initiate a payment transfer from a consumer's account in connection with any covered loan that the consumer has with the lender after the lender has attempted to initiate two consecutive failed payment transfers from that account in connection with any covered loan that the consumer has with the lender. For purposes of this paragraph (b), a payment transfer is deemed to have failed when it results in a return indicating that the consumer's account lacks sufficient funds or, if the lender is the consumer's account-holding institution, it is for an amount that the account lacks sufficient funds to cover.

(2) *Consecutive failed payment transfers.* For purposes of the prohibition in this paragraph (b):

(i) *First failed payment transfer.* A failed payment transfer is the first failed payment transfer from the consumer's account if it meets any of the following conditions:

(A) The lender has initiated no other payment transfer from the account in connection with the covered loan or any other covered loan that the consumer has with the lender.

(B) The immediately preceding payment transfer was successful, regardless of whether the lender has previously initiated a first failed payment transfer.

(C) The payment transfer is the first payment transfer to fail after the lender obtains the consumer's authorization for additional payment transfers pursuant to paragraph (c) of this section.

(ii) *Second consecutive failed payment transfer.* A failed payment transfer is the second consecutive failed payment transfer from the consumer's account if the immediately preceding payment transfer was a first failed payment transfer. For purposes of this paragraph (b)(2)(ii), a previous payment transfer includes a payment transfer initiated at the same time or on the same day as the failed payment transfer.

(iii) *Different payment channel.* A failed payment transfer meeting the conditions in paragraph (b)(2)(ii) of this section is the second consecutive failed payment transfer regardless of whether

the first failed payment transfer was initiated through a different payment channel.

(c) *Exception for additional payment transfers authorized by the consumer—(1) General.* Notwithstanding the prohibition in paragraph (b) of this section, a lender may initiate additional payment transfers from a consumer's account after two consecutive failed payment transfers if the additional payment transfers are authorized by the consumer in accordance with the requirements and conditions in this paragraph (c) or if the lender executes a single immediate payment transfer at the consumer's request in accordance with paragraph (d) of this section.

(2) *General authorization requirements and conditions—(i) Required payment transfer terms.* For purposes of this paragraph (c), the specific date, amount, and payment channel of each additional payment transfer must be authorized by the consumer, except as provided in paragraph (c)(2)(ii) or (iii) of this section.

(ii) *Application of specific date requirement to re-initiating a returned payment transfer.* If a payment transfer authorized by the consumer pursuant to this paragraph (c) is returned for nonsufficient funds, the lender may re-initiate the payment transfer, such as by representing it once through the ACH system, on or after the date authorized by the consumer, provided that the returned payment transfer has not triggered the prohibition in paragraph (b) of this section.

(iii) *Special authorization requirements and conditions for payment transfers to collect a late fee or returned item fee.* A lender may initiate a payment transfer pursuant to this paragraph (c) solely to collect a late fee or returned item fee without obtaining the consumer's authorization for the specific date and amount of the payment transfer only if the consumer has authorized the lender to initiate such payment transfers in advance of the withdrawal attempt. For purposes of this paragraph (c)(2)(iii), the consumer authorizes such payment transfers only if the consumer's authorization obtained under paragraph (c)(3)(iii) of this section includes a statement, in terms that are clear and readily understandable to the

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consumer, that payment transfers may be initiated solely to collect a late fee or returned item fee and that specifies the highest amount for such fees that may be charged and the payment channel to be used.

(3) *Requirements and conditions for obtaining the consumer's authorization—(i) General.* For purposes of this paragraph (c), the lender must request and obtain the consumer's authorization for additional payment transfers in accordance with the requirements and conditions in this paragraph (c)(3).

(ii) *Provision of payment transfer terms to the consumer.* The lender may request the consumer's authorization for additional payment transfers no earlier than the date on which the lender provides to the consumer the consumer rights notice required by §1041.9(c). The request must include the payment transfer terms required under paragraph (c)(2)(i) of this section and, if applicable, the statement required by paragraph (c)(2)(iii) of this section. The lender may provide the terms and statement to the consumer by any one of the following means:

(A) In writing, by mail or in person, or in a retainable form by email if the consumer has consented to receive electronic disclosures in this manner under §1041.9(a)(4) or agrees to receive the terms and statement by email in the course of a communication initiated by the consumer in response to the consumer rights notice required by §1041.9(c).

(B) By oral telephone communication, if the consumer affirmatively contacts the lender in that manner in response to the consumer rights notice required by §1041.9(c) and agrees to receive the terms and statement in that manner in the course of, and as part of, the same communication.

(iii) *Signed authorization required—(A) General.* For an authorization to be valid under this paragraph (c), it must be signed or otherwise agreed to by the consumer in writing or electronically and in a retainable format that memorializes the payment transfer terms required under paragraph (c)(2)(i) of this section and, if applicable, the statement required by paragraph (c)(2)(iii) of this section. The signed authorization must be obtained from the con-

sumer no earlier than when the consumer receives the consumer rights notice required by §1041.9(c) in person or electronically, or the date on which the consumer receives the notice by mail. For purposes of this paragraph (c)(3)(iii)(A), the consumer is considered to have received the notice at the time it is provided to the consumer in person or electronically, or, if the notice is provided by mail, the earlier of the third business day after mailing or the date on which the consumer affirmatively responds to the mailed notice.

(B) *Special requirements for authorization obtained by oral telephone communication.* If the authorization is granted in the course of an oral telephone communication, the lender must record the call and retain the recording.

(C) *Memorialization required.* If the authorization is granted in the course of a recorded telephonic conversation or is otherwise not immediately retainable by the consumer at the time of signature, the lender must provide a memorialization in a retainable form to the consumer by no later than the date on which the first payment transfer authorized by the consumer is initiated. A memorialization may be provided to the consumer by email in accordance with the requirements and conditions in paragraph (c)(3)(ii)(A) of this section.

(4) *Expiration of authorization.* An authorization obtained from a consumer pursuant to this paragraph (c) becomes null and void for purposes of the exception in this paragraph (c) if:

(i) The lender subsequently obtains a new authorization from the consumer pursuant to this paragraph (c); or

(ii) Two consecutive payment transfers initiated pursuant to the consumer's authorization fail, as specified in paragraph (b) of this section.

(d) *Exception for initiating a single immediate payment transfer at the consumer's request.* After a lender's second consecutive payment transfer has failed as specified in paragraph (b) of this section, the lender may initiate a payment transfer from the consumer's account without obtaining the consumer's authorization for additional payment transfers pursuant to paragraph (c) of this section if:

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(1) The payment transfer is a single immediate payment transfer at the consumer's request as defined in paragraph (a)(2) of this section; and

(2) The consumer authorizes the underlying one-time electronic fund transfer or provides the underlying signature check to the lender, as applicable, no earlier than the date on which the lender provides to the consumer the consumer rights notice required by § 1041.9(c) or on the date that the consumer affirmatively contacts the lender to discuss repayment options, whichever date is earlier.

(e) *Prohibition against evasion.* A lender must not take any action with the intent of evading the requirements of this section.

§ 1041.9 Disclosure of payment transfer attempts.

(a) *General form of disclosures—(1) Clear and conspicuous.* Disclosures required by this section must be clear and conspicuous. Disclosures required by this section may contain commonly accepted or readily understandable abbreviations.

(2) *In writing or electronic delivery.* Disclosures required by this section must be provided in writing or, so long as the requirements of paragraph (a)(4) of this section are satisfied, through electronic delivery. The disclosures must be provided in a form that can be viewed on paper or a screen, as applicable. This paragraph (a)(2) is not satisfied by a disclosure provided orally or through a recorded message.

(3) *Retainable.* Disclosures required by this section must be provided in a retainable form, except for electronic short notices delivered by mobile application or text message under paragraph (b) or (c) of this section.

(4) *Electronic delivery.* Disclosures required by this section may be provided through electronic delivery if the following consent requirements are satisfied:

(i) *Consumer consent—(A) General.* Disclosures required by this section may be provided through electronic delivery if the consumer affirmatively consents in writing or electronically to the particular electronic delivery method.

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(B) *Email option required.* To obtain valid consumer consent to electronic delivery under this paragraph, a lender must provide the consumer with the option to select email as the method of electronic delivery, separate and apart from any other electronic delivery methods such as mobile application or text message.

(ii) *Subsequent loss of consent.* Notwithstanding paragraph (a)(4)(i) of this section, a lender must not provide disclosures required by this section through a method of electronic delivery if:

(A) The consumer revokes consent to receive disclosures through that delivery method; or

(B) The lender receives notification that the consumer is unable to receive disclosures through that delivery method at the address or number used.

(5) *Segregation requirements for notices.* All notices required by this section must be segregated from all other written or provided materials and contain only the information required by this section, other than information necessary for product identification, branding, and navigation. Segregated additional content that is not required by this section must not be displayed above, below, or around the required content.

(6) *Machine readable text in notices provided through electronic delivery.* If provided through electronic delivery, the payment notice required by paragraph (b) of this section and the consumer rights notice required by paragraph (c) of this section must use machine readable text that is accessible via both web browsers and screen readers.

(7) *Model forms—(i) Payment notice.* The content, order, and format of the payment notice required by paragraph (b) of this section must be substantially similar to Model Forms A-3 through A-4 in appendix A to this part.

(ii) *Consumer rights notice.* The content, order, and format of the consumer rights notice required by paragraph (c) of this section must be substantially similar to Model Form A-5 in appendix A to this part.

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(iii) *Electronic short notice.* The content, order, and format of the electronic short notice required by paragraph (b) of this section must be substantially similar to Model Clauses A-6 and A-7 in appendix A to this part. The content, order, and format of the electronic short notice required by paragraph (c) of this section must be substantially similar to Model Clause A-8 in appendix A to this part.

(8) *Foreign language disclosures.* Disclosures required under this section may be made in a language other than English, provided that the disclosures are made available in English upon the consumer's request.

(b) *Payment notice—(1) General.* Prior to initiating the first payment withdrawal or an unusual withdrawal from a consumer's account, a lender must provide to the consumer a payment notice in accordance with the requirements in this paragraph (b) as applicable.

(i) *First payment withdrawal* means the first payment transfer scheduled to be initiated by a lender for a particular covered loan, not including a single immediate payment transfer initiated at the consumer's request as defined in § 1041.8(a)(2).

(ii) *Unusual withdrawal* means a payment transfer that meets one or more of the conditions described in paragraph (b)(3)(ii)(C) of this section.

(iii) *Exceptions.* The payment notice need not be provided when the lender initiates:

(A) The initial payment transfer from a consumer's account after obtaining consumer authorization pursuant to § 1041.8(c), regardless of whether any of the conditions in paragraph (b)(3)(ii)(C) of this section apply; or

(B) A single immediate payment transfer initiated at the consumer's request in accordance with § 1041.8(a)(2).

(2) *First payment withdrawal notice—(i) Timing—(A) Mail.* If the lender provides the first payment withdrawal notice by mail, the lender must mail the notice no earlier than when the lender obtains payment authorization and no later than six business days prior to initiating the transfer.

(B) *Electronic delivery.* (1) If the lender provides the first payment withdrawal notice through electronic delivery, the

lender must send the notice no earlier than when the lender obtains payment authorization and no later than three business days prior to initiating the transfer.

(2) If, after providing the first payment withdrawal notice through electronic delivery pursuant to the timing requirements in paragraph (b)(2)(i) of this section, the lender loses the consumer's consent to receive the notice through a particular electronic delivery method according to paragraph (a)(4)(ii) of this section, the lender must provide notice of any future unusual withdrawal, if applicable, through alternate means.

(C) *In person.* If the lender provides the first payment withdrawal notice in person, the lender must provide the notice no earlier than when the lender obtains payment authorization and no later than three business days prior to initiating the transfer.

(ii) *Content requirements.* The notice must contain the following information and statements, as applicable, using language substantially similar to the language set forth in Model Form A-3 in appendix A to this part:

(A) *Identifying statement.* The statement, "Upcoming Withdrawal Notice," using that phrase, and, in the same statement, the name of the lender providing the notice.

(B) *Transfer terms—(1) Date.* Date that the lender will initiate the transfer.

(2) *Amount.* Dollar amount of the transfer.

(3) *Consumer account.* Sufficient information to permit the consumer to identify the account from which the funds will be transferred. The lender must not provide the complete account number of the consumer, but may use a truncated version similar to Model Form A-3 in appendix A to this part.

(4) *Loan identification information.* Sufficient information to permit the consumer to identify the covered loan associated with the transfer.

(5) *Payment channel.* Payment channel of the transfer.

(6) *Check number.* If the transfer will be initiated by a signature or paper check, remotely created check (as defined in Regulation CC, 12 CFR 229.2(fff)), or remotely created payment order (as defined in 16 CFR 310.2(cc)),

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the check number associated with the transfer.

(C) *Payment breakdown.* In a tabular form:

(1) *Payment breakdown heading.* A heading with the statement “Payment Breakdown,” using that phrase.

(2) *Principal.* The amount of the payment that will be applied to principal.

(3) *Interest.* The amount of the payment that will be applied to accrued interest on the loan.

(4) *Fees.* If applicable, the amount of the payment that will be applied to fees.

(5) *Other charges.* If applicable, the amount of the payment that will be applied to other charges.

(6) *Amount.* The statement “Total Payment Amount,” using that phrase, and the total dollar amount of the payment as provided in paragraph (b)(2)(ii)(B)(2) of this section.

(7) *Explanation of interest-only or negatively amortizing payment.* If applicable, a statement explaining that the payment will not reduce principal, using the applicable phrase “When you make this payment, your principal balance will stay the same and you will not be closer to paying off your loan” or “When you make this payment, your principal balance will increase and you will not be closer to paying off your loan.”

(D) *Lender name and contact information.* Name of the lender, the name under which the transfer will be initiated (if different from the consumer-facing name of the lender), and two different forms of lender contact information that may be used by the consumer to obtain information about the consumer’s loan.

(3) *Unusual withdrawal notice—(i) Timing—(A) Mail.* If the lender provides the unusual withdrawal notice by mail, the lender must mail the notice no earlier than 10 business days and no later than six business days prior to initiating the transfer.

(B) *Electronic delivery.* (1) If the lender provides the unusual withdrawal notice through electronic delivery, the lender must send the notice no earlier than seven business days and no later than three business days prior to initiating the transfer.

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(2) If, after providing the unusual withdrawal notice through electronic delivery pursuant to the timing requirements in paragraph (b)(3)(i)(B) of this section, the lender loses the consumer’s consent to receive the notice through a particular electronic delivery method according to paragraph (a)(4)(ii) of this section, the lender must provide notice of any future unusual withdrawal attempt, if applicable, through alternate means.

(C) *In person.* If the lender provides the unusual withdrawal notice in person, the lender must provide the notice no earlier than seven business days and no later than three business days prior to initiating the transfer.

(D) *Exception for open-end credit.* If the unusual withdrawal notice is for open-end credit as defined in § 1041.2(a)(16), the lender may provide the unusual withdrawal notice in conjunction with the periodic statement required under Regulation Z, 12 CFR 1026.7(b), in accordance with the timing requirements of that section.

(ii) *Content requirements.* The unusual withdrawal notice must contain the following information and statements, as applicable, using language substantially similar to the language set forth in Model Form A-4 in appendix A to this part:

(A) *Identifying statement.* The statement, “Alert: Unusual Withdrawal,” using that phrase, and, in the same statement, the name of the lender that is providing the notice.

(B) *Basic payment information.* The content required for the first withdrawal notice under paragraphs (b)(2)(ii)(B) through (D) of this section.

(C) *Description of unusual withdrawal.* The following content, as applicable, in a form substantially similar to the form in Model Form A-4 in appendix A to this part:

(1) *Varying amount—(i) General.* If the amount of a transfer will vary in amount from the regularly scheduled payment amount, a statement that the transfer will be for a larger or smaller amount than the regularly scheduled payment amount, as applicable.

(ii) *Open-end credit.* If the payment transfer is for open-end credit as defined in § 1041.2(a)(16), the varying amount content is required only if the

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amount deviates from the scheduled minimum payment due as disclosed in the periodic statement required under Regulation Z, 12 CFR 1026.7(b).

(2) *Date other than date of regularly scheduled payment.* If the payment transfer date is not a date on which a regularly scheduled payment is due under the terms of the loan agreement, a statement that the transfer will be initiated on a date other than the date of a regularly scheduled payment.

(3) *Different payment channel.* If the payment channel will differ from the payment channel of the transfer directly preceding it, a statement that the transfer will be initiated through a different payment channel and a statement of the payment channel used for the prior transfer.

(4) *For purpose of re-initiating returned transfer.* If the transfer is for the purpose of re-initiating a returned transfer, a statement that the lender is re-initiating a returned transfer, a statement of the date and amount of the previous unsuccessful attempt, and a statement of the reason for the return.

(4) *Electronic delivery—(i) General.* When the consumer has consented to receive disclosures through electronic delivery, the lender may provide the applicable payment notice required by paragraph (b)(1) of this section through electronic delivery only if it also provides an electronic short notice, except for email delivery as provided in paragraph (b)(4)(iii) of this section.

(ii) *Electronic short notice—(A) General content.* The electronic short notice required by this paragraph (b) must contain the following information and statements, as applicable, in a form substantially similar to Model Clause A-6 in appendix A to this part:

(1) *Identifying statement,* as required under paragraphs (b)(2)(ii)(A) and (b)(3)(ii)(A) of this section;

(2) *Transfer terms—(i) Date,* as required under paragraphs (b)(2)(ii)(B)(1) and (b)(3)(ii)(B) of this section;

(ii) *Amount,* as required under paragraphs (b)(2)(ii)(B)(2) and (b)(3)(ii)(B) of this section;

(iii) *Consumer account,* as required and limited under paragraphs (b)(2)(ii)(B)(3) and (b)(3)(ii)(B) of this section; and

(3) *Web site URL.* When the full notice is being provided through a linked URL

rather than as a PDF attachment, the unique URL of a Web site that the consumer may use to access the full payment notice required by paragraph (b) of this section.

(B) *Additional content requirements.* If the transfer meets any of the conditions for unusual attempts described in paragraph (b)(3)(ii)(C) of this section, the electronic short notice must also contain the following information and statements, as applicable, using language substantially similar to the language in Model Clause A-7 in appendix A to this part:

(1) *Varying amount,* as defined under paragraph (b)(3)(ii)(C)(1) of this section;

(2) *Date other than due date of regularly scheduled payment,* as defined under paragraph (b)(3)(ii)(C)(2) of this section; and

(3) *Different payment channel,* as defined under paragraph (b)(3)(ii)(C)(3) of this section.

(iii) *Email delivery.* When the consumer has consented to receive disclosures through electronic delivery, and the method of electronic delivery is email, the lender may either deliver the full notice required by paragraph (b)(1) of this section in the body of the email or deliver the full notice as a linked URL Web page or PDF attachment along with the electronic short notice as provided in paragraph (b)(4)(ii) of this section.

(c) *Consumer rights notice—(1) General.* After a lender initiates two consecutive failed payment transfers from a consumer's account as described in § 1041.8(b), the lender must provide to the consumer a consumer rights notice in accordance with the requirements of paragraphs (c)(2) through (4) of this section.

(2) *Timing.* The lender must send the notice no later than three business days after it receives information that the second consecutive attempt has failed.

(3) *Content requirements.* The notice must contain the following information and statements, using language substantially similar to the language set forth in Model Form A-5 in appendix A to this part:

(i) *Identifying statement.* A statement that the lender, identified by name, is no longer permitted to withdraw loan

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payments from the consumer's account.

(ii) *Last two attempts were returned.* A statement that the lender's last two attempts to withdraw payment from the consumer's account were returned due to non-sufficient funds, or, if applicable to payments initiated by the consumer's account-holding institution, caused the account to go into overdraft status.

(iii) *Consumer account.* Sufficient information to permit the consumer to identify the account from which the unsuccessful payment attempts were made. The lender must not provide the complete account number of the consumer, but may use a truncated version similar to Model Form A-5 in appendix A to this part.

(iv) *Loan identification information.* Sufficient information to permit the consumer to identify any covered loans associated with the unsuccessful payment attempts.

(v) *Statement of Federal law prohibition.* A statement, using that phrase, that in order to protect the consumer's account, Federal law prohibits the lender from initiating further payment transfers without the consumer's permission.

(vi) *Contact about choices.* A statement that the lender may be in contact with the consumer about payment choices going forward.

(vii) *Previous unsuccessful payment attempts.* In a tabular form:

(A) *Previous payment attempts heading.* A heading with the statement "previous payment attempts."

(B) *Payment due date.* The scheduled due date of each previous unsuccessful payment transfer attempted by the lender.

(C) *Date of attempt.* The date of each previous unsuccessful payment transfer initiated by the lender.

(D) *Amount.* The amount of each previous unsuccessful payment transfer initiated by the lender.

(E) *Fees.* The fees charged by the lender for each unsuccessful payment attempt, if applicable, with an indication that these fees were charged by the lender.

(viii) *CFPB information.* A statement, using that phrase, that the Consumer Financial Protection Bureau created

this notice, a statement that the CFPB is a Federal government agency, and the URL to www.cfpb.gov/payday. This statement must be the last piece of information provided in the notice.

(4) *Electronic delivery—(i) General.* When the consumer has consented to receive disclosures through electronic delivery, the lender may provide the consumer rights notice required by paragraph (c) of this section through electronic delivery only if it also provides an electronic short notice, except for email delivery as provided in paragraph (c)(4)(ii) of this section.

(ii) *Electronic short notice—(A) Content.* The notice must contain the following information and statements, as applicable, using language substantially similar to the language set forth in Model Clause A-8 in appendix A to this part:

(1) *Identifying statement.* As required under paragraph (c)(3)(i) of this section;

(2) *Last two attempts were returned.* As required under paragraph (c)(3)(ii) of this section;

(3) *Consumer account.* As required and limited under paragraph (c)(3)(iii) of this section;

(4) *Statement of Federal law prohibition.* As required under paragraph (c)(3)(v) of this section; and

(5) *Web site URL.* When the full notice is being provided through a linked URL rather than as a PDF attachment, the unique URL of a Web site that the consumer may use to access the full consumer rights notice required by paragraph (c) of this section.

(B) [Reserved]

(iii) *Email delivery.* When the consumer has consented to receive disclosures through electronic delivery, and the method of electronic delivery is email, the lender may either deliver the full notice required by paragraph (c)(1) of this section in the body of the email or deliver the full notice as a linked URL Web page or PDF attachment along with the electronic short notice as provided in paragraph (c)(4)(ii) of this section.

[82 FR 54871, Nov. 17, 2017, as amended at 84 FR 27929, June 17, 2019]

Subpart D—Recordkeeping, Anti-Evasion, Severability, and Dates**§§ 1041.10–1041.11 [Reserved]****§ 1041.12 Compliance program and record retention.**

(a) *Compliance program.* A lender making a covered loan must develop and follow written policies and procedures that are reasonably designed to ensure compliance with the requirements in this part. These written policies and procedures must be appropriate to the size and complexity of the lender and its affiliates, and the nature and scope of the covered loan lending activities of the lender and its affiliates.

(b) *Record retention.* A lender must retain evidence of compliance with this part for 36 months after the date on which a covered loan ceases to be an outstanding loan.

(1) *Retention of loan agreement for covered loans.* To comply with the requirements in this paragraph (b), a lender must retain or be able to reproduce an image of the loan agreement for each covered loan that the lender originates.

(2)–(3) [Reserved]

(4) *Retention of records relating to payment practices for covered loans.* To comply with the requirements in this paragraph (b), a lender must retain or be able to reproduce an image of the following documentation, as applicable, in connection with a covered loan:

(i) Leveraged payment mechanism(s) obtained by the lender from the consumer;

(ii) Authorization of additional payment transfer, as described in § 1041.8(c)(3)(iii); and

(iii) Underlying one-time electronic transfer authorization or underlying signature check, as described in § 1041.8(d)(2).

(5) *Electronic records in tabular format regarding payment practices for covered loans.* To comply with the requirements in this paragraph (b), a lender must retain electronic records in tab-

ular format that include the following information for covered loans:

(i) History of payments received and attempted payment transfers, as defined in § 1041.8(a)(1), including:

(A) Date of receipt of payment or attempted payment transfer;

(B) Amount of payment due;

(C) Amount of attempted payment transfer;

(D) Amount of payment received or transferred; and

(E) Payment channel used for attempted payment transfer.

(ii) If an attempt to transfer funds from a consumer's account is subject to the prohibition in § 1041.8(b)(1), whether the lender or service provider obtained authorization to initiate a payment transfer from the consumer in accordance with the requirements in § 1041.8(c) or (d).

[82 FR 54871, Nov. 17, 2017, as amended at 85 FR 44444, July 22, 2020]

§ 1041.13 Prohibition against evasion.

A lender must not take any action with the intent of evading the requirements of this part.

§ 1041.14 Severability.

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect.

§ 1041.15 Effective and compliance dates.

(a) *Effective date.* The effective date of this part is January 16, 2018.

(b) *April 16, 2018 application deadline.* The deadline to submit an application for preliminary approval for registration pursuant to § 1041.11(c)(1) is April 16, 2018.

(c) *August 19, 2019 compliance date.* The compliance date for §§ 1041.2, 1041.3, 1041.7 through 1041.9, 1041.12(a), (b) introductory text and (b)(4) and (5), and 1041.13 is August 19, 2019.

[84 FR 27929, June 17, 2019, as amended at 85 FR 44445, July 22, 2020]

APPENDIX A TO PART 1041—MODEL FORMS

A-1 AND A-2 MODEL FORMS [RESERVED]

A-3 MODEL FORM FOR FIRST PAYMENT WITHDRAWAL NOTICE UNDER § 1041.9(b)(2)

A-3 Model Form for First Payment Withdrawal Notice under § 1041.9(b)(2)

WILLOW LENDING

800-555-5555

willowlending.com

Upcoming Withdrawal Notice from Willow Lending

On November 12, 2016, Willow Lending will attempt to withdraw a payment of \$80 from your account ending in 0022. The payment will be withdrawn by check, using check #999.

If this payment is not successful, we will add a \$10 returned payment fee to your balance on loan #5432.

Contact Willow Lending at 1-800-555-5555 if you have questions or need to stop this withdrawal. The institution where you have your account also may be able to assist you.

Payment breakdown

Principal now	\$0
Interest	\$80
Total payment amount	\$80

When you make this payment, your principal balance will stay the same and you will not be closer to paying off your loan.

A-4 MODEL FORM FOR UNUSUAL WITHDRAWAL NOTICE UNDER § 1041.9(b)(3)

A-4 Model Form for Unusual Withdrawal Notice under § 1041.9(b)(3)

WILLOW LENDING

800-555-5555

willowlending.com

Alert: Unusual Withdrawal from Willow Lending

On November 12, 2016, Willow Lending will attempt to withdraw a payment of \$80 from your account ending in 0022. This electronic withdrawal will be made by ACH transfer.

This payment is unusual because it is larger than your originally scheduled payment. The previous withdrawal was initiated on November 2, 2016, for \$60.

If this payment is not successful, we will add a \$10 returned payment fee to your balance on loan #5432.

Contact Willow Lending at 1-800-555-5555 if you have questions or need to stop this withdrawal. The institution where you have your account also may be able to assist you.

Payment breakdown

Principal	\$50
Interest	\$20
Fees	\$10
Total payment amount	\$80

A-5 MODEL FORM FOR CONSUMER RIGHTS NOTICE UNDER § 1041.9(c)

A-5 Model Form for Consumer Rights Notice under § 1041.9(c)

WILLOW LENDING800-555-5555
willowlending.com**Notice: Willow Lending is no longer permitted to withdraw loan payments from your account**

Our last two attempts to withdraw payment on your loan #5432 from your account ending in 0022 were returned because your account did not contain enough funds to cover the payment. To protect your account, federal law prohibits us from trying to withdraw payment again without your permission.

We may contact you to talk about your payment choices going forward.

Previous payment attempts

Payment due date	Date of attempt	Amount	Fees charged by Willow Lending
November 7, 2016	November 7, 2016	\$80	\$10 returned payment fee
November 7, 2016	November 10, 2016	\$80	\$10 returned payment fee

The Consumer Financial Protection Bureau (CFPB) created this notice to inform you of your rights under federal law. The CFPB is a federal government agency built to protect consumers. To learn more about your rights as a borrower, visit www.cfpb.gov/payday.

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A-6 MODEL CLAUSE FOR FIRST PAYMENT WITHDRAWAL ELECTRONIC SHORT NOTICE UNDER
§ 1041.9(b)(4)

A-6 Model Clause for First Payment Withdrawal Electronic Short Notice under § 1041.9(b)(4)

Subject (applicable to email only)

Upcoming Withdrawal Notice from Willow Lending

Body

Upcoming Withdrawal Notice from Willow Lending

On Nov 12, 2016, we will attempt to withdraw a payment of \$80
from your account ending in 0022.

View the details at willowlending.com/xox302ksw.

A-7 MODEL CLAUSE FOR UNUSUAL WITHDRAWAL ELECTRONIC SHORT NOTICE UNDER § 1041.9(c)(4)(ii)(B)

A-7 Model Clause for Unusual Withdrawal Electronic Short Notice under § 1041.9(b)(4)(ii)(B)

Subject (applicable to email only)

Alert: Unusual Withdrawal from Willow Lending

Body

Alert: Unusual Withdrawal from Willow Lending

On Nov 12, 2016, we will attempt to withdraw a payment of \$80
from your account ending in 0022. This payment is unusual
because it is larger than your originally scheduled payment.

View the details at willowlending.com/xox302ksw.

A-8 MODEL CLAUSE FOR CONSUMER RIGHTS ELECTRONIC SHORT NOTICE UNDER § 1041.9(c)(4)

A-8 Model Clause for Consumer Rights Electronic Short Notice under § 1041.9(c)(4)

Subject (applicable to email only)

Notice: Willow Lending is no longer permitted to withdraw loan payments from your account

Body

Notice: Willow Lending is no longer permitted to withdraw loan payments from your account

Our last two attempts to withdraw payment from your account ending in 0022 were returned. To protect your account, federal law prohibits us from trying to withdraw payment again without your permission.

View the details at willowlending.com/xox302ksw.

[82 FR 54871, Nov. 17, 2017, as amended at 84 FR 27929, June 17, 2019; 85 FR 44445, July 22, 2020]

**SUPPLEMENT I TO PART 1041—OFFICIAL
INTERPRETATIONS**

Section 1041.2—Definitions

2(a)(3) Closed-End Credit

1. *In general.* Institutions may rely on 12 CFR 1026.2(a)(10) and its related commentary in determining the meaning of closed-end credit, but without regard to whether the credit is consumer credit, as that term is defined in 12 CFR 1026.2(a)(12), or is extended to a consumer, as that term is defined in 12 CFR 1026.2(a)(11).

2(a)(5) Consummation

1. *New loan.* When a contractual obligation on the consumer's part is created is a matter to be determined under applicable law. A contractual commitment agreement, for example, that under applicable law binds the consumer to the loan terms would be consummation. Consummation, however, does not occur merely because the consumer has made some financial investment in the transaction (for example, by paying a non-refundable fee) unless applicable law holds otherwise.

2(a)(11) Credit

1. *In general.* Institutions may rely on 12 CFR 1026.2(a)(14) and its related commentary in determining the meaning of credit.

2(a)(12) Electronic Fund Transfer

1. *In general.* Institutions may rely on 12 CFR 1005.3(b) and its related commentary in determining the meaning of electronic fund transfer.

2(a)(13) Lender

1. *Regularly extends credit.* The test for determining whether a person regularly extends credit for personal, family, or household purposes is explained in Regulation Z, 12 CFR 1026.2(a)(17)(v). Any loan to a consumer primarily for personal, family, or household purposes, whether or not the loan is a covered loan under this part, counts toward the numeric threshold for determining whether a person regularly extends credit.

2(a)(16) Open-End Credit

1. *In general.* Institutions may rely on 12 CFR 1026.2(a)(20) and its related commentary in determining the meaning of open-end credit, but without regard to whether the credit permits a finance charge to be imposed from time to time on an outstanding balance as defined in 12 CFR 1026.4. Also, for the purposes of defining open-end credit under this part, the term credit, as defined in § 1041.2(a)(11), is substituted for the term consumer credit, as defined in 12 CFR 1026.2(a)(12); the term lender, as defined in § 1041.2(a)(13), is substituted for the term creditor, as defined in 12 CFR 1026.2(a)(17); and the term consumer, as defined in

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§ 1041.2(a)(4), is substituted for the term consumer, as defined in 12 CFR 1026.2(a)(11). See generally § 1041.2(b).

2(a)(17) Outstanding Loan

1. *Payments owed to third parties.* A loan is an outstanding loan if it meets all the criteria set forth in § 1041.2(a)(17), regardless of whether the consumer is required to pay the lender, an affiliate of the lender, or a service provider. A lender selling the loan or the loan servicing rights to a third party does not affect whether a loan is an outstanding loan under § 1041.2(a)(17).

2. *Stale loans.* A loan is generally an outstanding loan if the consumer has a legal obligation to repay the loan, even if the consumer is delinquent or if the consumer is in a repayment plan or workout arrangement. However, a loan that the consumer otherwise has a legal obligation to repay is not an outstanding loan for purposes of this part if the consumer has not made any payment on the loan within the previous 180-day period. A loan ceases to be an outstanding loan as of the earliest of the date the consumer repays the loan in full, the date the consumer is released from the legal obligation to repay, the date the loan is otherwise legally discharged, or the date that is 180 days following the last payment that the consumer has made on the loan, even if the payment is not a regularly scheduled payment in a scheduled amount. If the consumer does not make any payments on a loan and none of these other events occur, the loan ceases to be outstanding 180 days after consummation. A loan cannot become an outstanding loan due to any events that occur after the consumer repays the loan in full, the consumer is released from the legal obligation to repay, the loan is otherwise legally discharged, 180 days following the last payment that the consumer has made on the loan, or 180 days after consummation of a loan on which the consumer makes no payments.

2(a)(18) Service Provider

1. *Credit access businesses and credit service organizations.* Persons who provide a material service to lenders in connection with the lenders' offering or provision of covered loans are service providers, subject to the specific limitations in section 1002(26) of the Dodd-Frank Act. Accordingly, credit access businesses and credit service organizations that provide a material service to lenders during the course of obtaining for consumers, or assisting consumers in obtaining, loans from lenders, are service providers, subject to the specific limitations in section 1002(26) of the Dodd-Frank Act.

2(b) Rule of Construction

1. *Incorporation of terms from underlying statutes and regulations.* For purposes of this

part, where definitions are incorporated from other statutes or regulations, users may as applicable rely on embedded definitions, appendices, and commentary for those other laws. For example, 12 CFR 1005.2(b) and its related commentary determine the meaning of account under § 1041.2(a)(1). However, where this part defines the same term or a parallel term in a way that creates a substantive distinction, the definition in this part shall control. See, for example, the definition of open-end credit in § 1041.2(a)(16), which is generally determined according to 12 CFR 1026.2(a)(20) and its related commentary but without regard to whether the credit is consumer credit, as that term is defined in 12 CFR 1026.2(a)(12), or is extended to a consumer, as that term is defined in 12 CFR 1026.2(a)(11), because this part provides a different and arguably broader definition of consumer in § 1041.2(a)(4).

Section 1041.3—Scope of Coverage; Exclusions; Exemptions

3(b) Covered Loans

1. *Credit structure.* The term covered loan includes open-end credit and closed-end credit, regardless of the form or structure of the credit.

2. *Primary purpose.* Under § 1041.3(b), a loan is not a covered loan unless it is extended primarily for personal, family, or household purposes. Institutions may rely on 12 CFR 1026.3(a) and its related commentary in determining the primary purpose of a loan.

Paragraph 3(b)(1)

1. *Closed-end credit that does not provide for multiple advances to consumers.* A loan does not provide for multiple advances to a consumer if the loan provides for full disbursement of the loan proceeds only through disbursement on a single specific date.

2. *Loans that provide for multiple advances to consumers.* Both open-end credit and closed-end credit may provide for multiple advances to consumers. Open-end credit can have a fixed expiration date, as long as during the plan's existence the consumer may use credit, repay, and reuse the credit. Likewise, closed-end credit may consist of a series of advances. For example:

i. Under a closed-end commitment, the lender might agree to lend a total of \$1,000 in a series of advances as needed by the consumer. When a consumer has borrowed the full \$1,000, no more is advanced under that particular agreement, even if there has been repayment of a portion of the debt.

3. *Facts and circumstances test for determining whether loan is substantially repayable within 45 days.* Substantially repayable means that the substantial majority of the loan or advance is required to be repaid within 45 days of consummation or advance, as the case may be. Application of the standard

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depends on the specific facts and circumstances of each loan, including the timing and size of the scheduled payments. A loan or advance is not substantially repayable within 45 days of consummation or advance merely because a consumer chooses to repay within 45 days when the loan terms do not require the consumer to do so.

4. *Deposit advance products.* A loan or advance is substantially repayable within 45 days of consummation or advance if the lender has the right to be repaid through a sweep or withdrawal of any qualifying electronic deposit made into the consumer's account within 45 days of consummation or advance. A loan or advance described in this paragraph is substantially repayable within 45 days of consummation or advance even if no qualifying electronic deposit is actually made into or withdrawn by the lender from the consumer's account.

5. *Loans with alternative, ambiguous, or unusual payment schedules.* If a consumer, under any applicable law, would breach the terms of the agreement between the consumer and the lender or service provider by not substantially repaying the entire amount of the loan or advance within 45 days of consummation or advance, as the case may be, the loan is a covered short-term loan under §1041.3(b)(1). For loans or advances that are not required to be repaid within 45 days of consummation or advance, if the consumer, under applicable law, would not breach the terms of the agreement between the consumer and the lender by not substantially repaying the loan or advance in full within 45 days, the loan is a covered longer-term balloon-payment loan under §1041.3(b)(2) or a covered longer-term loan under §1041.3(b)(3) if the loan otherwise satisfies the criteria specified in §1041.3(b)(2) or (3), respectively.

Paragraph 3(b)(2)

1. *Closed-end credit that does not provide for multiple advances to consumers.* See comments 3(b)(1)-1 and 3(b)(1)-2.

2. *Payments more than twice as large as other payments.* For purposes of §1041.3(b)(2)(i) and (ii), all required payments of principal and any charges (or charges only, depending on the loan features) due under the loan are used to determine whether a particular payment is more than twice as large as another payment, regardless of whether the payments have changed during the loan term due to rate adjustments or other payment changes permitted or required under the loan.

3. *Charges excluded.* Charges for actual unanticipated late payments, for exceeding a credit limit, or for delinquency, default, or a similar occurrence that may be added to a payment are excluded from the determination of whether the loan is repayable in a single payment or a particular payment is more than twice as large as another pay-

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ment. Likewise, sums that are accelerated and due upon default are excluded from the determination of whether the loan is repayable in a single payment or a particular payment is more than twice as large as another payment.

4. *Multiple-advance structures.* Loans that provide for more than one advance are considered to be a covered longer-term balloon-payment loan under §1041.3(b)(2)(ii) if either:

i. The consumer is required to repay substantially the entire amount of an advance more than 45 days after the advance is made or is required to make at least one payment on the advance that is more than twice as large as any other payment; or

ii. A loan with multiple advances is structured such that paying the required minimum payment may not fully amortize the outstanding balance by a specified date or time, and the amount of the final payment to repay the outstanding balance at such time could be more than twice the amount of other minimum payments under the plan. For example, the lender extends an open-end credit plan with a \$500 credit limit, monthly billing cycles, and a minimum payment due each billing cycle that is equal to 10% of the outstanding principal. Fees or interest on the plan are equal to 10% of the outstanding principal per month, so that if a consumer pays nothing other than the minimum payment amount, the outstanding principal remains the same. All outstanding amounts must be repaid within six months of the advance. The credit plan is a covered loan under §1041.3(b)(2)(ii) because if the consumer drew the entire amount at one time and then made only minimum payments, the sixth payment would be more than twice the amount of the minimum payment required (\$50).

Paragraph 3(b)(3)

1. *Conditions for coverage of a longer-term loan.* A loan that is not a covered short-term loan or a covered longer-term balloon-payment loan is a covered longer-term loan only if it satisfies both the cost of credit requirement of §1041.3(b)(3)(i) and leveraged payment mechanism requirement of §1041.3(b)(3)(ii). If the requirements of §1041.3(b)(3) are met, and the loan is not otherwise excluded or conditionally exempted from coverage by §1041.3(d), (e), or (f), the loan is a covered longer-term loan. For example, a 60-day loan that is not a covered longer-term balloon-payment loan is not a covered longer-term loan if the cost of credit as measured pursuant to §1041.2(a)(6) is less than or equal to a rate of 36 percent per annum even if the lender or service provider obtains a leveraged payment mechanism.

2. *No balance during a billing cycle.* Under §1041.2(a)(6)(ii)(B), the cost of credit for open-end credit must be calculated according

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to the rules for calculating the effective annual percentage rate for a billing cycle as set forth in Regulation Z, 12 CFR 1026.14(c) and (d), which provide that the annual percentage rate cannot be calculated for billing cycles in which there is a finance charge but no other balance. Accordingly, pursuant to § 1041.2(a)(6)(ii)(B), the cost of credit could not be calculated for such billing cycles. Section 1041.3(b)(3)(i)(B)(I) provides that, for such billing cycles, an open-end credit plan is determined to have exceeded the threshold set forth in that paragraph if there is no balance other than a finance charge imposed by the lender.

3. *Timing for coverage determination.* A loan may become a covered longer-term loan at any such time as both of the requirements of § 1041.3(b)(3)(i) and (ii) are met. For example:

i. A lender originates a closed-end loan that is not a longer-term balloon-payment loan to be repaid within six months of consummation with a cost of credit equal to 60 percent. At the time of consummation, the loan is not a covered longer-term loan because it does not have a leveraged payment mechanism. After two weeks, the lender obtains a leveraged payment mechanism. The loan is now a covered longer-term loan because it meets both of the requirements of § 1041.3(b)(3)(i) and (ii).

ii. A lender extends an open-end credit plan with monthly billing cycles and a leveraged payment mechanism. At consummation and again at the end of the first billing cycle, the plan is not a covered longer-term loan because its cost of credit is below 36 percent. In the second billing cycle, the plan's cost of credit is 45 percent because several fees are triggered in addition to interest on the principal balance. The plan is now a covered longer-term loan because it meets both of the requirements of § 1041.3(b)(3)(i) and (ii). Beginning on the first day of the third billing cycle, and thereafter for the duration of the plan, the lender must therefore comply with the requirements of this part including by, for example, providing a first withdrawal notice before initiating the first payment transfer on or after the first day of the third billing cycle. The requirements to provide certain payment withdrawal notices under § 1041.9 have been structured so that the notices can be provided in the same mailing as the periodic statements that are required by Regulation Z, 12 CFR 1026.7(b). See, e.g., § 1041.9(b)(3)(i)(D).

Paragraph 3(b)(3)(ii)

1. *Timing.* The condition in § 1041.3(b)(3)(ii) is satisfied if a lender or service provider obtains a leveraged payment mechanism before, at the same time as, or after the consumer receives the entire amount of funds that the consumer is entitled to receive under the loan, regardless of the means by

which the lender or service provider obtains a leveraged payment mechanism.

2. *Leveraged payment mechanism in contract.* The condition in § 1041.3(b)(3)(ii) is satisfied if a loan agreement authorizes the lender to elect to obtain a leveraged payment mechanism, regardless of the time at which the lender actually obtains a leveraged payment mechanism. The following are examples of situations in which a lender obtains a leveraged payment mechanism under § 1041.3(b)(3)(ii):

i. *Future authorization.* A loan agreement provides that the consumer, at some future date, must authorize the lender or service provider to debit the consumer's account on a recurring basis.

ii. *Delinquency or default provisions.* A loan agreement provides that the consumer must authorize the lender or service provider to debit the consumer's account on a one-time or a recurring basis if the consumer becomes delinquent or defaults on the loan.

Paragraph 3(c)

1. *Initiating a transfer of money from a consumer's account.* A lender or service provider obtains the ability to initiate a transfer of money when that person can collect payment, or otherwise withdraw funds, from a consumer's account, either on a single occasion or on a recurring basis, without the consumer taking further action. Generally, when a lender or service provider has the ability to "pull" funds or initiate a transfer from the consumer's account, that person has a leveraged payment mechanism. However, a "push" transaction from the consumer to the lender or service provider does not in itself give the lender or service provider a leveraged payment mechanism.

2. *Lender-initiated transfers.* The following are examples of situations in which a lender or service provider has the ability to initiate a transfer of money from a consumer's account:

i. *Check.* A lender or service provider obtains a check, draft, or similar paper instrument written by the consumer, other than a single immediate payment transfer at the consumer's request as described in § 1041.3(c) and comment 3(c)-3.

ii. *Electronic fund transfer authorization.* The consumer authorizes a lender or service provider to initiate an electronic fund transfer from the consumer's account in advance of the transfer, other than a single immediate payment transfer at the consumer's request as described in § 1041.3(c) and comment 3(c)-3.

iii. *Remotely created checks and remotely created payment orders.* A lender or service provider has authorization to create or present a remotely created check (as defined by Regulation CC, 12 CFR 229.2(fff)), remotely created payment order (as defined in 16 CFR

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310.2(cc)), or similar instrument drafted on the consumer's account.

iv. *Transfer by account-holding institution.* A lender or service provider that is an account-holding institution has a right to initiate a transfer of funds between the consumer's account and an account of the lender or affiliate, including, but not limited to, an account-holding institution's right of set-off.

3. *Single immediate payment transfer at the consumer's request excluded.* A single immediate payment transfer at the consumer's request, as defined in §1041.8(a)(2), is excluded from the definition of leveraged payment mechanism. Accordingly, if the loan or other agreement between the consumer and the lender or service provider does not otherwise provide for the lender or service provider to initiate a transfer without further consumer action, the lender or service provider can initiate a single immediate payment transfer at the consumer's request without causing the loan to become a covered loan under §1041.3(b)(3). See §1041.8(a)(2) and related commentary for guidance on what constitutes a single immediate payment transfer at the consumer's request.

4. *Transfers not initiated by the lender.* A lender or service provider does not initiate a transfer of money from a consumer's account if the consumer authorizes a third party, such as a bank's automatic bill pay service, to initiate a transfer of money from the consumer's account to a lender or service provider.

3(d) Exclusions**3(d)(1) Certain Purchase Money Security Interest Loans**

1. *"Sole purpose" test.* The requirements of this part do not apply to loans made solely and expressly to finance the consumer's initial purchase of a good in which the lender takes a security interest as a condition of the credit. For example, the requirements of this part would not apply to a transaction in which a lender makes a loan to a consumer for the express purpose of initially purchasing a motor vehicle, television, household appliance, or furniture in which the lender takes a security interest and the amount financed is approximately equal to, or less than, the cost of acquiring the good, even if the cost of credit exceeds 36 percent per annum and the lender also obtains a leveraged payment mechanism. A loan is made solely and expressly to finance the consumer's initial purchase of a good even if the amount financed under the loan includes Federal, State, or local taxes or amounts required to be paid under applicable State and Federal licensing and registration requirements. This exclusion does not apply to refinances of credit extended for the purchase of a good.

12 CFR Ch. X (1-1-24 Edition)**3(d)(2) Real Estate Secured Credit**

1. *Real estate and dwellings.* The requirements of this part do not apply to credit secured by any real property, or by any personal property, such as a mobile home, used or expected to be used as a dwelling if the lender records or otherwise perfects the security interest within the term of the loan, even if the cost of credit exceeds 36 percent per annum and the lender or servicer provider also obtains a leveraged payment mechanism. If the lender does not record or perfect the security interest during the term of the loan, however, the credit is not excluded from the requirements of this part under §1041.3(d)(2).

3(d)(5) Non-Recourse Pawn Loans

1. *Lender possession required and no recourse permitted.* A pawn loan must satisfy two conditions to be excluded from the requirements of this part under §1041.3(d)(5). First, the lender must have sole physical possession and use of the property securing the pawned property at all times during the entire term of the loan. If the consumer retains either possession or use of the property, however limited the consumer's possession or use of the property might be, the loan is not excluded from the requirements of this part under §1041.3(d)(5). Second, the lender must have no recourse if the consumer does not elect to redeem the pawned item and repay the loan other than retaining the pawned property to dispose of according to State or local law. If any consumer, or if any co-signor, guarantor, or similar person, is personally liable for the difference between the outstanding balance on the loan and the value of the pawned property, the loan is not excluded from the requirements of this part under §1041.3(d)(5).

3(d)(6) Overdraft Services

1. *Definitions.* Institutions may rely on 12 CFR 1005.17(a) and its related commentary in determining whether credit is an overdraft service or an overdraft line of credit that is excluded from the requirements of this part under §1041.3(d)(6).

3(d)(7) Wage Advance Programs

1. Advances of wages under §1041.3(d)(7) must be offered by an employer, as defined in the Fair Labor Standards Act, 29 U.S.C. 203(d), or by the employer's business partner to the employer's employees pursuant to a wage advance program. For example, an advance program might be offered by a company that provides payroll card services or accounting services to the employer, or by the employer with the assistance of such a company. Similarly, an advance program might be offered by a company that provides consumer financial products and services as

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part of the employer's benefits program, such that the company would have information regarding the wages accrued by the employee.

Paragraph 3(d)(7)(i)

1. Under the exclusion in §1041.3(d)(7)(i), the advance must be made only against accrued wages. To qualify for that exclusion, the amount advanced must not exceed the amount of the employee's accrued wages. Accrued wages are wages that the employee is entitled to receive under State law in the event of separation from the employer for work performed for the employer, but for which the employee has yet to be paid.

Paragraph 3(d)(7)(ii)(B)

1. Under §1041.3(d)(7)(ii)(B), the entity advancing the funds is required to warrant that it has no legal or contractual claim or remedy against the consumer based on the consumer's failure to repay in the event the amount advanced is not repaid in full. This provision does not prevent the entity from obtaining a one-time authorization to seek repayment from the consumer's transaction account.

3(d)(8) No-Cost Advances

1. Under §1041.3(d)(8)(i), the entity advancing the funds is required to warrant that it has no legal or contractual claim or remedy against the consumer based on the consumer's failure to repay in the event the amount advanced is not repaid in full. This provision does not prevent the entity from obtaining a one-time authorization to seek repayment from the consumer's transaction account.

3(e) Alternative Loans

1. *General.* Section 1041.3(e) conditionally exempts from this part alternative covered loans that satisfy the conditions and requirements set forth in §1041.3(e). Nothing in §1041.3(e) provides lenders with an exemption from the requirements of other applicable laws, including State laws. The conditions for an alternative loan made under §1041.3(e) largely track the conditions set forth by the National Credit Union Administration at 12 CFR 701.21(c)(7)(iii) for a Payday Alternative Loan made by a Federal credit union. All lenders, including Federal credit unions and persons that are not Federal credit unions, are permitted to make loans under §1041.3(e), provided that such loans are permissible under other applicable laws, including State laws.

3(e)(1) Loan Term Conditions

Paragraph 3(e)(1)(iv)

1. *Substantially equal payments.* Under §1041.3(e)(1)(iv), payments are substantially

equal in amount if the amount of each scheduled payment on the loan is equal to or within a small variation of the others. For example, if a loan is repayable in six biweekly payments and the amount of each scheduled payment is within 1 percent of the amount of the other payments, the loan is repayable in substantially equal payments. In determining whether a loan is repayable in substantially equal payments, a lender may disregard the effects of collecting the payments in whole cents.

2. *Substantially equal intervals.* The intervals for scheduled payments are substantially equal if the payment schedule requires repayment on the same date each month or in the same number of days of the prior scheduled payment. For example, a loan for which payment is due every 15 days has payments due in substantially equal intervals. A loan for which payment is due on the 15th day of each month also has payments due in substantially equal intervals. In determining whether payments fall due in substantially equal intervals, a lender may disregard that dates of scheduled payments may be slightly changed because the scheduled date is not a business day, that months have different numbers of days, and the occurrence of leap years. Section 1041.3(e)(1)(iv) does not prevent a lender from accepting prepayment on a loan made under §1041.3(e).

3. *Amortization.* Section 1041.3(e)(1)(iv) requires that the scheduled payments fully amortize the loan over the contractual period and prohibits lenders from making loans under §1041.3(e) with interest-only payments or with a payment schedule that front-loads payments of interest and fees. While under §1041.3(e)(1)(iv) the payment amount must be substantially equal for each scheduled payment, the amount of the payment that goes to principal and to interest will vary. The amount of payment applied to interest will be greater for earlier payments when there is a larger principal outstanding.

Paragraph 3(e)(1)(v)

1. *Cost of credit.* Under §1041.3(e)(1)(v), the lender must not impose any charges other than the rate and application fees permissible for Federal credit unions to charge under 12 CFR 701.21(c)(7)(iii). Under 12 CFR 701.21(c)(7)(iii), application fees must reflect the actual costs associated with processing the application and must not exceed \$20.

3(e)(2) Borrowing History Condition

1. *Relevant records.* A lender may make an alternative covered loan under §1041.3(e) only if the lender determines from its records that the consumer's borrowing history on alternative covered loans made under §1041.3(e) meets the criteria set forth in §1041.3(e)(2). The lender is not required to

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obtain information about a consumer's borrowing history from other persons, such as by obtaining a consumer report.

2. *Determining 180-day period.* For purposes of counting the number of loans made under §1041.3(e)(2), the 180-day period begins on the date that is 180 days prior to the consummation date of the loan to be made under §1041.3(e) and ends on the consummation date of such loan.

3. *Total number of loans made under §1041.3(e)(2).* Section 1041.3(e)(2) excludes loans from the conditional exemption in §1041.3(e) if the loan would result in the consumer being indebted on more than three outstanding loans made under §1041.3(e) from the lender in any consecutive 180-day period. See §1041.2(a)(17) for the definition of outstanding loan. Under §1041.3(e)(2), the lender is required to determine from its records the consumer's borrowing history on alternative covered loans made under §1041.3(e) by the lender. The lender must use this information about borrowing history to determine whether the loan would result in the consumer being indebted on more than three outstanding loans made under §1041.3(e) from the lender in a consecutive 180-day period, determined in the manner described in comment 3(e)(2)-2. Section 1041.3(e) does not prevent lenders from making a covered loan subject to the requirements of this part.

4. *Example.* For example, assume that a lender seeks to make an alternative loan under §1041.3(e) to a consumer and the loan does not qualify for the safe harbor under §1041.3(e)(4). The lender checks its own records and determines that during the 180 days preceding the consummation date of the prospective loan, the consumer was indebted on two outstanding loans made under §1041.3(e) from the lender. The loan, if made, would be the third loan made under §1041.3(e) on which the consumer would be indebted during the 180-day period and, therefore, would be exempt from this part under §1041.3(e). If, however, the lender determined that the consumer was indebted on three outstanding loans under §1041.3(e) from the lender during the 180 days preceding the consummation date of the prospective loan, the condition in §1041.3(e)(2) would not be satisfied and the loan would not be an alternative loan subject to the exemption under §1041.3(e) but would instead be a covered loan subject to the requirements of this part.

3(e)(3) Income Documentation Condition

1. *General.* Section 1041.3(e)(3) requires lenders to maintain policies and procedures for documenting proof of recurring income and to comply with those policies and procedures when making alternative loans under §1041.3(e). For the purposes of §1041.3(e)(3), lenders may establish any procedure for documenting recurring income that satisfies the lender's own underwriting obligations. For

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example, lenders may choose to use the procedure contained in the National Credit Union Administration's guidance at 12 CFR 701.21(c)(7)(iii) on Payday Alternative Loan programs recommending that Federal credit unions document consumer income by obtaining two recent paycheck stubs.

3(f) Accommodation Lending

1. *General.* Section 1041.3(f) provides a conditional exemption for covered loans if, at the time of origination: (1) The lender and its affiliates collectively have made 2,500 or fewer covered loans in the current calendar year and made 2,500 or fewer covered loans in the preceding calendar year; and (2) during the most recent completed tax year in which the lender was in operation, if applicable, the lender and any affiliates that were in operation and used the same tax year derived no more than 10 percent of their receipts from covered loans, or if the lender was not in operation in a prior tax year, the lender reasonably anticipates that the lender and any of its affiliates that use the same tax year will, during the current tax year, derive no more than 10 percent of their combined receipts from covered loans. For example, assume a lender begins operation in January 2019, uses the calendar year as its tax year, and has no affiliates. In 2019, the lender could originate up to 2,500 covered loans that are not subject to the requirements of this part if at the time of each origination it reasonably anticipates that no more than 10 percent of its receipts during the current tax year will derive from covered loans. In 2020, the lender could originate up to 2,500 covered loans that are not subject to the requirements of this part if the lender made 2,500 or fewer covered loans in 2019 and the lender derived no more than 10 percent of its receipts in the 2019 tax year from covered loans. Section 1041.3(f) provides that covered longer-term loans for which all transfers meet the conditions in §1041.8(a)(1)(ii), and receipts from such loans, are not included for the purpose of determining whether the conditions of §1041.3(f)(1) and (2) have been satisfied. For example, a bank that makes a covered longer-term loan using a loan agreement that includes the conditions in §1041.8(a)(1)(ii) does not need to include that loan, or the receipts from that loan, in determining whether it is below the 2,500 loan threshold or the 10 percent of receipts threshold in §1041.3(f)(1) and (2).

2. *Reasonable anticipation of receipts for current tax year.* A lender and its affiliates can look to receipts to date in forecasting their total receipts for the current tax year, but are expected to make reasonable adjustments to account for an upcoming substantial change in business plans or other relevant and known factors.

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Section 1041.7—Identification of Unfair and Abusive Practice

1. *General.* A lender who complies with §1041.8 with regard to a covered loan has not committed the unfair and abusive practice under §1041.7.

Section 1041.8—Prohibited Payment Transfer Attempts

8(a) Definitions

8(a)(1) Payment Transfer

1. *Lender-initiated.* A lender-initiated debit or withdrawal includes a debit or withdrawal initiated by the lender's agent, such as a payment processor.

2. *Any amount due.* The following are examples of funds transfers that are for the purpose of collecting any amount due in connection with a covered loan:

i. A transfer for the amount of a scheduled payment due under a loan agreement for a covered loan.

ii. A transfer for an amount smaller than the amount of a scheduled payment due under a loan agreement for a covered loan.

iii. A transfer for the amount of the entire unpaid loan balance collected pursuant to an acceleration clause in a loan agreement for a covered loan.

iv. A transfer for the amount of a late fee or other penalty assessed pursuant to a loan agreement for a covered loan.

3. *Amount purported to be due.* A transfer for an amount that the consumer disputes or does not legally owe is a payment transfer if it otherwise meets the definition set forth in §1041.8(a)(1).

4. *Transfers of funds not initiated by the lender.* A lender does not initiate a payment transfer when:

i. A consumer, on her own initiative or in response to a request or demand from the lender, makes a payment to the lender in cash withdrawn by the consumer from the consumer's account.

ii. A consumer makes a payment via an online or mobile bill payment service offered by the consumer's account-holding institution.

iii. The lender seeks repayment of a covered loan pursuant to a valid court order authorizing the lender to garnish a consumer's account.

Paragraph 8(a)(1)(i)(A)

1. *Electronic fund transfer.* Any electronic fund transfer meeting the general definition in §1041.8(a)(1) is a payment transfer, including but not limited to an electronic fund transfer initiated by a debit card or a prepaid card.

Paragraph 8(a)(1)(B)

1. *Signature check.* A transfer of funds by signature check meeting the general definition in §1041.8(a)(1) is a payment transfer regardless of whether the transaction is processed through the check network or through another network, such as the ACH network. The following example illustrates this concept: A lender processes a consumer's signature check through the check system to collect a scheduled payment due under a loan agreement for a covered loan. The check is returned for nonsufficient funds. The lender then converts and processes the check through the ACH system, resulting in a successful payment. Both transfers are payment transfers, because both were initiated by the lender for purposes of collecting an amount due in connection with a covered loan.

Paragraph 8(a)(1)(E)

1. *Transfer by account-holding institution.* Under §1041.8(a)(1)(i)(E), when the lender is the account holder, a transfer of funds by the account-holding institution from a consumer's account held at the same institution is a payment transfer if it meets the general definition in §1041.8(a)(1)(i), unless the transfer of funds meets the conditions in §1041.8(a)(1)(ii) and is therefore excluded from the definition. See §1041.8(a)(1)(ii) and related commentary.

2. *Examples.* Payment transfers initiated by an account-holding institution from a consumer's account include, but are not limited to, the following:

i. Initiating an internal transfer from a consumer's account to collect a scheduled payment on a covered loan.

ii. Sweeping the consumer's account in response to a delinquency on a covered loan.

iii. Exercising a right of offset to collect against an outstanding balance on a covered loan.

Paragraph 8(a)(1)(ii) Conditional Exclusion for Certain Transfers by Account-Holding Institutions

1. *General.* The exclusion in §1041.8(a)(1)(ii) applies only to a lender that is also the consumer's account-holding institution. The exclusion applies only if the conditions in both §1041.8(a)(1)(ii)(A) and (B) are met with respect to a particular transfer of funds. A lender whose transfer meets the exclusion has not committed the unfair and abusive practice under §1041.7 and is not subject to §1041.8 or §1041.9 in connection with that transaction, but is subject to subpart C for any transfers that do not meet the exclusion in §1041.8(a)(1)(ii) and are therefore payment transfers under §1041.8(a)(1).

Paragraph 8(a)(1)(ii)(A)

1. *Terms of loan agreement or account agreement.* The condition in §1041.8(a)(1)(ii)(A) is

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met only if the terms of the loan agreement or account agreement setting forth the restrictions on charging fees are in effect at the time the covered loan is made and remain in effect for the duration of the loan.

2. *Fees prohibited.* Examples of the types of fees restricted under §1041.8(a)(1)(ii)(A) include, but are not limited to, nonsufficient fund fees, overdraft fees, and returned-item fees. A lender seeking to initiate transfers of funds pursuant to the exclusion in §1041.8(a)(1)(ii) may still charge the consumer a late fee for failure to make a timely payment, as permitted under the terms of the loan agreement and other applicable law, notwithstanding that the lender has initiated a transfer of funds meeting the description in §1041.8(a)(1)(ii)(A) in an attempt to collect the payment.

Paragraph 8(a)(1)(ii)(B)

1. *General.* Under §1041.8(a)(1)(ii)(B), to be eligible for the exclusion in §1041.8(a)(1)(ii), a lender may not close the consumer's account in response to a negative balance that results from a lender-initiated transfer of funds in connection with the covered loan. A lender is not restricted from closing the consumer's account in response to another event, even if the event occurs after a lender-initiated transfer of funds has brought the account to a negative balance. For example, a lender may close the account at the consumer's request, for purposes of complying with other regulatory requirements, or to protect the account from suspected fraudulent use or unauthorized access, and still meet the condition in §1041.8(a)(1)(ii)(B).

2. *Terms of loan agreement or account agreement.* The condition in §1041.8(a)(1)(ii)(B) is met only if the terms of the loan agreement or account agreement providing that the lender will not close the account in the specified circumstances are in effect at the time the covered loan is made and remain in effect for the duration of the loan.

8(a)(2) Single Immediate Payment Transfer at the Consumer's Request**Paragraph 8(a)(2)(i)**

1. *Time of initiation.* A one-time electronic fund transfer is initiated at the time that the transfer is sent out of the lender's control. Thus, the electronic fund transfer is initiated at the time that the lender or its agent sends the transfer to be processed by a third party, such as the lender's bank. The following example illustrates this concept: A lender obtains a consumer's authorization for a one-time electronic fund transfer at 2 p.m. and sends the payment entry to its agent, a payment processor, at 5 p.m. on the same day. The agent then sends the payment entry to the lender's bank for further processing the next business day at 8 a.m. The timing condition in §1041.8(a)(2)(ii) is satisfied,

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because the lender's agent sent the transfer out of its control within one business day after the lender obtained the consumer's authorization.

Paragraph 8(a)(2)(ii)

1. *Time of processing.* A signature check is processed at the time that the check is sent out of the lender's control. Thus, the check is processed at the time that the lender or its agent sends the check to be processed by a third party, such as the lender's bank. For an example illustrating this concept within the context of initiating a one-time electronic fund transfer, see comment 8(a)(2)(i)-1.

2. *Check provided by mail.* For purposes of §1041.8(a)(2)(ii), if the consumer provides the check by mail, the check is deemed to be provided on the date that the lender receives it.

8(b) Prohibition on Initiating Payment Transfers From a Consumer's Account After Two Consecutive Failed Payment Transfers

1. *General.* When the prohibition in §1041.8(b) applies, a lender is generally restricted from initiating any further payment transfers from the consumer's account in connection with any covered loan that the consumer has with the lender at the time the prohibition is triggered, unless the requirements and conditions in either §1041.8(c) or (d) are satisfied for each such covered loan for which the lender seeks to initiate further payment transfers. The prohibition applies, for example, to payment transfers that might otherwise be initiated to collect payments that later fall due under a loan agreement for a covered loan and to transfers to collect late fees or returned item fees as permitted under the terms of such a loan agreement. In addition, the prohibition applies regardless of whether the lender holds an otherwise valid authorization or instrument from the consumer, including but not limited to an authorization to collect payments by preauthorized electronic fund transfers or a post-dated check. See §1041.8(c) and (d) and accompanying commentary for guidance on the requirements and conditions that a lender must satisfy to initiate a payment transfer from a consumer's account after the prohibition applies.

2. *Account.* The prohibition in §1041.8(b) applies only to the account from which the lender attempted to initiate the two consecutive failed payment transfers.

3. *More than one covered loan.* The prohibition in §1041.8(b) is triggered after the lender has attempted to initiate two consecutive failed payment transfers in connection with any covered loan or covered loans that the consumer has with the lender. Thus, when a consumer has more than one covered loan

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with the lender, the two consecutive failed payment transfers need not be initiated in connection with the same loan in order for the prohibition to be triggered, but rather can be initiated in connection with two different loans. For example, the prohibition is triggered if the lender initiates the first failed payment transfer to collect payment on one covered loan and the second consecutive failed payment transfer to collect payment on a different covered loan, assuming that the conditions for a first failed payment transfer, in § 1041.8(b)(2)(i), and second consecutive failed transfer, in § 1041.8(b)(2)(ii), are met.

4. *Application to bona fide subsequent loan.* If a lender triggers the prohibition in § 1041.8(b), the lender is not prohibited under § 1041.8(b) from initiating a payment transfer in connection with a bona fide subsequent covered loan that was originated after the prohibition was triggered, provided that the lender has not attempted to initiate two consecutive failed payment transfers from the consumer's account in connection with the bona fide subsequent covered loan. For purposes of § 1041.8(b) only, a bona fide subsequent covered loan does not include a covered loan that refinances or rolls over any covered loan that the consumer has with the lender at the time the prohibition is triggered.

8(b)(1) General

1. *Failed payment transfer.* A payment transfer results in a return indicating that the consumer's account lacks sufficient funds when it is returned unpaid, or is declined, due to nonsufficient funds in the consumer's account.

2. *Date received.* The prohibition in § 1041.8(b) applies as of the date on which the lender or its agent, such as a payment processor, receives the return of the second consecutive failed transfer or, if the lender is the consumer's account-holding institution, the date on which the second consecutive failed payment transfer is initiated.

3. *Return for other reason.* A transfer that results in a return for a reason other than a lack of sufficient funds, such as a return made due to an incorrectly entered account number, is not a failed transfer for purposes of § 1041.8(b).

4. *Failed payment transfer initiated by a lender that is the consumer's account-holding institution.* When a lender that is the consumer's account-holding institution initiates a payment transfer for an amount that the account lacks sufficient funds to cover, the payment transfer is a failed payment transfer for purposes of the prohibition in § 1041.8(b), regardless of whether the result is classified or coded in the lender's internal procedures, processes, or systems as a return for nonsufficient funds or, if applicable, regardless of whether the full amount of the

payment transfer is paid out of overdraft. Such a lender does not initiate a failed payment transfer for purposes of the prohibition if the lender merely defers or foregoes debiting or withdrawing payment from an account based on the lender's observation that the account lacks sufficient funds.

8(b)(2) Consecutive Failed Payment Transfers

8(b)(2)(i) First Failed Payment Transfer

1. *Examples.* The following examples illustrate concepts of first failed payment transfers under § 1041.8(b)(2)(i). All of the examples assume that the consumer has only one covered loan with the lender:

i. A lender, having made no other attempts, initiates an electronic fund transfer to collect the first scheduled payment due under a loan agreement for a covered loan, which results in a return for nonsufficient funds. The failed transfer is the first failed payment transfer. The lender, having made no attempts in the interim, re-presents the electronic fund transfer and the re-presentation results in the collection of the full payment. Because the subsequent attempt did not result in a return for nonsufficient funds, the number of consecutive failed payment transfers resets to zero. The following month, the lender initiates an electronic fund transfer to collect the second scheduled payment due under the covered loan agreement, which results in a return for nonsufficient funds. That failed transfer is a first failed payment transfer.

ii. A storefront lender, having made no prior attempts, processes a consumer's signature check through the check system to collect the first scheduled payment due under a loan agreement for a covered loan. The check is returned for nonsufficient funds. This constitutes the first failed payment transfer. The lender does not thereafter convert and process the check through the ACH system, or initiate any other type of payment transfer, but instead contacts the consumer. At the lender's request, the consumer comes into the store and makes the full payment in cash withdrawn from the consumer's account. The number of consecutive failed payment transfers remains at one, because the consumer's cash payment was not a payment transfer as defined in § 1041.8(a)(2).

8(b)(2)(ii) Second Consecutive Failed Payment Transfer

1. *General.* Under § 1041.8(b)(2)(ii), a failed payment transfer is the second consecutive failed transfer if the previous payment transfer was a first failed payment transfer. The following examples illustrate this concept:

i. Assume that a consumer has only one covered loan with a lender. The lender, having initiated no other payment transfer in

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connection with the covered loan, initiates an electronic fund transfer to collect the first scheduled payment due under the loan agreement. The transfer is returned for non-sufficient funds. The returned transfer is the first failed payment transfer. The lender next initiates an electronic fund transfer for the following scheduled payment due under the loan agreement for the covered loan, which is also returned for nonsufficient funds. The second returned transfer is the second consecutive failed payment transfer.

ii. Assume that a consumer has two covered loans, Loan A and Loan B, with a lender. Further assume that the lender has initiated no failed payment transfers in connection with either covered loan. On the first of the month, the lender initiates an electronic fund transfer to collect a regularly scheduled payment on Loan A, resulting in a return for nonsufficient funds. The returned transfer is the first failed payment transfer. Two weeks later, the lender, having initiated no further payment transfers in connection with either covered loan, initiates an electronic fund transfer to collect a regularly scheduled payment on Loan B, also resulting in a return for nonsufficient funds. The second returned transfer is the second consecutive failed payment transfer, and the lender is thus prohibited under §1041.8(b) from initiating further payment transfers in connection with either covered loan.

2. *Previous payment transfer.* Section 1041.8(b)(2)(ii) provides that a previous payment transfer includes a payment transfer initiated at the same time or on the same day as the first failed payment transfer. The following example illustrates how this concept applies in determining whether the prohibition in §1041.8(b) is triggered: Assume that a consumer has only one covered loan with a lender. The lender has made no other payment transfers in connection with the covered loan. On Monday at 9 a.m., the lender initiates two electronic fund transfers to collect the first scheduled payment under the loan agreement, each for half of the total amount due. Both transfers are returned for nonsufficient funds. Because each transfer is one of two failed transfers initiated at the same time, the lender has initiated a second consecutive failed payment transfer under §1041.8(b)(2)(ii), and the prohibition in §1041.8(b) is therefore triggered.

3. *Application to exception in §1041.8(d).* When, after a second consecutive failed payment transfer, a lender initiates a single immediate payment transfer at the consumer's request pursuant to the exception in §1041.8(d), the failed transfer count remains at two, regardless of whether the transfer succeeds or fails. Further, the exception is limited to a single payment transfer. Accordingly, if a payment transfer initiated pursuant to the exception fails, the lender is not permitted to re-initiate the transfer, such as

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by re-presenting it through the ACH system, unless the lender obtains a new authorization under §1041.8(c) or (d).

8(b)(2)(iii) Different Payment Channel

1. *General.* Section 8(b)(2)(iii) provides that if a failed payment transfer meets the descriptions set forth in §1041.8(b)(2)(ii), it is the second consecutive failed transfer regardless of whether the first failed transfer was made through a different payment channel. The following example illustrates this concept: A lender initiates an electronic funds transfer through the ACH system for the purpose of collecting the first payment due under a loan agreement for a covered loan. The transfer results in a return for nonsufficient funds. This constitutes the first failed payment transfer. The lender next processes a remotely created check through the check system for the purpose of collecting the same first payment due. The remotely created check is returned for non-sufficient funds. The second failed attempt is the second consecutive failed attempt because it meets the description set forth in §1041.8(b)(2)(ii).

8(c) Exception for Additional Payment Transfers Authorized by the Consumer

1. *General.* Section 1041.8(c) sets forth one of two exceptions to the prohibition in §1041.8(b). Under the exception in §1041.8(c), a lender is permitted to initiate additional payment transfers from a consumer's account after the lender's second consecutive transfer has failed if the additional transfers are authorized by the consumer in accordance with certain requirements and conditions as specified in the rule. In addition to the exception under §1041.8(c), a lender is permitted to execute a single immediate payment transfers at the consumer's request under §1041.8(d), if certain requirements and conditions are satisfied.

8(c)(1) General

1. *Consumer's underlying payment authorization or instrument still required.* The consumer's authorization required by §1041.8(c) is in addition to, and not in lieu of, any separate payment authorization or instrument required to be obtained from the consumer under applicable laws.

8(c)(2) General Authorization Requirements and Conditions**8(c)(2)(i) Required Payment Transfer Terms**

1. *General.* Section 1041.8(c)(2)(i) sets forth the general requirement that, for purposes of the exception in §1041.8(c), the specific date, amount, and payment channel of each additional payment transfer must be authorized by the consumer, subject to a limited exception in §1041.8(c)(2)(iii) for payment transfers

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solely to collect a late fee or returned item fee. Accordingly, for the exception to apply to an additional payment transfer, the transfer's specific date, amount, and payment channel must be included in the signed authorization obtained from the consumer under §1041.8(c)(3)(iii). For guidance on the requirements and conditions that apply when obtaining the consumer's signed authorization, see §1041.8(c)(3)(iii) and accompanying commentary.

2. *Specific date.* The requirement that the specific date of each additional payment transfer be authorized by the consumer is satisfied if the consumer authorizes the month, day, and year of each transfer.

3. *Amount larger than specific amount.* The exception in §1041.8(c)(2) does not apply if the lender initiates a payment transfer for an amount larger than the specific amount authorized by the consumer. Accordingly, such a transfer would violate the prohibition on additional payment transfers under §1041.8(b).

4. *Smaller amount.* A payment transfer initiated pursuant to §1041.8(c) is initiated for the specific amount authorized by the consumer if its amount is equal to or smaller than the authorized amount.

8(c)(2)(iii) Special Authorization Requirements and Conditions for Payment Transfers To Collect a Late Fee or Returned Item Fee

1. *General.* If a lender obtains the consumer's authorization to initiate a payment transfer solely to collect a late fee or returned item fee in accordance with the requirements and conditions under §1041.8(c)(2)(iii), the general requirement in §1041.8(c)(2) that the consumer authorize the specific date and amount of each additional payment transfer need not be satisfied.

2. *Highest amount.* The requirement that the consumer's signed authorization include a statement that specifies the highest amount that may be charged for a late fee or returned item fee is satisfied, for example, if the statement specifies the maximum amount permitted under the loan agreement for a covered loan.

3. *Varying fee amounts.* If a fee amount may vary due to the remaining loan balance or other factors, the rule requires the lender to assume the factors that result in the highest amount possible in calculating the specified amount.

8(c)(3) Requirements and Conditions for Obtaining the Consumer's Authorization

8(c)(3)(ii) Provision of Payment Transfer Terms to the Consumer

1. *General.* A lender is permitted under §1041.8(c)(3)(ii) to request a consumer's authorization on or after the day that the lender provides the consumer rights notice re-

quired by §1041.9(c). For the exception in §1041.8(c) to apply, however, the consumer's signed authorization must be obtained no earlier than the date on which the consumer is considered to have received the consumer rights notice, as specified in §1041.8(c)(3)(iii).

2. *Different options.* Nothing in §1041.8(c)(3)(ii) prohibits a lender from providing different options for the consumer to consider with respect to the date, amount, or payment channel of each additional payment transfer for which the lender is requesting authorization. In addition, if a consumer declines a request, nothing in §1041.8(c)(3)(ii) prohibits a lender from making a follow-up request by providing a different set of terms for the consumer to consider. For example, if the consumer declines an initial request to authorize two recurring payment transfers for a particular amount, the lender may make a follow-up request for the consumer to authorize three recurring payment transfers for a smaller amount.

Paragraph 8(c)(3)(ii)(A)

1. *Request by email.* Under §1041.8(c)(3)(ii)(A), a lender is permitted to provide the required terms and statement to the consumer in writing or in a retainable form by email if the consumer has consented to receive electronic disclosures in that manner under §1041.9(a)(4) or agrees to receive the terms and statement by email in the course of a communication initiated by the consumer in response to the consumer rights notice required by §1041.9(c). The following example illustrates a situation in which the consumer agrees to receive the required terms and statement by email after affirmatively responding to the notice:

i. After a lender provides the consumer rights notice in §1041.9(c) by mail to a consumer who has not consented to receive electronic disclosures under §1041.9(a)(4), the consumer calls the lender to discuss her options for repaying the loan, including the option of authorizing additional payment transfers pursuant to §1041.8(c). In the course of the call, the consumer asks the lender to provide the request for the consumer's authorization via email. Because the consumer has agreed to receive the request via email in the course of a communication initiated by the consumer in response to the consumer rights notice, the lender is permitted under §1041.8(c)(3)(ii)(A) to provide the request to the consumer by that method.

2. *E-Sign Act does not apply to provision of terms and statement.* The required terms and statement may be provided to the consumer electronically in accordance with the requirements for requesting the consumer's authorization in §1041.8(c)(3) without regard to the E-Sign Act. However, under §1041.8(c)(3)(iii)(A), an authorization obtained electronically is valid only if it is

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signed or otherwise agreed to by the consumer in accordance with the signature requirements in the E-Sign Act. See § 1041.8(c)(3)(iii)(A) and comment 8(c)(3)(iii)(A)-1.

3. *Same communication.* Nothing in § 1041.8(c)(3)(ii) prohibits a lender from requesting the consumer's authorization for additional payment transfers and providing the consumer rights notice in the same communication, such as a single written mailing or a single email to the consumer. Nonetheless, the consumer rights notice may be provided to the consumer only in accordance with the requirements and conditions in § 1041.9, including but not limited to the segregation requirements that apply to the notice. Thus, for example, if a lender mails the request for authorization and the notice to the consumer in the same envelope, the lender must provide the notice on a separate piece of paper, as required under § 1041.9. Similarly, a lender could provide the notice to a consumer in the body of an email and attach a document containing the request for authorization. In such cases, it would be permissible for the lender to add language after the text of the notice explaining that the other document is a request for a new authorization.

Paragraph 8(c)(3)(ii)(B)

1. *Request by oral telephone communication.* Nothing in § 1041.8(c)(3)(ii) prohibits a lender from contacting the consumer by telephone to discuss repayment options, including the option of authorizing additional payment transfers. However, under § 1041.8(c)(3)(ii)(B), a lender is permitted to provide the required terms and statement to the consumer by oral telephone communication for purposes of requesting authorization only if the consumer affirmatively contacts the lender in that manner in response to the consumer rights notice required by § 1041.9(c) and agrees to receive the terms and statement by that method of delivery in the course of, and as part of, the same communication.

8(c)(3)(iii) Signed Authorization Required**8(c)(3)(iii)(A) General**

1. *E-Sign Act signature requirements.* For authorizations obtained electronically, the requirement that the authorization be signed or otherwise agreed to by the consumer is satisfied if the E-Sign Act requirements for electronic records and signatures are met. Thus, for example, the requirement is satisfied by an email from the consumer or by a code entered by the consumer into the consumer's telephone keypad, assuming that in each case the signature requirements in the E-Sign Act are complied with.

2. *Consumer's affirmative response to the notice.* A consumer affirmatively responds to the consumer rights notice that was pro-

vided by mail when, for example, the consumer calls the lender on the telephone to discuss repayment options after receiving the notice.

8(c)(3)(iii)(C) Memorialization Required

1. *Timing.* The memorialization is deemed to be provided to the consumer on the date it is mailed or transmitted.

2. *Form of memorialization.* The requirement that the memorialization be provided in a retainable form is not satisfied by a copy of a recorded telephone call, notwithstanding that the authorization was obtained in that manner.

3. *Electronic delivery.* A lender is permitted under § 1041.8(c)(3)(iii)(C) to provide the memorialization to the consumer by email in accordance with the requirements and conditions for requesting authorization in § 1041.8(c)(3)(ii)(A), regardless of whether the lender requested the consumer's authorization in that manner. For example, if the lender requested the consumer's authorization by telephone but also has obtained the consumer's consent to receive electronic disclosures by email under § 1041.9(a)(4), the lender may provide the memorialization to the consumer by email, as specified in § 1041.8(c)(3)(ii)(A).

8(d) Exception for Initiating a Single Immediate Payment Transfer at the Consumer's Request

1. *General.* For guidance on the requirements and conditions that must be satisfied for a payment transfer to meet the definition of a single immediate payment transfer at the consumer's request, see § 1041.8(a)(2) and accompanying commentary.

2. *Application of prohibition.* A lender is permitted under the exception in § 1041.8(d) to initiate a single payment transfer requested by the consumer only once and thus is prohibited under § 1041.8(b) from re-initiating the payment transfer if it fails, unless the lender subsequently obtains the consumer's authorization to re-initiate the payment transfer under § 1041.8(c) or (d). However, a lender is permitted to initiate any number of payment transfers from a consumer's account pursuant to the exception in § 1041.8(d), provided that the requirements and conditions are satisfied for each such transfer. See comment 8(b)(2)(ii)-3 for further guidance on how the prohibition in § 1041.8(b) applies to the exception in § 1041.8(d).

3. *Timing.* A consumer affirmatively contacts the lender when, for example, the consumer calls the lender after noticing on her bank statement that the lender's last two payment withdrawal attempts have been returned for nonsufficient funds.

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8(e) Prohibition Against Evasion

1. *General.* Section 1041.8(e) provides that a lender must not take any action with the intent of evading the requirements of §1041.8. In determining whether a lender has taken action with the intent of evading the requirements of §1041.8, the form, characterization, label, structure, or written documentation of the lender's action shall not be dispositive. Rather, the actual substance of the lender's action as well as other relevant facts and circumstances will determine whether the lender's action was taken with the intent of evading the requirements of §1041.8. If the lender's action is taken solely for legitimate business purposes, it is not taken with the intent of evading the requirements of §1041.8. By contrast, if a consideration of all relevant facts and circumstances reveals a purpose that is not a legitimate business purpose, the lender's action may have been taken with the intent of evading the requirements of §1041.8. A lender action that is taken with the intent of evading the requirements of this part may be knowing or reckless. Fraud, deceit, or other unlawful or illegitimate activity may be one fact or circumstance that is relevant to the determination of whether a lender's action was taken with the intent of evading the requirements of §1041.8, but fraud, deceit, or other unlawful or illegitimate activity is not a pre-requisite to such a finding.

2. *Illustrative example.* A lender collects payment on its covered loans primarily through recurring electronic fund transfers authorized by consumers at consummation. As a matter of lender policy and practice, after a first attempt to initiate an ACH payment transfer from a consumer's account for the full payment amount is returned for non-sufficient funds, the lender initiates a second payment transfer from the account on the following day for \$1.00. If the second payment transfer succeeds, the lender immediately splits the amount of the full payment into two separate payment transfers and initiates both payment transfers from the account at the same time, resulting in two returns for non-sufficient funds in the vast majority of cases. The lender developed the policy and began the practice shortly prior to August 19, 2019. The lender's prior policy and practice when re-presenting the first failed payment transfer was to re-present for the payment's full amount. Depending on the relevant facts and circumstances, the lender's actions may have been taken with the intent of evading the requirements of §1041.8. Specifically, by initiating a second payment transfer for \$1.00 from the consumer's account the day after a first transfer for the full payment amount fails and, if that payment transfer succeeds, initiating two simultaneous payment transfers from the account for the split amount of the full payment, re-

sulting in two returns for non-sufficient funds in the vast majority of cases, the lender avoided the prohibition in §1041.8(b) on initiating payment transfers from a consumer's account after two consecutive payment transfers have failed.

Section 1041.9—Disclosure of Payment Transfer Attempts

1. *General.* Section 1041.9 sets forth two main disclosure requirements related to collecting payments from a consumer's account in connection with a covered loan. The first, set forth in §1041.9(b), is a payment notice required to be provided to a consumer in advance of initiating the first payment withdrawal or an unusual withdrawal from the consumer's account, subject to certain exceptions. The second, set forth in §1041.9(c), is a consumer rights notice required to be provided to a consumer after a lender receives notice of a second consecutive failed payment transfer from the consumer's account, as described in §1041.8(b). In addition, §1041.9 requires lenders to provide an electronic short notice in two situations when they are providing the disclosures required by this section through certain forms of electronic delivery. The first, set forth in §1041.9(b)(4), is an electronic short notice that must be provided along with the payment notice. This provision allows an exception for when the method of electronic delivery is email; for that method, the lender may use the electronic short notice under §1041.9(b)(4)(ii) or may provide the full notice within the body of the email. The second, set forth in §1041.9(c)(4), is an electronic short notice that must be provided along with the consumer rights notice. As with the payment notices, this consumer rights notice provision also allows an exception for when the method of electronic delivery is email; for that method, the lender may use the electronic short notice under §1041.9(c)(4)(ii) or may provide the full notice within the body of the email.

9(a) General Form of Disclosures

9(a)(1) Clear and Conspicuous

1. *Clear and conspicuous standard.* Disclosures are clear and conspicuous for purposes of §1041.9 if they are readily understandable and their location and type size are readily noticeable to consumers.

9(a)(2) In Writing or Electronic Delivery

1. *Electronic delivery.* Section 1041.9(a)(2) allows the disclosures required by §1041.9 to be provided through electronic delivery as long as the requirements of §1041.9(a)(4) are satisfied, without regard to the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*).

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9(a)(3) Retainable

1. *General.* Electronic disclosures, to the extent permitted by §1041.9(a)(4), are retainable for purposes of §1041.9 if they are in a format that is capable of being printed, saved, or emailed by the consumer. The general requirement to provide disclosures in a retainable form does not apply when the electronic short notices are provided in via mobile application or text message. For example, the requirement does not apply to an electronic short notice that is provided to the consumer's mobile telephone as a text message. In contrast, if the access is provided to the consumer via email, the notice must be in a retainable form, regardless of whether the consumer uses a mobile telephone to access the notice.

9(a)(4) Electronic Delivery

1. *General.* Section 1041.9(a)(4) permits disclosures required by §1041.9 to be provided through electronic delivery if the consumer consent requirements under §1041.9(a)(4) are satisfied.

9(a)(4)(i) Consumer Consent

9(a)(4)(i)(A) General

1. *General.* Section 1041.9(a)(4)(i) permits disclosures required by §1041.9 to be provided through electronic delivery if the lender obtains the consumer's affirmative consent to receive the disclosures through a particular electronic delivery method. This affirmative consent requires lenders to provide consumers with an option to select a particular electronic delivery method. The consent must clearly show the method of electronic delivery that will be used, such as email, text message, or mobile application. Consent provided by checking a box during the origination process may qualify as being in writing. Consent can be obtained for multiple methods of electronic delivery, but the consumer must have affirmatively selected and provided consent for each method.

9(a)(4)(i)(B) Email Option Required

1. *General.* Section §1041.9(a)(4)(i)(B) provides that when obtaining consumer consent to electronic delivery under §1041.9(a)(4), a lender must provide the consumer with an option to receive the disclosures through email. The lender may choose to offer email as the only method of electronic delivery under §1041.9(a)(4).

9(a)(4)(ii) Subsequent Loss of Consent

1. *General.* The prohibition on electronic delivery of disclosures in §1041.9(a)(4)(ii) applies to the particular electronic method for which consent is lost. When a lender loses a consumer's consent to receive disclosures via text message, for example, but has not lost the consumer's consent to receive disclo-

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sures via email, the lender may continue to provide disclosures via email, assuming that all of the requirements in §1041.9(a)(4) are satisfied.

2. *Loss of consent applies to all notices.* The loss of consent applies to all notices required by §1041.9. For example, if a consumer revokes consent in response to the electronic short notice text message delivered along with the payment notice under §1041.9(b)(4)(ii), that revocation also applies to text delivery of the electronic short notice that would be delivered with the consumer rights notice under §1041.9(c)(4)(ii).

Paragraph 9(a)(4)(ii)(A)

1. *Revocation.* For purposes of §1041.9(a)(4)(ii)(A), a consumer may revoke consent for any reason and by any reasonable means of communication. Reasonable means of communication may include calling the lender and revoking consent orally, mailing a revocation to an address provided by the lender on its consumer correspondence, sending an email response or clicking on a revocation link provided in an email from the lender, and responding by text message to a text message sent by the lender.

Paragraph 9(a)(4)(ii)(B)

1. *Notice.* A lender receives notification for purposes of §1041.9(a)(4)(ii)(B) when the lender receives any information indicating that the consumer did not receive or is unable to receive disclosures in a particular electronic manner. Examples of notice include but are not limited to the following:

- i. An email returned with a notification that the consumer's account is no longer active or does not exist.
- ii. A text message returned with a notification that the consumer's mobile telephone number is no longer in service.
- iii. A statement from the consumer that the consumer is unable to access or review disclosures through a particular electronic delivery method.

9(a)(5) Segregation Requirements for Notices

1. *Segregated additional content.* Although segregated additional content that is not required by §1041.9 may not appear above, below, or around the required content, additional content may be delivered through a separate form, such as a separate piece of paper or Web page.

9(a)(7) Model Forms

1. *Safe harbor provided by use of model forms.* Although the use of the model forms and clauses is not required, lenders using them will be deemed to be in compliance with the disclosure requirement with respect to such model forms.

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9(b) Payment Notice

9(b)(1)(i) First Payment Withdrawal

1. *First payment withdrawal.* Depending on when the payment authorization granted by the consumer is obtained on a covered loan and whether the exception for a single immediate payment transfer made at the consumer's request applies, the first payment withdrawal may or may not be the first payment made on a covered loan. When a lender obtains payment authorization during the origination process, the lender may provide the first payment withdrawal notice at that time. A lender that obtains payment authorization after a payment has been made by the consumer in cash, or after initiating a single immediate payment transfer at the consumer's request, would deliver the notice later in the loan term. If a consumer provides one payment authorization that the lender uses to initiate a first payment withdrawal after a notice as required by § 1041.9(b)(1)(i), but the consumer later changes the authorization or provides an additional authorization, the lender's exercise of that new authorization would not be the first payment withdrawal; however, it may be an unusual withdrawal under § 1041.9(b)(1)(ii).

2. *First payment withdrawal is determined when the loan is in covered status.* As discussed in comment 3(b)(3)-3, there may be situations where a longer-term loan is not covered at the time of origination but becomes covered at a later date. The lender's first attempt to execute a payment transfer after a loan becomes a covered loan under this part is the first payment withdrawal. For example, consider a loan that is not considered covered at the time of origination. If the lender initiates a payment withdrawal during the first and second billing cycles and the loan becomes covered at the end of the second cycle, any lender initiated payment during the third billing cycle is considered a first payment withdrawal under this section.

3. *Intervening payments.* Unscheduled intervening payments do not change the determination of first payment withdrawal for purposes of the notice requirement. For example, a lender originates a loan on April 1, with a payment scheduled to be withdrawn on May 1. At origination, the lender provides the consumer with a first payment withdrawal notice for May 1. On April 28, the consumer makes the payment due on May 1 in cash. The lender does not initiate a withdrawal on May 1. The lender initiates a withdrawal for the next scheduled payment June 1. The lender satisfied its notice obligation with the notice provided at origination, so it is not required to send a first payment notice in connection with the June 1 payment although it may have to send an unusual

payment notice if the transfer meets one of the conditions in § 1041.9(b)(3)(ii)(C).

9(b)(1)(iii) Exceptions

1. *Exception for initial payment transfer applies even if the transfer is unusual.* The exception in § 1041.9(b)(1)(iii)(A) applies even if the situation would otherwise trigger the additional disclosure requirements for unusual attempts under § 1041.9(b)(3). For example, if the payment channel of the initial payment transfer after obtaining the consumer's consent is different than the payment channel used before the prohibition under § 1041.8 was triggered, the exception in § 1041.9(b)(1)(iii)(A) applies.

2. *Multiple transfers in advance.* If a consumer has affirmatively consented to multiple transfers in advance, the exception in § 1041.9(b)(1)(iii)(A) applies only to the first initial payment transfer of that series.

9(b)(2) First Payment Withdrawal Notice

9(b)(2)(i) Timing

1. *When the lender obtains payment authorization.* For all methods of delivery, the earliest point that the lender may provide the first payment withdrawal notice is when the lender obtains the payment authorization. For example, the notice can be provided simultaneously when the lender provides a consumer with a copy of a completed payment authorization, or after providing the authorization copy. The provision allows the lender to provide consumers with the notice at a convenient time because the lender and consumer are already communicating about the loan, but also allows flexibility for lenders that prefer to provide the notice closer to the payment transfer date. For example, the lender could obtain consumer consent to electronic delivery and deliver the notice through email 4 days before initiating the transfer, or the lender could hand deliver it to the consumer at the end of the loan origination process.

9(b)(2)(i)(A) Mail

1. *General.* The six business-day period begins when the lender places the notice in the mail, not when the consumer receives the notice. For example, if a lender places the notice in the mail on Monday, June 1, the lender may initiate the transfer of funds on Tuesday, June 9, if it is the 6th business day following mailing of the notice.

9(b)(2)(i)(B) Electronic Delivery

Paragraph 9(b)(2)(i)(B)(1)

1. *General.* The three-business-day period begins when the lender sends the notice, not when the consumer receives or is deemed to have received the notice. For example, if a lender sends the notice by email on Monday,

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June 1, the lender may initiate the transfer of funds on Thursday, June 4, the third business day following transmitting the notice.

Paragraph 9(b)(2)(i)(B)(2)

1. *General.* In some circumstances, a lender may lose a consumer's consent to receive disclosures through a particular electronic delivery method after the lender has provided the notice. In such circumstances, the lender may initiate the transfer for the payment currently due as scheduled. If the lender is scheduled to make a future unusual withdrawal attempt following the one that was disclosed in the previously provided first withdrawal notice, the lender must provide notice for that unusual withdrawal through alternate means, in accordance with the applicable timing requirements in § 1041.9(b)(3)(i).

2. *Alternate Means.* The alternate means may include a different electronic delivery method that the consumer has consented to, in person, or by mail, in accordance with the applicable timing requirements in § 1041.9(b)(3)(i).

9(b)(2)(ii) Content Requirements**9(b)(2)(ii)(B) Transfer Terms****Paragraph 9(b)(2)(ii)(B)(1) Date**

1. *Date.* The initiation date is the date that the payment transfer is sent outside of the lender's control. Accordingly, the initiation date of the transfer is the date that the lender or its agent sends the payment to be processed by a third party. For example, if a lender sends its ACH payments to a payment processor working on the lender's behalf on Monday, June 1, but the processor does not submit them to its bank and the ACH network until Tuesday, June 2, the date of the payment transfer is Tuesday the 2nd.

Paragraph 9(b)(2)(ii)(B)(2) Amount

1. *Amount.* The amount of the transfer is the total amount of money that will be transferred from the consumer's account, regardless of whether the total corresponds to the amount of a regularly scheduled payment. For example, if a single transfer will be initiated for the purpose of collecting a regularly scheduled payment of \$50.00 and a late fee of \$30.00, the amount that must be disclosed under § 1041.9(b)(2)(ii)(B)(2) is \$80.00.

Paragraph 9(b)(2)(ii)(B)(5) Payment Channel

1. *General.* Payment channel refers to the specific payment method, including the network that the transfer will travel through and the form of the transfer. For example, a lender that uses the consumer's paper check information to initiate a payment transfer through the ACH network would use the ACH payment channel under

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§ 1041.9(b)(2)(ii)(B)(5). A lender that uses consumer account and routing information to initiate a remotely created check over the check network would use the remotely created check payment channel. A lender that uses a post-dated signature check to initiate a transfer over the check network would use the signature check payment channel. A lender that initiates a payment from a consumer's prepaid card would specify whether that payment is processed as an ACH transfer, a PIN debit card network payment, or a signature debit card network payment.

2. *Illustrative examples.* In describing the payment channel in the disclosure, the most common payment channel descriptions include, but are not limited to, ACH transfers, checks, remotely created checks, remotely created payment orders, internal transfers, PIN debit card payments, and signature debit card network payments.

9(b)(2)(ii)(C) Payment Breakdown**9(b)(2)(ii)(C)(2) Principal**

1. *General.* The amount of the payment that is applied to principal must always be included in the payment breakdown table, even if the amount applied is \$0.

9(b)(2)(ii)(C)(4) Fees

1. *General.* This field must only be provided if some of the payment amount will be applied to fees. In situations where more than one fee applies, fees may be disclosed separately or aggregated. A lender may use its own term to describe the fee, such as "late payment fee."

9(b)(2)(ii)(C)(5) Other Charges

1. *General.* This field must only be provided if some of the payment amount will be applied to other charges. In situations when more than one other charge applies, other charges may be disclosed separately or aggregated. A lender may use its own term to describe the charge, such as "insurance charge."

9(b)(3) Unusual Withdrawal Notice**9(b)(3)(i) Timing**

1. *General.* See comments on 9(b)(2) regarding the first payment withdrawal notice.

9(b)(3)(ii) Content Requirements

1. *General.* If the payment transfer is unusual according to the circumstances described in § 1041.9(b)(3)(ii)(C), the payment notice must contain both the basic payment information required by § 1041.9(b)(2)(ii)(B) through (D) and the description of unusual withdrawal required by § 1041.9(b)(3)(ii)(C).

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9(b)(3)(ii)(C) Description of Unusual Withdrawal

1. *General.* An unusual withdrawal notice is required under §1041.9(b)(3) if one or more conditions are present. The description of an unusual withdrawal informs the consumer of the condition that makes the pending payment transfer unusual.

2. *Illustrative example.* The lender provides a first payment withdrawal notice at origination. The first payment withdrawal initiated by the lender occurs on March 1, for \$75, as a paper check. The second payment is scheduled for April 1, for \$75, as an ACH transfer. Before the second payment, the lender provides an unusual withdrawal notice. The notice contains the basic payment information along with an explanation that the withdrawal is unusual because the payment channel has changed from paper check to ACH. Because the amount did not vary, the payment is taking place on the regularly scheduled date, and this is not a re-initiated payment, the only applicable content under §1041.9(b)(3)(ii)(C) is the different payment channel information.

3. *Varying amount.* The information about varying amount for closed-end loans in §1041.9(b)(3)(ii)(C)(1)(i) applies in two circumstances. First, the requirement applies when a transfer is for the purpose of collecting a payment that is not specified by amount on the payment schedule, including, for example, a one-time electronic payment transfer to collect a late fee. Second, the requirement applies when the transfer is for the purpose of collecting a regularly scheduled payment for an amount different from the regularly scheduled payment amount according to the payment schedule. Given existing requirements for open-end credit, circumstances that trigger an unusual withdrawal for open-end credit are more limited according to §1041.9(b)(3)(ii)(C)(1)(ii). Because the outstanding balance on open-end credit may change over time, the minimum payment due on the scheduled payment date may also fluctuate. However, the minimum payment amount due for open-end credit would be disclosed to the consumer according to the periodic statement requirement in Regulation Z. The payment transfer amount would not be considered unusual with regards to open-end credit unless the amount deviates from the minimum payment due as disclosed in the periodic statement. The requirement for a first payment withdrawal notice under §1041.9(b)(2) and the other circumstances that could trigger an unusual withdrawal notice under §1041.9(b)(3)(ii)(C)(2) through (4), continue to apply.

4. *Date other than due date of regularly scheduled payment.* The changed date information in §1041.9(b)(3)(ii)(C)(2) applies in two circumstances. First, the requirement applies when a transfer is for the purpose of

collecting a payment that is not specified by date on the payment schedule, including, for example, a one-time electronic payment transfer to collect a late fee. Second, the requirement applies when the transfer is for the purpose of collecting a regularly scheduled payment on a date that differs from the regularly scheduled payment date according to the payment schedule.

9(b)(4) Electronic Delivery

1. *General.* If the lender is using a method of electronic delivery other than email, such as text or mobile application, the lender must provide the notice with the electronic short notice as provided in §1041.9(b)(4)(ii). If the lender is using email as the method of electronic delivery, §1041.9(b)(4)(iii) allows the lender to determine whether to use the electronic short notice approach or to include the full text of the notice in the body of the email.

9(b)(4)(ii) Electronic Short Notice

9(b)(4)(ii)(A) General Content

1. *Identifying statement.* If the lender is using email as the method of electronic delivery, the identifying statement required in §1041.9(b)(2)(ii)(A) and (b)(3)(ii)(A) must be provided in both the email subject line and the body of the email.

9(c) Consumer Rights Notice

9(c)(2) Timing

1. *General.* Any information provided to the lender or its agent that the payment transfer has failed would trigger the timing requirement provided in §1041.9(c)(2). For example, if the lender's agent, a payment processor, learns on Monday, June 1 that an ACH payment transfer initiated by the processor on the lender's behalf has been returned for non-sufficient funds, the lender would be required to send the consumer rights notice by Thursday, June 4.

9(c)(3) Content Requirements

1. *Identifying statement.* If the lender is using email as the method of electronic delivery, the identifying statement required in §1041.9(c)(3)(i) must be provided in both the email subject line and the body of the email.

2. *Fees.* If the lender is also the consumer's account-holding institution, this includes all fees charged in relation to the transfer, including any returned payment fees charged to outstanding loan balance and any fees, such as overdraft or insufficient fund fees, charged to the consumer's account.

9(c)(4) Electronic Delivery

1. *General.* See comments 9(b)(4)-1 and 9(b)(4)(ii)(A)-1.

Pt. 1070**Section 1041.12—Compliance Program and Record Retention****12(a) Compliance Program**

1. *General.* Section 1041.12(a) requires a lender making a covered loan to develop and follow written policies and procedures that are reasonably designed to ensure compliance with the applicable requirements in this part. These written policies and procedures must provide guidance to a lender's employees on how to comply with the requirements in this part. In particular, under §1041.12(a), a lender must develop and follow detailed written policies and procedures reasonably designed to achieve compliance, as applicable, with the payments requirements in §§1041.8 and 1041.9. The provisions and commentary in each section listed above provide guidance on what specific directions and other information a lender must include in its written policies and procedures.

12(b) Record Retention

1. *General.* Section 1041.12(b) requires a lender to retain various categories of documentation and information concerning payment practices in connection with covered loans. The items listed are non-exhaustive as to the records that may need to be retained as evidence of compliance with this part.

12(b)(4) Retention of Records Relating to Payment Practices for Covered Loans

1. *Methods of retaining documentation.* Section 1041.12(b)(4) requires a lender either to retain certain payment-related information in connection with covered loans in original form or to be able to reproduce an image of such documents accurately. For example, §1041.12(b)(4) requires the lender to either retain a paper copy of the leveraged payment mechanism obtained in connection with a covered longer-term loan or to be able to reproduce an image of the mechanism. For documentation that the lender receives electronically, the lender may retain either the electronic version or a printout.

12(b)(5) Electronic Records in Tabular Format Regarding Payment Practices for Covered Loans

1. *Electronic records in tabular format.* Section 1041.12(b)(5) requires a lender to retain records regarding payment practices in electronic, tabular format. Tabular format means a format in which the individual data elements comprising the record can be transmitted, analyzed, and processed by a computer program, such as a widely used spreadsheet or database program. Data formats for image reproductions, such as PDF, and document formats used by word processing programs are not tabular formats.

12 CFR Ch. X (1-1-24 Edition)**Section 1041.13—Prohibition Against Evasion**

1. *Lender action taken with the intent of evading the requirements of the rule.* Section 1041.13 provides that a lender must not take any action with the intent of evading the requirements of this part. In determining whether a lender has taken action with the intent of evading the requirements of this part, the form, characterization, label, structure, or written documentation of the lender's action shall not be dispositive. Rather, the actual substance of the lender's action as well as other relevant facts and circumstances will determine whether the lender's action was taken with the intent of evading the requirements of this part. If the lender's action is taken solely for legitimate business purposes, it is not taken with the intent of evading the requirements of this part. By contrast, if a consideration of all relevant facts and circumstances reveals the presence of a purpose that is not a legitimate business purpose, the lender's action may have been taken with the intent of evading the requirements of this part. A lender action that is taken with the intent of evading the requirements of this part may be knowing or reckless. Fraud, deceit, or other unlawful or illegitimate activity may be one fact or circumstance that is relevant to the determination of whether a lender's action was taken with the intent of evading the requirements of this part, but fraud, deceit, or other unlawful or illegitimate activity is not a prerequisite to such a finding.

[82 FR 54871, Nov. 17, 2017, as amended at 84 FR 27929, June 17, 2019; 85 FR 44445, July 22, 2020]

PART 1070—DISCLOSURE OF RECORDS AND INFORMATION**Subpart A—General Provisions and Definitions**

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- 1070.2 General definitions.
- 1070.3 Custodian of records; certification; alternative authority.
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- 1070.61 Training; rules of conduct; penalties for non-compliance.
- 1070.62 Preservation of records.
- 1070.63 Use and collection of Social Security numbers.

AUTHORITY: 12 U.S.C. 5481 *et seq.*; 5 U.S.C. 552; 5 U.S.C. 552a; 18 U.S.C. 1905; 18 U.S.C. 641; 44 U.S.C. ch. 31; 44 U.S.C. ch. 35; 12 U.S.C. 3401 *et seq.*

SOURCE: 78 FR 11503, Feb. 15, 2013, unless otherwise noted.

Subpart A—General Provisions and Definitions

§ 1070.1 Authority, purpose, and scope.

(a) *Authority.* (1) This part is issued by the Bureau of Consumer Financial Protection, an independent Bureau within the Federal Reserve System, pursuant to the Consumer Financial Protection Act of 2010, 12 U.S.C. 5481 *et seq.*; the Freedom of Information Act, 5 U.S.C. 552; the Privacy Act of 1974, 5 U.S.C. 552a; the Federal Records Act, 44 U.S.C. 3101; the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*; the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401; the Trade Secrets Act, 18 U.S.C. 1905; 18 U.S.C. 641; and any other applicable law that establishes a basis for the exercise of governmental authority by the CFPB.

(2) This part establishes mechanisms for carrying out the CFPB's statutory responsibilities under the statutes in paragraph (a)(1) of this section to the extent those responsibilities require the disclosure, production, or withholding of information. In this regard, the CFPB has determined that the CFPB, and its delegates, may disclose information of the CFPB, in accordance with the procedures set forth in this part, whenever it is necessary or appropriate to do so in the exercise of any of the CFPB's authority. The CFPB has determined that all such disclosures, made in accordance with the

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rules and procedures specified in this part, are authorized by law.

(b) *Purpose and scope.* This part contains the CFPB's rules relating to the disclosure of records and information generated by and obtained by the CFPB.

(1) Subpart A contains general provisions and definitions used in this part.

(2) Subpart B implements the Freedom of Information Act, 5 U.S.C. 552.

(3) Subpart C sets forth the procedures with respect to subpoenas, orders, or other requests for CFPB information in connection with legal proceedings.

(4) Subpart D provides for the protection of confidential information and procedures for sharing confidential information with supervised institutions, government Agencies, and others in certain circumstances.

(5) Subpart E implements the Privacy Act of 1974, 5 U.S.C. 552a.

[83 FR 46084, Sept. 12, 2018]

§ 1070.2 General definitions.

For purposes of this part:

(a) *Associate Director for Supervision, Enforcement and Fair Lending* means the Associate Director for Supervision, Enforcement and Fair Lending of the CFPB or any CFPB employee to whom the Associate Director for Supervision, Enforcement and Fair Lending has delegated authority to act under this part.

(b) *Business day* means any day except Saturday, Sunday or a legal Federal holiday.

(c) *CFPB* means the Bureau of Consumer Financial Protection.

(d) *Chief FOIA Officer* means the Chief Operating Officer of the CFPB.

(e) *Chief Operating Officer* means the Chief Operating Officer of the CFPB, or any CFPB employee to whom the Chief Operating Officer has delegated authority to act under this part.

(f) *Confidential information* means confidential consumer complaint information, confidential investigative information, and confidential supervisory information, as well as any other CFPB information that may be exempt from disclosure under the Freedom of Information Act pursuant to 5 U.S.C. 552(b). Confidential information does not include information contained

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in records that have been made publicly available by the CFPB or information that has otherwise been publicly disclosed by an employee, or agent of the CFPB, with the authority to do so. Confidential information obtained by a third party or otherwise incorporated in the records of a third party, including another agency, shall remain confidential information subject to this part.

(g) *Confidential consumer complaint information* means information received or generated by the CFPB through processes or procedures established under 12 U.S.C. 5493(b)(3), to the extent that such information is exempt from disclosure pursuant to 5 U.S.C. 552(b).

(h) *Confidential investigative information* means:

(1) Any documentary material, written report, or written answers to questions, tangible thing, or transcript of oral testimony received by the CFPB in any form or format pursuant to a civil investigative demand, as those terms are set forth in 12 U.S.C. 5562, or received by the CFPB voluntarily in lieu of a civil investigative demand; and

(2) Any other documents, materials, or records prepared by, on behalf of, received by, or for the use by the CFPB or any other Federal or State agency in the conduct of enforcement activities, and any information derived from such materials.

(i) *Confidential supervisory information* means:

(1) Reports of examination, inspection and visitation, non-public operating, condition, and compliance reports, supervisory letter, or similar document, and any information contained in, derived from, or related to such documents;

(2) Any documents, materials, or records, including reports of examination, prepared by, or on behalf of, or for the use of the CFPB or any other Federal, State, or foreign government agency in the exercise of supervisory authority over a financial institution, and any information derived from such documents, materials, or records;

(3) Any communications between the CFPB and a supervised financial institution or a Federal, State, or foreign

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government agency related to the CFPB's supervision of the institution;

(4) Any information provided to the CFPB by a financial institution for purposes of detecting and assessing risks to consumers and to markets for consumer financial products or services pursuant to 12 U.S.C. 5414(b)(1)(C), 5515(b)(1)(C), or 5516(b), or to assess whether an institution should be considered a covered person, as that term is defined by 12 U.S.C. 5481, or is subject to the CFPB's supervisory authority; and/or

(5) Information that is exempt from disclosure pursuant to 5 U.S.C. 552(b)(8).

(j) *Director* means the Director of the CFPB or his or her designee, or a person authorized to perform the functions of the Director in accordance with law.

(k) *Employee* means all current employees or officials of the CFPB, including contract personnel, the employees of the Office of the Inspector General of the Board of Governors of the Federal Reserve System and the Consumer Financial Protection Bureau, and any other individuals who have been appointed by, or are subject to the supervision, jurisdiction, or control of the Director, as well as the Director. The procedures established within this part also apply to former employees where specifically noted.

(l) *Financial institution* means any person involved in the offering or provision of a "financial product or service," including a "covered person" or "service provider," as those terms are defined by 12 U.S.C. 5481.

(m) *General Counsel* means the General Counsel of the CFPB or any CFPB employee to whom the General Counsel has delegated authority to act under this part.

(n) *Person* means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

(o) *Report of examination* means the report prepared by the CFPB concerning the examination or inspection of a supervised financial institution.

(p) *State* means any State, territory, or possession of the United States, the District of Columbia, the Common-

wealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, or the United States Virgin Islands or any federally recognized Indian tribe, as defined by the Secretary of the Interior under section 104(a) of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a–1(a)), and includes any political subdivision thereof.

(q) *Supervised financial institution* means a financial institution that is or that may become subject to the CFPB's supervisory authority.

[85 FR 75216, Nov. 24, 2020]

§ 1070.3 Custodian of records; certification; alternative authority.

(a) *Custodian of records*. The Chief Operating Officer is the official custodian of all records of the CFPB, including records that are in the possession or control of the CFPB or any CFPB employee.

(b) *Certification of record*. The Chief Operating Officer may certify the authenticity of any CFPB record or any copy of such record, or the absence thereof, for any purpose, and for or before any duly constituted Federal or State court, tribunal, or agency.

(c) *Alternative authority*. Any action or determination required or permitted to be done by the Chief Operating Officer may be done by any employee who has been duly designated for this purpose by the Chief Operating Officer.

[83 FR 46084, Sept. 12, 2018]

§ 1070.4 Records of the CFPB not to be otherwise disclosed.

Except as provided by this part, employees or former employees of the CFPB, or others in possession of a record of the CFPB that the CFPB has not already made public, are prohibited from disclosing such records, without authorization, to any person who is not an employee of the CFPB.

[83 FR 46084, Sept. 12, 2018]

§ 1070.5 Service of summonses and complaints.

(a) Only the General Counsel is authorized to receive and accept summonses or complaints sought to be served upon the CFPB or CFPB employees sued in their official capacity.

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Such documents should be served upon the General Counsel, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552. This authorization for receipt shall in no way affect the requirements of service elsewhere provided in applicable rules and regulations.

(b) If, notwithstanding paragraph (a) of this section, any summons or complaint described in that paragraph is delivered to an employee of the CFPB, the employee shall decline to accept the proffered service and may notify the person attempting to make service of the regulations set forth herein. If, notwithstanding this instruction, an employee accepts service of a document described in paragraph (a) of this section, the employee shall immediately notify and deliver a copy of the summons and complaint to the General Counsel.

(c) When a CFPB employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the CFPB (whether or not the officer or employee is also sued in an official capacity), the employee by law is to be served personally with process. *See Fed. R. Civ. P. 4(i)(3).* An employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the CFPB shall immediately notify, and deliver a copy of the summons and complaint to, the General Counsel.

(d) The CFPB will only accept service of process for an employee sued in his or her official capacity. Documents for which the General Counsel accepts service in official capacity shall be marked "Service Accepted in Official Capacity Only." Acceptance of service shall not constitute an admission or waiver with respect to jurisdiction, propriety of service, improper venue, or any other defense in law or equity available under applicable laws or rules.

[83 FR 46084, Sept. 12, 2018]

Subpart B—Freedom of Information Act

SOURCE: 83 FR 46084, Sept. 12, 2018, unless otherwise noted.

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§ 1070.10 General.

This subpart contains the regulations of the CFPB implementing the Freedom of Information Act (the FOIA), 5 U.S.C. 552, as amended. These regulations set forth procedures for requesting access to records maintained by the CFPB. These regulations should be read together with the FOIA, the 1987 Office of Management and Budget Guidelines for FOIA Fees, the CFPB's Privacy Act regulations set forth in subpart E of this part, and the FOIA web page on the CFPB's website, <http://www.consumerfinance.gov>, which provide additional information about this topic.

§ 1070.11 Information made available; discretionary disclosures.

(a) *In general.* The FOIA provides for public access to information and records developed or maintained by Federal agencies. Generally, the FOIA divides agency information into three major categories and provides methods by which each category of information is to be made available to the public. The three major categories of information are as follows:

(1) Information required to be published in the FEDERAL REGISTER (see § 1070.12);

(2) Information required to be made available for public inspection in an electronic format or, in the alternative, to be published and offered for sale (see § 1070.13); and

(3) Information required to be made available to any member of the public upon specific request (see §§ 1070.14 through 1070.22).

(b) *Discretionary disclosures.* Even though a FOIA exemption may apply to the information or records requested, the CFPB may, if not precluded by law, elect under the circumstances not to apply the exemption. The fact that the exemption is not applied by the CFPB in response to a particular request shall have no precedential significance in processing other requests.

(c) *Disclosures of records frequently requested.* Subject to the application of the FOIA exemptions and exclusions (5 U.S.C. 552(b) and (c)), the CFPB shall make publicly available, as provided by § 1070.13, all records regardless of form

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or format, which have been released previously to any person under 5 U.S.C. 552(a)(3) and §§ 1070.14 through 1070.22, and which the CFPB determines have become or are likely to become the subject of subsequent requests for substantially the same records. When the CFPB receives three (3) or more requests for substantially the same records, then the CFPB shall also make the released records publicly available.

§ 1070.12 Publication in the Federal Register.

(a) *Requirement.* The CFPB shall separately state, publish and maintain current in the FEDERAL REGISTER for the guidance of the public the following information:

(1) Descriptions of its central and field organization and the established place at which, the persons from whom, and the methods whereby, the public may obtain information, make submissions or requests, or obtain decisions;

(2) Statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(3) Rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(4) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the CFPB; and

(5) Each amendment, revision, or repeal of matters referred to in paragraphs (a)(1) through (4) of this section.

(b) *Exceptions.* Publication of the information under paragraph (a) of this section shall be subject to the application of the FOIA exemptions and exclusions (5 U.S.C. 552(b) and (c)) and the limitations provided in 5 U.S.C. 552(a)(1).

§ 1070.13 Public inspection in an electronic format.

(a) *In general.* Subject to the application of the FOIA exemptions and exclusions (5 U.S.C. 552(b) and (c)), the CFPB shall, in conformance with 5 U.S.C. 552(a)(2), make available for public in-

spection in an electronic format, including by posting on the CFPB's website, <http://www.consumerfinance.gov>, or, in the alternative, promptly publish and offer for sale the following information:

(1) Final opinions, including concurring and dissenting opinions, and orders made in the adjudication of cases;

(2) Those statements of policy and interpretations which have been adopted by the CFPB but are not published in the FEDERAL REGISTER;

(3) Its administrative staff manuals and instructions to staff that affect a member of the public;

(4) Copies of all records made publicly available pursuant to § 1070.11; and

(5) A general index of the records referred to in paragraph (a)(4) of this section.

(b) *Information made available online.* For records required to be made available for public inspection in an electronic format pursuant to 5 U.S.C. 552(a)(2) (paragraphs (a)(1) through (4) of this section), as soon as practicable, the CFPB shall make such records available on its e-FOIA Library, located at <http://www.consumerfinance.gov>.

(c) *Record availability at the on-site e-FOIA Library.* Any member of the public may, upon request, access the CFPB's e-FOIA Library via a computer terminal at 1700 G Street NW, Washington, DC 20552. Such a request may be made by electronic means as set forth on the CFPB's website, <http://www.consumerfinance.gov>, or in writing, to the Chief FOIA Officer, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552. The request must indicate a preferred date and time for the requested access. The CFPB reserves the right to arrange a different date and time with the requester, if necessary.

(d) *Redaction of identifying details.* To prevent a clearly unwarranted invasion of personal privacy, the CFPB may redact identifying details contained in any matter described in paragraphs (a)(1) through (4) of this section before making such matters available for inspection or publication. The justification for the redaction shall be explained fully in writing, and the extent of such redaction shall be indicated on

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the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in 5 U.S.C. 552(b) under which the redaction is made. If technically feasible, the extent of the redaction shall be indicated at the place in the record where the redaction is made.

§ 1070.14 Requests for CFPB records.

(a) *In general.* Subject to the application of the FOIA exemptions and exclusions (5 U.S.C. 552(b) and (c)), the CFPB shall promptly make its records available to any person pursuant to a request that conforms to the rules and procedures of this section.

(b) *Form of request.* A request for records of the CFPB shall be made in writing as follows:

(1) If a request is submitted by mail or delivery service, it shall be addressed to the Chief FOIA Officer, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552. The request shall be labeled “Freedom of Information Act Request.”

(2) If a request is submitted by electronic means, it shall be submitted as set forth on the CFPB’s website, <http://www.consumerfinance.gov>. The request shall be labeled “Freedom of Information Act Request.”

(c) *Content of request.* (1) In order to ensure the CFPB’s ability to respond in a timely manner, a FOIA request must describe the records that the requester seeks in sufficient detail to enable CFPB personnel to locate them with a reasonable amount of effort. Whenever possible, the request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record. If known, the requester should include any file designations or descriptions for the records requested. The more specific the requester is about the records or type of records requested, the more likely the CFPB will be able to locate those records in response to the request;

(2) In order to ensure the CFPB’s ability to communicate effectively with the requester, a request should include contact information for the requester, including the name of the re-

quester and, to the extent available, a mailing address, telephone number, and email address at which the CFPB may contact the requester regarding the request;

(3) The request should state whether the requester wishes to receive the records in a specific format;

(4) A requester should indicate in the request whether the requester is a commercial user, an educational institution, non-commercial scientific institution, representative of the news media, or “other” requester, as those terms are defined in § 1070.22(b), and the basis for claiming that fee category;

(5) If a requester seeks a waiver or reduction of fees associated with processing a request, then the request shall include a statement to that effect as is required by § 1070.22(e); and

(6) If a requester seeks expedited processing of a request, then the request must include a statement to that effect as is required by § 1070.17.

(d) *Perfected requests; effect of request deficiencies.* For purposes of computing its deadline to respond to a request, the CFPB will deem itself to have received a request only if, and on the date that, it receives a request that contains substantially all of the information required by and that otherwise conforms with paragraphs (b) and (c) of this section. The CFPB need not accept a request, process a request, or be bound by any deadlines in this subpart for processing a request that fails to conform, in any material respect, to the requirements of paragraphs (b) and (c) of this section. If a request is deficient in any material respect, then the CFPB may return it to the requester and if it does so, it shall advise the requester in what respect the request is deficient, and what additional information is needed to respond to the request. The requester may then amend or resubmit the request. A determination by the CFPB that a request is deficient in any respect is not a denial of a request for records and such determinations are not subject to appeal. If a requester fails to respond to a CFPB notification that a request is deficient within thirty (30) days of the CFPB’s notification, the CFPB will deem the request withdrawn.

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(e) *Requests by an individual for CFPB records pertaining to that individual.* An individual who wishes to inspect or obtain copies of records of the Bureau that pertain to that individual shall provide identity verification in accordance with § 1070.53(c).

(f) *Requests for CFPB records pertaining to another individual.* Where a request for records pertains to a third party, a requester may receive greater access by submitting either a notarized authorization signed by that individual or a declaration by that individual made in compliance with the requirements set forth in 28 U.S.C. 1746 authorizing disclosure of the records to the requester, or submits proof that the individual is deceased (*e.g.*, a copy of a death certificate or an obituary). The CFPB may require a requester to supply additional information if necessary in order to verify that a particular individual has consented to disclosure.

(g) *Assistance from FOIA Public Liaison.* Requesters may contact the CFPB's FOIA Public Liaison to seek assistance in determining the appropriate fee category, formatting of requests, or resolving any problems that arise prior to submitting a request or during the processing of a request. The FOIA Public Liaison can be contacted at the telephone number listed on the CFPB's website, <http://www.consumerfinance.gov>.

§ 1070.15 Responsibility for responding to requests for CFPB records.

(a) *In general.* In determining which records are responsive to a request, the CFPB ordinarily will include only records in its possession as of the date the CFPB begins its search for them. If any other date is used, the CFPB shall inform the requester of that date.

(b) *Authority to grant or deny requests.* The Chief FOIA Officer shall be authorized to grant or deny any request for a record of the CFPB.

(c) *Consultations, referrals and coordination.* When reviewing a record in response to a request, the CFPB will determine whether another agency is better able to determine whether the record is exempt from disclosure under the FOIA. As to any such record, the

agency must proceed in one of the following ways:

(1) *Referral.* (i) When a requested record has been created by an agency other than the CFPB, the CFPB shall refer the record to that agency for a direct response to the requester.

(ii) Whenever the CFPB refers any part of the responsibility for responding to a request to another agency, it must document the referral, maintaining a copy of the record that it refers, and notify the requester of the referral, informing the requester of the name of the agency to which the record was referred, including that agency's FOIA contact information.

(2) *Consultation.* When a FOIA request is received for a record created by the CFPB that includes information originated by another agency, the CFPB shall consult the originating agency for review and recommendation on disclosure. The CFPB shall not release any such records without prior consultation with the originating agency.

(3) *Coordination.* The standard referral procedure is not appropriate where disclosure of the identity of the agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the agency that received the request should coordinate with the originating agency to seek its views on the disclosability of the record. The release determination for the record that is the subject of the coordination should then be conveyed to the requester by the agency that originally received the request.

§ 1070.16 Timing of responses to requests for CFPB records.

(a) *In general.* Except as set forth in paragraphs (b) through (d) of this section, and § 1070.17, the CFPB shall respond to requests according to their order of receipt.

(b) *Multitrack processing.* (1) The CFPB may establish separate tracks to process simple and complex requests. The CFPB may assign a request to the simple or complex track(s) based on the amount of work and/or time needed

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to process the request. The CFPB shall process requests in each track based on the date the request was perfected in accordance with §1070.14(d).

(2) The CFPB may provide a requester in its complex track with an opportunity to limit the scope of the request to qualify for faster processing within the specified limits of the simple track(s).

(c) *Time period for responding to requests for records.* Ordinarily, the CFPB shall have twenty (20) business days from when a request is received by the CFPB to determine whether to grant or deny a request for records. The twenty (20) business day time period set forth in this paragraph (c) shall not be tolled by the CFPB except that the CFPB may:

(1) Make one reasonable demand to the requester for clarifying information about the request and toll the twenty (20) business day time period while it awaits the clarifying information; or

(2) Toll the twenty (20) business day time period while it awaits clarification from or addresses any dispute with the requester regarding the assessment of fees.

(d) *Unusual circumstances.* (1) Where the CFPB determines that due to unusual circumstances it cannot respond either to a request within the time period set forth in paragraph (c) of this section or to an appeal within the time period set forth in §1070.21, the CFPB may extend the applicable time periods by informing the requester in writing of the unusual circumstances and of the date by which the CFPB expects to complete its processing of the request or appeal. Any extension or extensions of time with respect to a request or an appeal shall not cumulatively total more than ten (10) business days. However, if the CFPB determines that it needs additional time beyond a ten (10) business day extension to process a request, then the CFPB shall notify the requester, provide the requester with an opportunity to limit the scope of the request, arrange for an alternative time frame for processing the request, or modify the request, and notify the requester of the availability of services provided by its FOIA Public Liaison

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and the Office of Government Information Services (OGIS).

(2) As used in this paragraph (d), "unusual circumstances" means:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request, or among two or more CFPB offices having substantial subject matter interest therein.

§ 1070.17 Requests for expedited processing.

(a) *In general.* The CFPB shall process a request on an expedited basis whenever a requester demonstrates a compelling need for expedited processing in accordance with the requirements of this paragraph (a) or in other cases that the CFPB deems appropriate.

(b) *Form and content of a request for expedited processing.* A request for expedited processing shall be made as follows:

(1) A request for expedited processing shall be made in writing and submitted as part of a request for records in accordance with §1070.14(b), or at any time during the processing of the request. When a request for records includes a request for expedited processing, the request shall be labeled "Expedited Processing Requested."

(2) A request for expedited processing shall contain a statement that demonstrates a compelling need for the requester to obtain expedited processing of the requested records. A "compelling need" is defined as follows:

(i) Failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. The requester shall fully explain the circumstances warranting such an expected threat so that the CFPB may make a reasoned determination that a delay in obtaining the

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requested records could pose such a threat; or

(ii) With respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal government activity. A requester who is not a full-time member of the news media must establish that the requester is a person whose primary professional activity or occupation is information dissemination, though it need not be the requester's sole occupation. Such a requester also must establish a particular urgency to inform the public about the government activity involved in the request—one that extends beyond the public's right to know about government activity generally. The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an "urgency to inform" the public on the topic.

(3) The requester shall certify the written statement that purports to demonstrate a compelling need for expedited processing to be true and correct to the best of the requester's knowledge and belief. The certification must be in the form prescribed by 28 U.S.C. 1746: "I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on [date]." The requester shall mail or submit electronically a copy of such written certification to the Chief FOIA Officer as set forth in §1070.14(b). The CFPB may waive this certification requirement in appropriate circumstances.

(c) *Determinations of requests for expedited processing.* Within ten (10) calendar days of its receipt of a request for expedited processing, the CFPB shall decide whether to grant it and shall notify the requester of the determination in writing.

(d) *Effect of granting requests for expedited processing.* If the CFPB grants a request for expedited processing, then the CFPB shall give the expedited request priority over non-expedited requests and shall process the expedited request as soon as practicable. The CFPB may assign expedited requests to their own simple and complex processing tracks based upon the amount of work and/or time needed to process

them. Within each such track, an expedited request shall be processed in the order of its receipt.

(e) *Appeals of denials of requests for expedited processing.* If the CFPB denies a request for expedited processing, then the requester shall have the right to submit an appeal of the denial determination in accordance with §1070.21. The CFPB shall communicate this appeal right as part of its written notification to the requester denying expedited processing. The requester shall label its appeal request "Appeal for Expedited Processing." The CFPB shall act expeditiously upon an appeal of a denial of a request for expedited processing.

§ 1070.18 Responses to requests for CFPB records.

(a) *Acknowledgements of requests.* Upon receipt of a request, the CFPB will assign to the request a unique tracking number. The CFPB will send an acknowledgement letter to the requester by mail or email within ten (10) calendar days of receipt of the request. The acknowledgement letter will contain the following information:

(1) The applicable request tracking number;

(2) The date of receipt of the request, as determined in accordance with §1070.14(d), as well as the date when the requester may expect a response;

(3) A brief statement identifying the subject matter of the request; and

(4) A confirmation, with respect to any fees that may apply to the request pursuant to §1070.22, that the requester has sought a waiver or reduction in such fees, has agreed to pay any and all applicable fees, or has specified an upper limit that the requester is willing to pay in fees to process the request.

(b) *Initial determination to grant or deny a request.* (1) The officer designated in §1070.15(b), or his or her delegate, shall make initial determinations either to grant or to deny in whole or in part requests for records.

(2) If the request is granted in full or in part, and if the requester requests a copy of the records requested, then a copy of the records shall be mailed or emailed to the requester in the requested format, to the extent the

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records are readily producible in the requested format. The CFPB shall also send the requester a statement of the applicable fees, either at the time of the determination or shortly thereafter, and inform the requester of the availability of its FOIA Public Liaison to offer assistance.

(3) In the case of a request for inspection, the requester shall be notified in writing of the determination, when and where the requested records may be inspected, and of the fees incurred in complying with the request. The CFPB shall then promptly make the records available for inspection at the time and place stated, in a manner that will not interfere with CFPB's operations and will not exclude other persons from making inspections. The requester shall not be permitted to remove the records from the room where inspection is made. If, after making inspection, the requester desires copies of all or a portion of the requested records, copies shall be furnished upon payment of the established fees prescribed by § 1070.22. Fees may be charged for search and review time as stated in § 1070.22.

(4) If it is determined that the request for records should be denied in whole or in part, the requester shall be notified by mail or by email. The letter of notification shall:

(i) State the exemptions relied upon in denying the request;

(ii) If technically feasible, indicate the amount of information deleted and the exemptions under which the deletion is made at the place in the record where such deletion is made (unless providing such indication would harm an interest protected by the exemption relied upon to deny such material);

(iii) Set forth the name and title or position of the responsible official;

(iv) Advise the requester of the right to seek dispute resolution services from the Bureau's FOIA Public Liaison or the Office of Governmental Information Services;

(v) Advise the requester of the right to administrative appeal in accordance with § 1070.21; and

(vi) Specify the official or office to which such appeal shall be submitted.

(5) If it is determined, after a reasonable search for records, that no respon-

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sive records have been found to exist, the requester shall be notified in writing or by email. The notification shall also advise the requester of the right to administratively appeal the CFPB's determination that no responsive records exist (*i.e.*, to challenge the adequacy of the CFPB's search for responsive records) in accordance with § 1070.21. The response shall specify the official or office to which the appeal shall be submitted for review.

(c) *Resolution of disputes.* The CFPB is committed to efficiently resolving disputes during the request process. The following resources are available to requesters to resolve any disputes that may arise during the request process:

(1) *FOIA Public Liaison.* Any request related questions or concerns should be directed to the FOIA Public Liaison, who is responsible for reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

(2) *Dispute resolution.* The National Archives and Records Administration (NARA), Office of Government Information Services (OGIS) offers non-compulsory, non-binding dispute resolution services to help resolve FOIA disputes. A requester may contact OGIS directly at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001, Email: ogis@nara.gov, Phone: (301) 837-1996, Fax: (301) 837-0348. This information is provided as a public service only. By providing this information, the CFPB does not commit to refer disputes to OGIS.

(d) *Format of records disclosed.* (1) The CFPB will provide records in the requested format if the records can readily be reproduced from the original file to that specific format.

(2) The CFPB may charge fees associated with converting records or files into the requested format in accordance with § 1070.22.

§ 1070.19 Classified information.

Whenever a request is made for a record containing information that another agency has classified, or which may be appropriate for classification by another agency under Executive

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Order 13526 or any other executive order concerning the classification of information, the CFPB shall refer the responsibility for responding to the request to the classifying or originating agency, as appropriate.

§ 1070.20 Requests for business information provided to the CFPB.

(a) *In general.* Business information provided to the CFPB by a business submitter shall not be disclosed pursuant to a FOIA request except in accordance with this section.

(b) *Definitions.* For purposes of this section:

(1) *Business information* means commercial or financial information obtained by the CFPB from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(2) *Submitter* means any person from whom the CFPB obtains business information, directly or indirectly. The term includes, without limitation, corporations, State, local, and tribal governments, and foreign governments.

(c) *Designation of business information.* A submitter of business information will use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4 of the FOIA. These designations will expire ten (10) years after the date of the submission unless the submitter requests otherwise and provides justification for, a longer designation period.

(d) *Notice to submitters.* The CFPB shall provide a submitter with prompt written notice of receipt of a request or appeal encompassing its business information whenever required in accordance with paragraph (e) of this section. Such written notice shall either describe the exact nature of the business information requested or provide copies of the records or portions of records containing the business information. When notification of a voluminous number of submitters is required, notification may be made by posting or publishing the notice in a place reasonably likely to accomplish it.

(e) *When notice is required.* (1) The CFPB shall provide a submitter with notice of receipt of a request or appeal whenever:

(i) The information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(ii) The CFPB has reason to believe that the information may be protected from disclosure under Exemption 4.

(2) The notice requirements of this paragraph (e) shall not apply if:

(i) The CFPB determines that the information is exempt under the FOIA;

(ii) The information lawfully has been published or otherwise made available to the public;

(iii) Disclosure of the information is required by statute (other than the FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600 (3 CFR, 1988 Comp., p. 235); or

(iv) The designation made by the submitter under paragraph (e)(1)(i) of this section appears obviously frivolous, except that, in such a case, the CFPB shall, within a reasonable time prior to a specified disclosure date, give the submitter written notice of any final decision to disclose the information.

(f) *Opportunity to object to disclosure before release.* (1) Through the notice described in paragraph (d) of this section, the CFPB shall delay any release in order to afford a submitter ten (10) business days from the date of the notice to provide the CFPB with a detailed statement of any objection to disclosure. Such statement shall specify all grounds for withholding any of the information under any exemption of the FOIA and, in the case of Exemption 4, shall demonstrate why the information is considered to be a trade secret or commercial or financial information that is privileged or confidential. In the event that a submitter fails to respond to the notice within the time specified in it, the submitter shall be considered to have no objection to disclosure of the information. Information provided by a submitter pursuant to this paragraph (f) may itself be subject to disclosure under the FOIA.

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(2) When notice is given to a submitter under this section, the requester shall be advised that such notice has been given to the submitter. The requester shall be further advised that a delay in responding to the request may be considered a denial of access to records and that the requester may proceed with an administrative appeal or seek judicial review, if appropriate. However, the requester will be invited to agree to a voluntary extension of time so that the CFPB may review the submitter's objection to disclose, if any.

(g) *Notice of intent to disclose.* The CFPB shall consider a submitter's objections and specific grounds for non-disclosure prior to determining whether to disclose business information. Whenever the CFPB decides to disclose business information over the objection of a submitter, the CFPB shall forward to the submitter a written notice which shall include:

(1) A statement of the reasons for which the submitter's disclosure objections were not sustained;

(2) A description of the business information to be disclosed; and

(3) A specified disclosure date which is not less than ten (10) business days after the notice of the final decision to release the requested information has been mailed to the submitter. Except as otherwise prohibited by law, a copy of the disclosure notice shall be forwarded to the requester at the same time.

(h) *Notice to submitter of FOIA lawsuit.* Whenever a requester brings suit seeking to compel disclosure of business information, the CFPB shall promptly notify the submitter of that business information of the existence of the suit.

(i) *Notice to requester of business information.* The CFPB shall notify a requester whenever it provides the submitter with notice and an opportunity to object to disclosure; whenever it notifies the submitter of its intent to disclose the requested information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

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§ 1070.21 Administrative appeals.

(a) *Grounds for administrative appeals.* A requester may appeal an initial determination of the CFPB, including for the following reasons:

(1) To deny access to records in whole or in part (as provided in § 1070.18(b));

(2) To assign a particular fee category to the requester (as provided in § 1070.22(b));

(3) To deny a request for a reduction or waiver of fees (as provided in § 1070.22(e));

(4) That no records exist that are responsive to the request (as provided in § 1070.18(b)); or

(5) To deny a request for expedited processing (as provided in § 1070.17(e)).

(b) *Time limits for filing administrative appeals.* An appeal, other than an appeal of a denial of expedited processing, must be postmarked or submitted electronically on a date that is within ninety (90) calendar days after the date the initial determination is sent to the requester or the date of the letter transmitting the last records released, whichever is later. An appeal of a denial of expedited processing must be made within ten (10) days of the date of the initial determination letter to deny expedited processing (see § 1070.17).

(c) *Form and content of administrative appeals.* In order to ensure a timely response to an appeal, the appeal shall be made in writing as follows:

(1) If appeal is submitted by mail or delivery service, it shall be addressed to and submitted to the officer specified in paragraph (e) of this section at the address set forth in § 1070.14(b). The appeal shall be labeled "Freedom of Information Act Appeal."

(2) If an appeal is submitted by electronic means, it shall be addressed to the officer specified in paragraph (e) of this section and submitted as set forth on the CFPB's website, <http://www.consumerfinance.gov>. The appeal shall be labeled "Freedom of Information Act Appeal."

(3) The appeal shall set forth contact information for the requester, including, to the extent available, a mailing address, telephone number, or email address at which the CFPB may contact the requester regarding the appeal; and

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(4) The appeal shall specify the applicable request tracking number, the date of the initial request, and the date of the letter of initial determination, and, where possible, enclose a copy of the initial request and the initial determination being appealed.

(d) *Processing of administrative appeals.* The FOIA office will record the date that appeals are received. The receipt of the appeal will be acknowledged by the CFPB and the requester will be advised of the date the appeal was received, the appeal tracking number, and the expected date of response.

(e) *Determinations to grant or deny administrative appeals.* The General Counsel is authorized to and shall decide whether to affirm the initial determination (in whole or in part), to reverse the initial determination (in whole or in part) or to remand the initial determination to the Chief FOIA Officer for further action and shall notify the requester of this decision in writing within twenty (20) business days after the date of receipt of the appeal, unless extended pursuant to § 1070.16(d).

(1) If it is decided that the appeal is to be denied (in whole or in part) the requester shall be:

(i) Notified in writing of the denial;

(ii) Notified of the reasons for the denial, including which of the FOIA exemptions were relied upon;

(iii) Notified of the name and title or position of the official responsible for the determination on appeal;

(iv) Provided with a statement that judicial review of the denial is available in the United States District Court for the judicial district in which the requester resides or has a principal place of business, the judicial district in which the requested records are located, or the District of Columbia in accordance with 5 U.S.C. 552(a)(4)(B); and

(v) Provided with notification that dispute resolution services are available to the requester as a non-exclusive alternative to litigation through the Office of Government Information Services in accordance with 5 U.S.C. 552(h)(3). Dispute resolution is a voluntary process. If the CFPB agrees to participate in the dispute resolution services provided by the Office of Gov-

ernmental Information Services, it will actively engage as a partner to the process in an attempt to resolve the dispute.

(2) If the initial determination is reversed on appeal, the requester shall be so notified and the request shall be processed promptly in accordance with the decision on appeal.

(3) If the initial determination is remanded on appeal to the Chief FOIA Officer for further action, the requester shall be so notified and the request shall be processed in accordance with the decision on appeal. The remanded request shall be treated as a new request received by the CFPB as of the date when the General Counsel transmits the remand notification to the requester. The procedures and deadlines set forth in this subpart for processing, deciding, responding to, and filing administrative appeals of new FOIA requests shall apply to the remanded request.

(f) *Adjudication of administrative appeals of requests in litigation.* An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation.

§ 1070.22 Fees for processing requests for CFPB records.

(a) *In general.* The CFPB shall determine whether and to what extent to charge a requester fees for processing a FOIA request, for the services and in the amounts set forth in this paragraph (a), by determining an appropriate fee category for the requester (as set forth in paragraph (b) of this section) and then by charging the requester those fees applicable to the assigned category (as set forth in paragraph (c) of this section), unless circumstances exist (as described in paragraph (d) of this section) that render fees inapplicable or unless the requester has requested and the CFPB has granted a reduction in or waiver of fees (as set forth in paragraph (e) of this section).

(1) The CFPB shall charge a requester fees for the cost of copying or printing records at the rate of \$0.10 per page.

(2) The CFPB shall charge a requester for all time spent by its employees searching for records that are

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responsive to a request. The CFPB shall charge the requester fees for search time as follows:

(i) The CFPB shall charge for search time at the salary rate(s) (basic pay plus sixteen (16) percent) of the employee(s) who conduct the search. However, the CFPB shall charge search fees at the rate of \$9.00 per fifteen (15) minutes of search time whenever only administrative/clerical employees conduct a search and at the rate of \$23.00 per fifteen (15) minutes of search time whenever only professional/executive employees conduct a search. Search charges shall also include transportation of employees and records necessary to the search at actual cost. Fees may be charged for search time even if the search does not yield any responsive records, or if records are exempt from disclosure.

(ii) The CFPB shall charge the requester for the actual direct costs of conducting an electronic records search, including computer search time, runs, and output. The CFPB shall also charge for time spent by computer operators or programmers (at the rates set forth in paragraph (a)(2)(i) of this section) who conduct or assist in the conduct of an electronic records search.

(3) The CFPB shall charge a requester for time spent by its employees examining responsive records to determine whether any portions of such record are exempt from disclosure, pursuant to the FOIA exemptions of 5 U.S.C. 552(b). The CFPB shall also charge a requester for time spent by its employees redacting any such exempt information from a record and preparing a record for release to the requester. The CFPB shall charge a requester for time spent reviewing records at the salary rate(s) (*i.e.*, basic pay plus sixteen (16) percent) of the employees who conduct the review. However, the CFPB shall charge review fees at the rate of \$9.00 per fifteen (15) minutes of search time whenever only administrative/clerical employees review records and at the rate of \$23.00 per fifteen (15) minutes of search time whenever only professional/executive employees review records. Fees shall be charged for review time even if records ultimately are not disclosed.

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(4) Fees for all services provided shall be charged whether or not copies are made available to the requester for inspection. However, no fee shall be charged for monitoring a requester's inspection of records.

(5) Other services and materials requested which are not covered by this part nor required by the FOIA are chargeable at the actual cost to the CFPB. This includes, but is not limited to:

- (i) Certifying that records are true copies; or
- (ii) Sending records by special methods such as express mail, etc.

(b) *Categories of requesters.* (1) For purposes of assessing fees as set forth in this section, each requester shall be assigned to one of the following categories:

(i) *Commercial user* refers to one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation. The CFPB's decision to place a requester in the commercial use category will be made on a case-by-case basis based on how the requester will use the information.

(ii) *Educational institution* refers to any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with his or her role at the educational institution. Agencies may seek verification from the requester that the request is in furtherance of scholarly research and agencies will advise requesters of their placement in this category.

Example 1 to paragraph (b)(1)(ii). A request from a professor of geology at a university for records relating to soil erosion, written on letterhead of the Department of Geology, would be presumed to be from an educational institution.

Example 2 to paragraph (b)(1)(ii). A request from the same professor of geology seeking drug information from the Food and Drug Administration in furtherance of a murder mystery he is writing would not be presumed to be an institutional request, regardless of whether it was written on institutional stationery.

Example 3 to paragraph (b)(1)(ii). A student who makes a request in furtherance of their

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coursework or other school-sponsored activities and provides a copy of a course syllabus or other reasonable documentation to indicate the research purpose for the request, would qualify as part of this fee category.

(iii) *Non-commercial scientific institution* refers to an institution that is not operated on a “commercial user” basis as that term is defined in paragraph (b)(2)(i) of this section, and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(iv) *Representative of the news media* refers to any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this paragraph (b)(1)(iv), the term “news” means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ‘news’) who make their products available for purchase by or subscription by or free distribution to the general public. Other examples of news media entities include online publications and websites that regularly deliver news content to the public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the CFPB may also consider the past publication record of the requester in making such a determination.

(v) *Other requester* refers to a requester who does not fall within any of the categories described in paragraphs (b)(1)(i) through (iv) of this section.

(2) Within twenty (20) calendar days of its receipt of a request, the CFPB shall make a determination as to the proper fee category to apply to a requester. The CFPB shall inform the requester of the determination in the request acknowledgment letter, or if no such letter is required, in another writing. Where the CFPB has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, the CFPB should seek additional clarification before assigning the request to a specific category.

(3) If the CFPB assigns to a requester a fee category, then the requester shall have the right to submit an appeal of the CFPB’s determination in accordance with §1070.21. The CFPB shall communicate this appeal right as part of its written notification to the requester of an adverse fee category determination. The requester shall label its appeal request “Appeal of Fee Category Determination.”

(c) *Fees applicable to each category of requester.* The following fee schedule applies uniformly throughout the CFPB to requests processed under the FOIA. Specific levels of fees are prescribed for each category of requester defined in paragraph (b) of this section.

(1) Commercial users shall be charged the full direct costs of searching for, reviewing, and duplicating the records they request. Moreover, when a request is received for disclosure that is primarily in the commercial interest of the requester, the CFPB is not required to consider a request for a waiver or reduction of fees based upon the assertion that disclosure would be in the public interest. The CFPB may recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records or no records are located.

(2) Educational and non-commercial scientific institution requesters shall be charged only for the cost of duplicating the records they request, except that the CFPB shall provide the first one hundred (100) pages of duplication free of charge.

(3) Representatives of the news media shall be charged only for the cost of duplicating the records they request, except that the CFPB shall provide them

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with the first one hundred (100) pages of duplication free of charge.

(4) Other requesters who do not fit any of the categories described in paragraphs (c)(1) through (3) of this section shall be charged the full direct cost of searching for and duplicating records that are responsive to the request, except that the CFPB shall provide the first one hundred (100) pages of duplication and the first two hours of search time free of charge. The CFPB may recover the cost of searching for records even if there is ultimately no disclosure of records, or no records are located. Requests from persons for records about themselves filed in the CFPB's systems of records shall continue to be treated under the fee provisions of the Privacy Act of 1974, 5 U.S.C. 552a, which permit fees only for duplication, after the first one hundred (100) pages are furnished free of charge.

(d) *Other circumstances when fees are not charged.* In the following situations the CFPB may not charge a requester certain FOIA processing fees.

(1) If the cost of collecting a fee would be equal to or greater than the total FOIA processing fee, then the CFPB shall not charge a requester any FOIA processing fees.

(2) If the total search and review fees are less than \$250, then the CFPB shall not charge a requester any search and review fees.

(3) If the CFPB has waived or reduced FOIA processing fees in accordance with paragraph (e) of this section, then the CFPB shall not charge the portion of the FOIA processing fees that has been waived or reduced.

(4) If the CFPB fails to comply with any time limit under § 1070.15 or § 1070.21, then the CFPB shall not assess search fees or if the requester is a representative of the news media or an educational or noncommercial scientific institution, then the CFPB shall not assess duplication fees, unless:

(i) A court has determined that exceptional circumstances, as defined by the FOIA, exist; or

(ii) The CFPB has determined that unusual circumstances apply to the processing of the request; and

(A) Provided timely written notice to the requester of the unusual cir-

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cumstances in accordance with § 1070.16(d);

(B) Determined that more than 5,000 pages are necessary to respond to the request; and

(C) Discussed with the requester via mail, email, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request.

(5) If the CFPB determines, as a matter of administrative discretion, that waiving or reducing the fees would serve the interest of the United States Government.

(e) *Waiver or reduction of fees.* (1) A requester shall be entitled to receive from the CFPB a waiver or reduction in the fees otherwise applicable to a FOIA request whenever the requester:

(i) Requests such waiver or reduction of fees in writing as part of the FOIA request;

(ii) Labels the request for waiver or reduction of fees "Fee Waiver or Reduction Requested" on the FOIA request; and

(iii) Demonstrates that the fee reduction or waiver request that a waiver or reduction of the fees is in the public interest because:

(A) Furnishing the information is likely to contribute significantly to public understanding of the operations or activities of the government; and

(B) Furnishing the information is not primarily in the commercial interest of the requester.

(2) To determine whether the requester has satisfied the requirements of paragraph (e)(1)(iii)(A) of this section, the CFPB shall consider the following factors:

(i) The subject of the requested records must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, and not remote or attenuated.

(ii) The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially similar form, is not as

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likely to contribute to the public's understanding.

(iii) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration.

(iv) The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent.

(3) To determine whether the requester has satisfied the requirements of paragraph (e)(1)(iii)(B) of this section, the CFPB shall consider the following factors:

(i) The CFPB shall consider any commercial interest of the requester (with reference to the definition of "commercial user" in paragraph (b)(1)(i) of this section), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters shall be given an opportunity in the administrative process to provide explanatory information regarding this consideration.

(ii) A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. The CFPB ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

(4) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver shall be granted for those records.

(5) If the CFPB denies a request to reduce or waive fees, then the CFPB shall

advise the requester, in the denial notification letter, that the requester may incur fees if the CFPB proceeds to process the request. The notification letter shall also advise the requester that the CFPB will not proceed to process the request further unless the requester, in writing, directs the CFPB to do so and either agrees to pay any fees that may apply to processing the request or specifies an upper limit that the requester is willing to pay to process the request. If the CFPB does not receive this written direction and agreement/specification within thirty (30) calendar days of the date of the denial notification letter, then the CFPB shall deem the request to be withdrawn.

(6) If the CFPB denies a request to reduce or waive fees, then the requester shall have the right to submit an appeal of the denial determination in accordance with § 1070.21. The CFPB shall communicate this appeal right as part of its written notification to the requester denying the fee reduction or waiver request. The requester should label its appeal request "Appeal for Fee Reduction/Waiver."

(f) *Advance notice and prepayment of fees.* (1) The CFPB shall notify a requester of the estimated fees for processing a request and provide a breakdown of the fees attributable to search, review, and duplication, when the estimated fees are \$250 or more and:

(i) The fees exceed the limit set by the requester;

(ii) The requester did not specify a limit; or

(iii) The CFPB has denied a request for a reduction or waiver of fees.

(2) The requester must provide an agreement to pay the estimated fees; however, the requester shall also be given an opportunity to reformulate the request in an attempt to reduce fees.

(3) If the fees are estimated to exceed \$1000, the requester must pre-pay such amount prior to the processing of the request, or provide satisfactory assurance of full payment if the requester has a history of prompt payment of FOIA fees. The requester shall also be given an opportunity to reformulate the request in such a way as to lower the applicable fees.

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(4) The CFPB reserves the right to request prepayment after a request is processed and before documents are released.

(5) If a requester has previously failed to pay a fee within thirty (30) calendar days of the date of the billing, the requester shall be required to pay the full amount owed plus any applicable interest and to make an advance payment of the full amount of the estimated fee before the CFPB begins to process a new request or the pending request.

(6) When the CFPB acts under paragraphs (f)(1) through (5) of this section, the statutory time limits of twenty (20) days (excluding Saturdays, Sundays, and legal public holidays) from receipt of initial requests or appeals, plus extensions of these time limits, shall begin only after fees have been paid, a written agreement to pay fees has been provided, or a request has been reformulated.

(g) *Form of payment.* Payment may be tendered as set forth on the CFPB's website, <http://www.consumerfinance.gov>.

(h) *Charging interest.* The CFPB may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the date of the billing until payment is received by the CFPB. The CFPB will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97-365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(i) *Aggregating requests.* Where the CFPB reasonably believes that a requester or a group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, the CFPB may aggregate those requests and charge accordingly. The CFPB may presume that multiple requests of this type made within a thirty (30) day period have been made in order to avoid fees. Where requests are separated by a longer period, the CFPB will aggregate them only where there exists a solid basis for determining that aggregation is warranted under all the circumstances involved. Multiple requests

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involving unrelated matters will not be aggregated.

§ 1070.23 Authority and responsibilities of the Chief FOIA Officer.

(a) *Chief FOIA Officer.* The Director authorizes the Chief FOIA Officer to act upon all requests for agency records, with the exception of determining appeals from the initial determinations of the Chief FOIA Officer, which will be decided by the General Counsel. The Chief FOIA officer shall, subject to the authority of the Director:

(1) Have CFPB-wide responsibility for efficient and appropriate compliance with the FOIA;

(2) Monitor implementation of the FOIA throughout the CFPB and keep the Director, the General Counsel, and the Attorney General appropriately informed of the CFPB's performance in implementing the FOIA;

(3) Recommend to the Director such adjustments to agency practices, policies, personnel and funding as may be necessary to improve the Chief FOIA Officer's implementation of the FOIA;

(4) Review and report to the Attorney General, through the Director, at such times and in such formats as the Attorney General may direct, on the CFPB's performance in implementing the FOIA;

(5) Facilitate public understanding of the purposes of the statutory exemptions of the FOIA by including concise descriptions of the exemptions in both the CFPB's handbook and the CFPB's annual report on the FOIA, and by providing an overview, where appropriate, of certain general categories of CFPB records to which those exemptions apply;

(6) Designate one or more FOIA Public Liaisons;

(7) Offer Training to Bureau staff regarding their responsibilities under the FOIA;

(8) Serve as the primary Bureau liaison with the Office of Government Information Services and the Office of Information Policy; and

(9) Maintain and update, as necessary and in accordance with the requirements of this subpart, the CFPB's FOIA website, including its e-FOIA Library.

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(b) *FOIA Public Liaisons.* FOIA Public Liaisons shall report to the Chief FOIA Officer and shall serve as supervisory officials to whom a requester can raise concerns about the service the requester has received from the CFPB's FOIA office, following an initial response from the FOIA office staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

Subpart C—Disclosure of CFPB Information in Connection with Legal Proceedings

SOURCE: 83 FR 46084, Sept. 12, 2018, unless otherwise noted.

§ 1070.30 Purpose and scope; definitions.

(a) This subpart sets forth the procedures to be followed with respect to subpoenas, court orders, or other requests or demands for any CFPB information, whether contained in the files of the CFPB or acquired by a CFPB employee as part of the performance of that employee's duties or by virtue of employee's official status.

(b) This subpart does not apply to requests for official information made pursuant to subparts B, D, and E of this part.

(c) This subpart does not apply to requests for information made in the course of adjudicating claims against the CFPB by CFPB employees (present or former) or applicants for CFPB employment for which jurisdiction resides with the U.S. Equal Employment Opportunity Commission, the U.S. Merit Systems Protection Board, the Office of Special Counsel, the Federal Labor Relations Authority, or their successor agencies, or a labor arbitrator operating under a collective bargaining agreement between the CFPB and a labor organization representing CFPB employees.

(d) This subpart is intended only to inform the public about CFPB procedures concerning the service of process and responses to subpoenas, summons, or other demands or requests for official information or action and is not intended to and does not create, and

may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the CFPB or the United States.

(e) For purposes of this subpart:

(1) *Demand* means a subpoena or order for official information, whether contained in CFPB records or through testimony, related to or for possible use in a legal proceeding.

(2) *Legal proceeding* encompasses all pre-trial, trial, and post-trial stages of all judicial or administrative actions, hearings, investigations, or similar proceedings before courts, commissions, boards, grand juries, arbitrators, or other judicial or quasi-judicial bodies or tribunals, whether criminal, civil, or administrative in nature, and whether foreign or domestic. This phrase includes all stages of discovery as well as formal or informal requests by attorneys, their agents, or others involved in legal proceedings.

(3) *Official Information* means all information of any kind, however stored, that is in the custody and control of the CFPB or was acquired by CFPB employees, or former employees as part of their official duties or because of their official status while such individuals were employed by or served on behalf of the CFPB. Official information also includes any information acquired by CFPB employees or former employees while such individuals were engaged in matters related to consumer financial protection functions prior to the employees' transfer to the CFPB pursuant to Subtitle F of the Consumer Financial Protection Act of 2010.

(4) *Request* means any request for official information in the form of testimony, affidavits, declarations, admissions, responses to interrogatories, document production, inspections, or formal or informal interviews, during the course of a legal proceeding, including pursuant to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, or other applicable rules of procedure.

(5) *Testimony* means a statement in any form, including personal appearances before a court or other legal tribunal, interviews, depositions, telephonic, televised, or videographed

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statements or any responses given during discovery or similar proceeding in the course of litigation.

§ 1070.31 Service of subpoenas, court orders, and other demands for CFPB information or action.

(a) Except in cases in which the CFPB is represented by legal counsel who have entered an appearance or otherwise given notice of their representation, only the General Counsel is authorized to receive and accept subpoenas or other demands or requests directed to the CFPB or its employees, whether civil or criminal in nature, for:

- (1) Records of the CFPB;
- (2) Official information including, but not limited to, testimony, affidavits, declarations, admissions, responses to interrogatories, or informal statements, relating to material contained in the files of the CFPB or which any CFPB employee acquired in the course and scope of the performance of his or her official duties;
- (3) Garnishment or attachment of compensation of current or former employees; or
- (4) The performance or non-performance of any official CFPB duty.

(b) Documents described in paragraph (a) of this section should be served upon the General Counsel, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552. Service must be effected as provided in applicable rules and regulations governing service in Federal judicial and administrative proceedings. Acceptance of such documents by the General Counsel does not constitute a waiver of any defense that might otherwise exist with respect to service under the Federal Rules of Civil or Criminal Procedure or other applicable laws or regulations.

(c) In the event that any demand or request described in paragraph (a) of this section is sought to be delivered to a CFPB employee other than in the manner prescribed in paragraph (b) of this section, such employee shall decline service and direct the server of process to these regulations. If the demand or request is nonetheless delivered to the employee, the employee shall immediately notify, and deliver a

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copy of that document to, the General Counsel.

(d) The CFPB is not an agent for service for, or otherwise authorized to accept on behalf of its employees, any subpoenas, orders, or other demands or requests, which are not related to the employees' official duties.

(e) Copies of any subpoenas, orders, or other demands or requests that are directed to former employees of the CFPB in connection with the performance of official CFPB duties shall also be served upon the General Counsel. The CFPB shall not, however, serve as an agent for service for the former employee, nor is the CFPB otherwise authorized to accept service on behalf of its former employees. If the demand involves their official duties as CFPB employees, former employees who receive subpoenas, orders, or similar compulsory process should also notify, and deliver a copy of the document to, the General Counsel.

§ 1070.32 Testimony and production of documents prohibited unless approved by the General Counsel.

(a) Unless authorized by the General Counsel, no employee or former employee of the CFPB shall, in response to a demand or a request provide oral or written testimony by deposition, declaration, affidavit, or otherwise concerning any official information.

(b) Unless authorized by the General Counsel, no employee or former employee shall, in response to a demand or request, produce any document or any material acquired as part of the performance of that employee's duties or by virtue of that employee's official status.

§ 1070.33 Procedure when testimony or production of documents is sought; general.

(a) If, as part of a proceeding in which the United States or the CFPB is not a party, official information is sought through a demand for testimony, CFPB records, or other material, the party seeking such information must (except as otherwise required by Federal law or authorized by the General Counsel) set forth in writing:

- (1) The title and forum of the proceeding, if applicable;

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(2) A detailed description of the nature and relevance of the official information sought;

(3) A showing that other evidence reasonably suited to the requester's needs is not available from any other source; and

(4) If testimony is requested, the intended use of the testimony, a general summary of the desired testimony, and a showing that no document could be provided and used in lieu of testimony.

(b) To the extent he or she deems necessary or appropriate, the General Counsel may also require from the party seeking such information a plan of all reasonably foreseeable demands, including but not limited to the names of all employees and former employees from whom testimony or discovery will be sought, areas of inquiry, expected duration of proceedings requiring oral testimony, identification of potentially relevant documents, or any other information deemed necessary to make a determination. The purpose of this requirement is to assist the General Counsel in making an informed decision regarding whether testimony, the production of documents, or the provision of other information should be authorized.

(c) The General Counsel may consult or negotiate with an attorney for a party, or the party if not represented by an attorney, to refine or limit a request or demand so that compliance is less burdensome.

(d) The General Counsel will notify the CFPB employee and such other persons as circumstances may warrant of his or her decision regarding compliance with the request or demand.

§ 1070.34 Procedure when response to demand is required prior to receiving instructions.

(a) If a response to a demand described in § 1070.33 is required before the General Counsel renders a decision, the CFPB will request that the appropriate CFPB attorney or an attorney of the Department of Justice, as appropriate, take steps to stay, postpone, or obtain relief from the demand pending decision. If necessary, the attorney will:

(1) Appear with the employee upon whom the demand has been made;

(2) Furnish the court or other authority with a copy of the regulations contained in this subpart;

(3) Inform the court or other authority that the demand has been, or is being, as the case may be, referred for the prompt consideration of the appropriate CFPB official; and

(4) Request the court or authority to stay the demand pending receipt of the requested instructions.

(b) In the event that an immediate demand for production or disclosure is made in circumstances which would preclude the proper designation or appearance of an attorney of the CFPB or the Department of Justice on the employee's behalf, the employee, if necessary, shall request from the demanding court or authority a reasonable stay of proceedings for the purpose of obtaining instructions from the General Counsel.

§ 1070.35 Procedure in the event of an adverse ruling.

If a stay of, or other relief from, the effect of a demand made pursuant to §§ 1070.33 and 1070.34 is declined or not obtained, or if the court or other judicial or quasi-judicial authority declines to stay the effect of the demand made pursuant to §§ 1070.33 and 1070.34, or if the court or other authority rules that the demand must be complied with irrespective of the General Counsel's instructions not to produce the material or disclose the information sought, the employee upon whom the demand has been made shall decline to comply with the demand citing this subpart and *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

§ 1070.36 Considerations in determining whether the CFPB will comply with a demand or request.

(a) In deciding whether to comply with a demand or request, CFPB officials and attorneys shall consider, among other pertinent considerations:

(1) Whether such compliance would be unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rules of procedure governing the case or matter in which the demand arose;

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- (2) Whether the number of similar requests would have a cumulative effect on the expenditure of CFPB resources;
- (3) Whether compliance is appropriate under the relevant substantive law concerning privilege or disclosure of information;
- (4) The public interest;
- (5) The need to conserve the time of CFPB employees for the conduct of official business;
- (6) The need to avoid spending time and money of the United States for private purposes;
- (7) The need to maintain impartiality between private litigants in cases where a substantial government interest is not implicated;
- (8) Whether compliance would have an adverse effect on performance by the CFPB of its mission and duties;
- (9) The need to avoid involving the CFPB in controversial issues not related to its mission;
- (10) Whether compliance would interfere with supervisory examinations, compromise the CFPB's supervisory functions or programs, or undermine public confidence in supervised financial institutions; and
- (11) Whether compliance would interfere with the CFPB's ability to monitor for risks to consumers in the offering or provision of consumer financial products and services.
- (b) Among those demands and requests in response to which compliance will not ordinarily be authorized are those with respect to which any of the following factors, *inter alia*, exist:
- (1) Compliance would violate a statute or applicable rule of procedure;
- (2) Compliance would violate a specific regulation or Executive order;
- (3) Compliance would reveal information properly classified in the interest of national security;
- (4) Compliance would reveal confidential or privileged commercial or financial information or trade secrets without the owner's consent;
- (5) Compliance would compromise the integrity of the deliberative processes of the CFPB;
- (6) Compliance would not be appropriate or necessary under the relevant substantive law governing privilege;
- (7) Compliance would reveal confidential information; or

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(8) Compliance would interfere with ongoing investigations or enforcement proceedings, compromise constitutional rights, or reveal the identity of a confidential informant.

(c) The CFPB may condition disclosure of official information pursuant to a request or demand on the entry of an appropriate protective order.

§ 1070.37 Prohibition on providing expert or opinion testimony.

(a) Except as provided in this section, and subject to 5 CFR 2635.805, CFPB employees or former employees shall not provide opinion or expert testimony based upon information which they acquired in the scope and performance of their official CFPB duties, except on behalf of the CFPB or the United States or a party represented by the CFPB, or the Department of Justice, as appropriate.

(b) Any expert or opinion testimony by a former employee of the CFPB shall be excepted from paragraph (a) of this section where the testimony involves only general expertise gained while employed at the CFPB.

(c) Upon a showing by the requester of exceptional need or unique circumstances and that the anticipated testimony will not be adverse to the interests of the United States, the General Counsel may, consistent with 5 CFR 2635.805, exercise his or her discretion to grant special, written authorization for CFPB employees, or former employees, to appear and testify as expert witnesses at no expense to the United States.

(d) If, despite the final determination of the General Counsel, a court of competent jurisdiction or other appropriate authority orders the appearance and expert or opinion testimony of a current or former CFPB employee, that person shall immediately inform the General Counsel of such order. If the General Counsel determines that no further legal review of or challenge to the court's order will be made, the CFPB employee, or former employee, shall comply with the order. If so directed by the General Counsel, however, the employee, or former employee, shall decline to testify.

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SOURCE: 85 FR 75217, Nov. 24, 2020, unless otherwise noted.

§ 1070.40 Purpose and scope.

This subpart does not apply to requests for official information made pursuant to subpart B, C, or E of this part.

§ 1070.41 Non-disclosure of confidential information.

(a) *Non-disclosure.* Except as required by law or as provided in this part, no current or former employee or contractor or consultant of the CFPB, or any other person in possession of confidential information, shall disclose such confidential information by any means (including written or oral communications) or in any format (including paper and electronic formats), to:

(1) Any person who is not an employee, contractor, or consultant of the CFPB; or

(2) Any CFPB employee, contractor, or consultant when the disclosure of such confidential information to that employee, contractor, or consultant is not relevant to the performance of the employee's, contractor's, or consultant's assigned duties.

(b) *Disclosures to contractors and consultants.* CFPB contractors or consultants must treat confidential information in accordance with this part, other Federal laws and regulations that apply to Federal agencies for the protection of the confidentiality of personally identifiable information and for data security and integrity, as well as any additional conditions or limitations that the CFPB may impose. CFPB contractors or consultants may receive confidential information only if such contractors or consultants certify in writing to treat such confidential information in accordance with the requirements identified in this paragraph (b).

(c) *Disclosure of materials derived from confidential information.* The CFPB may, in its discretion, disclose materials that it derives from or creates using confidential information to the extent that such materials do not identify, either directly or indirectly, any

particular person to whom the confidential information pertains.

(d) *Disclosure of confidential information with consent.* Where practicable, the CFPB may, in its discretion and in accordance with applicable law, disclose confidential information that directly or indirectly identifies particular persons if the CFPB obtains prior consent from such persons to make the disclosure.

(e) *Nondisclosure of confidential information belonging to other agencies.* Nothing in this subpart requires or authorizes the CFPB to disclose confidential information belonging to another agency that has been provided to the CFPB (either directly or through a holder of the information such as a financial institution) to the extent that such disclosure contravenes applicable law or the terms of any agreement that exists between the CFPB and the agency to govern the CFPB's treatment of information that the agency provides to the CFPB.

§ 1070.42 Disclosure of confidential supervisory information and confidential investigative information.

(a) *Discretionary disclosure of confidential supervisory information or confidential investigative information by the CFPB.* The CFPB may, in its discretion, and to the extent consistent with applicable law, disclose confidential supervisory information or confidential investigative information concerning a person or its service providers to that person or to its affiliates.

(b) *Further disclosure of confidential supervisory information.* Unless directed otherwise by the Associate Director for Supervision, Enforcement and Fair Lending:

(1) Any supervised financial institution lawfully in possession of confidential supervisory information of the CFPB provided directly to it by the CFPB pursuant to paragraph (a) of this section may disclose such information, or portions thereof, to its affiliates and to the following individuals to the extent that the disclosure of such confidential supervisory information is relevant to the performance of such individuals' assigned duties:

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(i) Its directors, officers, trustees, members, general partners, or employees; and

(ii) The directors, officers, trustees, members, general partners, or employees of its affiliates.

(2) Any supervised financial institution or affiliate thereof that is lawfully in possession of confidential supervisory information of the CFPB provided directly to it by the CFPB pursuant to paragraph (a) of this section may disclose such information, or portions thereof, to:

(i) Its certified public accountant, legal counsel, contractor, consultant, or service provider;

(ii) Its insurance provider pursuant to a claim made under an existing policy, provided that the Bureau has not precluded indemnification or reimbursement for the claim; information disclosed pursuant to this paragraph (b)(2)(ii) may be used by the insurance provider solely for purposes of administering such a claim; or

(iii) Another person, with the prior written approval of the Associate Director for Supervision, Enforcement and Fair Lending.

(3) Where a supervised financial institution or its affiliate discloses confidential supervisory information of the CFPB pursuant to paragraph (b) of this section:

(i) The recipient of such confidential supervisory information shall not, without the prior written approval of the Associate Director for Supervision, Enforcement and Fair Lending, utilize, make, or retain copies of, or disclose confidential supervisory information for any purpose, except as is necessary to provide advice or services to the supervised financial institution or its affiliate; and

(ii) The supervised financial institution or its affiliate disclosing the confidential supervisory information shall take reasonable steps to ensure that the recipient complies with paragraph (b)(3)(i) of this section.

(4) Nothing in this paragraph (b) authorizes a supervised financial institution or affiliate thereof to further disclose confidential information belonging to another agency.

(c) *Further disclosure of confidential investigative information.* Nothing in this

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subpart shall prohibit any person lawfully in possession of confidential investigative information of the CFPB pursuant to paragraph (a) of this section from further disclosing that confidential investigative information.

§ 1070.43 Disclosure of confidential information to agencies.

(a) *Required disclosure of confidential information to agencies.* The CFPB shall:

(1) Disclose a draft of a report of examination of a supervised financial institution prior to its finalization, as provided in 12 U.S.C. 5515(e)(1)(C), and disclose a final report of examination, including any and all revisions made to such a report, as provided in 12 U.S.C. 5512(c)(6)(C)(i), to a Federal or State agency with jurisdiction over that supervised financial institution, provided that the CFPB receives from the agency reasonable assurances as to the confidentiality of the information disclosed; and

(2) Disclose confidential consumer complaint information to a Federal or State agency to facilitate preparation of reports to Congress required by 12 U.S.C. 5493(b)(3)(C) and to facilitate the CFPB's supervision and enforcement activities and its monitoring of the market for consumer financial products and services, provided that the agency shall first give written assurance to the CFPB that it will maintain such information in confidence, including in a manner that conforms to the standards that apply to Federal agencies for the protection of the confidentiality of personally identifiable information and for data security and integrity.

(b) *Discretionary disclosure of confidential information to agencies.* (1) Upon receipt of a written request that contains the information required by paragraph (b)(2) of this section, the CFPB may, in its discretion, disclose confidential information to a Federal or State agency to the extent that the disclosure of the information is relevant to the exercise of the agency's statutory or regulatory authority or, with respect to the disclosure of confidential supervisory information, to a Federal or State agency having jurisdiction over a supervised financial institution.

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(2) To obtain access to confidential information pursuant to paragraph (b)(1) of this section, an authorized officer or employee of the agency shall submit a written request to the Director. The request shall include the following:

(i) A description of the particular information, kinds of information, and where possible, the particular documents to which access is sought;

(ii) A statement of the purpose for which the information will be used;

(iii) A statement certifying and identifying, as required by paragraph (b)(1) of this section, the agency's statutory or regulatory authority that is relevant to the requested information or, with respect to a request for confidential supervisory information, the agency's jurisdiction over a supervised financial institution;

(iv) A statement certifying and identifying the agency's legal authority for protecting the requested information from public disclosure; and

(v) A certification that the agency will maintain the requested confidential information in confidence, including in a manner that conforms to the standards that apply to Federal agencies for the protection of the confidentiality of personally identifiable information and for data security and integrity, as well as any additional conditions or limitations that the CFPB may impose.

(c) *Negotiation of standing requests.* The CFPB may negotiate terms governing the exchange of confidential information with Federal or State agencies on a standing basis, as appropriate.

§ 1070.44 Disclosure of confidential consumer complaint information.

The CFPB may, to the extent permitted by law, disclose confidential consumer complaint information as it deems necessary to investigate, resolve, or otherwise respond to consumer complaints or inquiries concerning consumer financial products and services or a violation of Federal consumer financial law.

§ 1070.45 Affirmative disclosure of confidential information.

(a) The CFPB may disclose confidential information, in accordance with applicable law, as follows:

(1) To a CFPB employee, as that term is defined in § 1070.2 and in accordance with § 1070.41;

(2) To either House of the Congress or to an appropriate committee or subcommittee of the Congress, as set forth in 12 U.S.C. 5562(d)(2), provided that, upon the receipt by the CFPB of a request from the Congress for confidential information that a financial institution submitted to the CFPB along with a claim that such information consists of a trade secret or privileged or confidential commercial or financial information, or confidential supervisory information, the CFPB shall notify the financial institution in writing of its receipt of the request and provide the institution with a copy of the request;

(3) In investigational hearings and witness interviews, or otherwise in the investigation and administration of enforcement actions, as is reasonably necessary, at the discretion of the CFPB;

(4) In an administrative or court proceeding to which the CFPB is a party. In the case of confidential investigative information that contains any trade secret or privileged or confidential commercial or financial information, as claimed by designation by the submitter of such material, or confidential supervisory information, the submitter, or the CFPB, in its discretion, may seek an appropriate order prior to disclosure of such material in a proceeding;

(5) In CFPB personnel matters, as necessary and subject to appropriate protections;

(6) To agencies in summary form to the extent necessary to confer with such agencies about matters relevant to the exercise of the agencies' statutory or regulatory authority; or

(7) As required under any other applicable law.

(b) [Reserved]

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§ 1070.46 Other disclosures of confidential information.

(a) To the extent permitted by law and as authorized by the Director in writing, the CFPB may disclose confidential information other than as set forth in this subpart.

(b) Prior to disclosing confidential information pursuant to paragraph (a) of this section, the CFPB may, as it deems appropriate under the circumstances, provide written notice to the person to whom the confidential information pertains that the CFPB intends to disclose its confidential information in accordance with this section.

(c) The authority of the Director to disclose confidential information pursuant to paragraph (a) of this section shall not be delegated. However, a person authorized to perform the functions of the Director in accordance with law may exercise the authority of the Director as set forth in this section.

§ 1070.47 Other rules regarding the disclosure of confidential information.

(a) *Further disclosure prohibited.* (1) All confidential information made available under this subpart shall remain the property of the CFPB, unless the General Counsel provides otherwise in writing.

(2) Except as set forth in this subpart, no supervised financial institution, Federal or State agency, any officer, director, employee or agent thereof, or any other person to whom the confidential information is made available under this subpart, may further disclose such confidential information without the prior written permission of the Director.

(3) No person obtaining access to confidential information pursuant to this subpart may make a personal copy of any such information, and no person may remove confidential information from the premises of the institution or agency in possession of such information except as permitted under this subpart or by the CFPB.

(b) *Third party requests for information.* (1) A supervised financial institution, Federal or State agency, any officer, director, employee or agent thereof, or any other person to whom the

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CFPB's confidential information is made available under this subpart, that receives from a third party a legally enforceable demand or request for such confidential information (including but not limited to, a subpoena or discovery request or a request made pursuant to the Freedom of Information Act, 5 U.S.C. 552, the Privacy Act of 1974, 5 U.S.C. 552a, or any State analogue to such statutes) should:

(i) Inform the General Counsel of such request or demand in writing and provide the General Counsel with a copy of such request or demand as soon as practicable after receiving it;

(ii) To the extent permitted by applicable law, advise the requester that:

(A) The confidential information sought may not be disclosed insofar as it is the property of the CFPB; and

(B) Any request for the disclosure of such confidential information is properly directed to the CFPB pursuant to its regulations set forth in this subpart; and

(iii) Consult with the General Counsel before complying with the request or demand, and to the extent applicable:

(A) Give the CFPB a reasonable opportunity to respond to the demand or request;

(B) Assert all reasonable and appropriate legal exemptions or privileges that the CFPB may request be asserted on its behalf; and

(C) Consent to a motion by the CFPB to intervene in any action for the purpose of asserting and preserving any claims of confidentiality with respect to any confidential information.

(2) Nothing in this section shall prevent a supervised financial institution, Federal or State agency, any officer, director, employee or agent thereof, or any other person to whom the information is made available under this subpart from complying with a legally valid and enforceable order of a court of competent jurisdiction compelling production of the CFPB's confidential information, or, if compliance is deemed compulsory, with a request or demand from either House of the Congress or a duly authorized committee of the Congress. To the extent that compulsory disclosure of confidential information occurs as set forth in this

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paragraph (b)(2), the producing party shall use its best efforts to ensure that the requestor secures an appropriate protective order or, if the requestor is a legislative body, use its best efforts to obtain the commitment or agreement of the legislative body that it will maintain the confidentiality of the confidential information.

(c) *Additional conditions and limitations.* The CFPB may impose any additional conditions or limitations on disclosure or use under this subpart that it determines are necessary.

(d) *Return or destruction of records.* Except with respect to confidential investigative information disclosed pursuant to § 1070.42(a), the CFPB may require any person in possession of CFPB confidential information to return the records to the CFPB or destroy them.

(e) *Non-waiver of CFPB rights.* Except as provided in § 1070.42(c), the disclosure of confidential information to any person in accordance with this subpart does not constitute a waiver by the CFPB of its right to control, or impose limitations on, the subsequent use and dissemination of the information.

(f) *Non-waiver of privilege—(1) In general.* The CFPB shall not be deemed to have waived any privilege applicable to any information by transferring that information to, or permitting that information to be used by, any Federal or State agency.

(2) *Rule of construction.* Paragraph (f)(1) of this section shall not be construed as implying that any person waives any privilege applicable to any information because paragraph (f)(1) of this section does not apply to the transfer or use of that information.

(g) *Reports of unauthorized disclosure.* Any person that obtains confidential information under this subpart shall, as soon as possible and without unreasonable delay, notify the CFPB upon the discovery of any further disclosures made in violation of this subpart.

§ 1070.48 Disclosure of confidential information by the Inspector General.

Nothing in this subpart shall limit the discretion of the Office of the Inspector General of the Board of Governors of the Federal Reserve System and the Consumer Financial Protection Bureau to disclose confidential infor-

mation as needed in accordance with the Inspector General Act of 1978, 5 U.S.C. App. 3.

Subpart E—Privacy Act

SOURCE: 83 FR 46095, Sept. 12, 2018, unless otherwise noted.

§ 1070.50 Purpose and scope; definitions.

(a) This subpart implements the provisions of the Privacy Act of 1974, 5 U.S.C. 552a (the Privacy Act). The regulations apply to all records maintained by the CFPB and which are retrieved by an individual's name or personal identifier. The regulations set forth the procedures for requests for access to, or amendment of, records concerning individuals that are contained in systems of records maintained by the CFPB. These regulations should be read in conjunction with the Privacy Act, which provides additional information about this topic.

(b) For purposes of this subpart, the following definitions apply:

(1) The term *Chief Privacy Officer* means the Senior Agency Official for Privacy of the CFPB or any CFPB employee to whom the Senior Agency Official for Privacy has delegated authority to act under this part;

(2) The term *guardian* means the parent of a minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction;

(3) *Individual* means a citizen of the United States or an alien lawfully admitted for permanent residence;

(4) *Maintain* includes maintain, collect, use, or disseminate;

(5) *Record* means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voiceprint or a photograph;

(6) *Routine use* means the disclosure of a record that is compatible with the purpose for which it was collected;

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(7) *System of records* means a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual; and

(8) *Statistical record* means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by 13 U.S.C. 8.

[83 FR 46095, Sept. 12, 2018, as amended at 86 FR 48901, Sept. 1, 2021]

§ 1070.51 Authority and responsibilities of the Chief Privacy Officer.

The Chief Privacy Officer is authorized to:

(a) Develop, implement, and maintain an organization-wide privacy program;

(b) Respond to requests for access to, accounting of, or amendment of records contained in a system of records maintained by the CFPB;

(c) Approve the publication of new systems of records and amend existing systems of record; and

(d) File any necessary reports related to the Privacy Act.

§ 1070.52 Fees.

(a) *Copies of records.* The CFPB shall provide the requester with copies of records requested pursuant to § 1070.53 at the same cost charged for duplication of records under § 1070.22.

(b) *No fee.* The CFPB will not charge a fee if:

(1) Total charges associated with a request are less than \$5; or

(2) The requester is a CFPB employee or former employee, or an applicant for employment with the CFPB, and the request pertains to that employee, former employee, or applicant.

§ 1070.53 Request for access to records.

(a) *Procedures for making a request for access to records.* An individual's requests for access to records that pertain to that individual (or to the individual for whom the requester serves as guardian) may be submitted to the CFPB in writing as follows:

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(1) If submitted by mail or delivery service, the request shall be labeled "Privacy Act Request" and shall be addressed to the Chief Privacy Officer, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552.

(2) If submitted by electronic means, the request shall be labeled "Privacy Act Request" and the request shall be submitted as set forth at the CFPB's website, <http://www.consumerfinance.gov>.

(b) *Content of a request for access to records.* A request for access to records shall include:

(1) A statement that the request is made pursuant to the Privacy Act;

(2) The name of the system of records that the requester believes contains the record requested, or a description of the nature of the record sought in detail sufficient to enable CFPB personnel to locate the system of records containing the record with a reasonable amount of effort;

(3) Whenever possible, a description of the nature of the record sought, the date of the record or the period in which the requester believes that the record was created, and any other information that might assist the CFPB in identifying the record sought (e.g., maiden name, dates of employment, account information, etc.);

(4) Information necessary to verify the requester's identity pursuant to paragraph (c) of this section; and

(5) The mailing or email address where the CFPB's response or further correspondence should be sent.

(c) *Verification of identity.* To obtain access to the CFPB's records pertaining to a requester, the requester shall provide proof to the CFPB of the requester's identity as provided in paragraphs (c)(1) and (2) of this section.

(1) In general, the following will be considered adequate proof of a requester's identity:

(i) A photocopy of two forms of identification, including one form of identification that bears the requester's photograph, and one form of identification that bears the requester's signature;

(ii) A photocopy of a single form of identification that bears both the requester's photograph and signature;

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(iii) A statement swearing or affirming the requester's identity and to the fact that the requester understands the penalties provided in 5 U.S.C. 552a(i)(3); or

(iv) Successful completion of a third-party's identity verification process, designated by the Bureau, where that process meets the requirements of Identity Assurance Level 2 (IAL2) as described by the National Institute of Standards and Technology.

(2) Notwithstanding paragraph (c)(1) of this section, a designated official may require additional proof of the requester's identity before action will be taken on any request, if such official determines that it is necessary to protect against unauthorized disclosure of information in a particular case. In addition, if a requester seeks records pertaining to an individual in the requester's capacity as that individual's guardian, the requester shall be required to provide adequate proof of the requester's legal relationship before action will be taken on any request.

(d) *Request for accounting of previous disclosures.* An individual may request an accounting of previous disclosures of records pertaining to that individual in a system of records as provided in 5 U.S.C. 552a(c). Such requests should conform to the procedures and form for requests for access to records set forth in paragraphs (a) and (b) of this section.

[83 FR 46095, Sept. 12, 2018, as amended at 86 FR 48901, Sept. 1, 2021]

§ 1070.54 CFPB procedures for responding to a request for access.

(a) *Acknowledgment and response.* The CFPB will provide written acknowledgement of the receipt of a request within twenty (20) business days from the receipt of the request and will, where practicable, respond to each request within that twenty (20) day period. When a full response is not practicable within the twenty (20) day period, the CFPB will respond as promptly as possible.

(b) *Disclosure.* (1) When the CFPB discloses information in response to a request, the CFPB will make the information available for inspection and copying during regular business hours as provided in § 1070.13, or the CFPB

will mail it or email it to the requester, if feasible, upon request.

(2) The requester may bring with him or her anyone whom the requester chooses to see the requested material. All visitors to the CFPB's buildings must comply with the applicable security procedures.

(c) *Denial of a request.* If the CFPB denies a request made pursuant to § 1070.53, it will inform the requester in writing of the reason(s) for denial and the procedures for appealing the denial.

§ 1070.55 Special procedures for medical records.

If an individual requests medical or psychological records pursuant to § 1070.53, the CFPB will disclose them directly to the requester unless the CFPB determines that such disclosure could have an adverse effect on the requester. If the CFPB makes that determination, the CFPB shall provide the information to a licensed physician or other appropriate representative that the requester designates, who shall disclose those records to the requester in a manner he or she deems appropriate.

§ 1070.56 Request for amendment of records.

(a) *Procedures for making request.* (1) If an individual wishes to amend a record that pertains to that individual in a system of records, that individual may submit a request in writing to the Chief Privacy Officer, as set forth in § 1070.53(a). The request shall be labeled "Privacy Act Amendment Request."

(2) A request for amendment of a record must:

(i) Identify the name of the system of records that the requester believes contains the record for which the amendment is requested, or a description of the nature of the record in detail sufficient to enable CFPB personnel to locate the system of records containing the record with a reasonable amount of effort;

(ii) Specify the portion of that record requested to be amended; and

(iii) Describe the nature and reasons for each requested amendment.

(3) When making a request for amendment of a record, the CFPB will require a requester to verify his or her identity under the procedures set forth

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in § 1070.53(c), unless the requester has already done so in a related request for access or amendment.

(b) *Burden of proof.* In a request for amendment of a record, the requester bears the burden of proving by a preponderance of the evidence that the record is not accurate, relevant, timely, or complete.

§ 1070.57 CFPB review of a request for amendment of records.

(a) *Time limits.* The CFPB will acknowledge a request for amendment of records within ten (10) business days after it receives the request. In the acknowledgment, the CFPB may request additional information necessary for a determination on the request for amendment. The CFPB will make a determination on a request to amend a record promptly.

(b) *Contents of response to a request for amendment.* When the CFPB responds to a request for amendment, the CFPB will inform the requester in writing whether the request is granted or denied, in whole or in part. If the CFPB grants the request, it will take the necessary steps to amend the record and, when appropriate and possible, notify prior recipients of the record of its action. If the CFPB denies the request, in whole or in part, it will inform the requester in writing:

- (1) Why the request (or portion of the request) was denied;
- (2) That the requester has a right to appeal; and
- (3) How to file an appeal.

§ 1070.58 Appeal of adverse determination of request for access or amendment.

(a) *Appeal.* A requester may appeal a denial of a request made pursuant to § 1070.53 or § 1070.56 within ten (10) business days after the CFPB notifies the requester that it has denied the request.

(b) *Content of appeal.* A requester may submit an appeal in writing as set forth in § 1070.53(a). The appeal shall be addressed to the General Counsel and labeled "Privacy Act Appeal." The appeal must also:

- (1) Specify the background of the request; and

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(2) Provide reasons why the requester believes the denial is in error.

(c) *Determination.* The General Counsel will make a determination as to whether to grant or deny an appeal within thirty (30) business days from the date it is received, unless the General Counsel extends the time for good cause.

(1) If the General Counsel grants an appeal regarding a request for amendment, he or she will take the necessary steps to amend the record and, when appropriate and possible, notify prior recipients of the record of its action.

(2) If the General Counsel denies an appeal, he or she will inform the requester of such determination in writing, including the reasons for the denial, and the requester's right to file a statement of disagreement and to have a court review its decision.

(d) *Statement of disagreement.* (1) If the General Counsel denies an appeal regarding a request for amendment, a requester may file a concise statement of disagreement with the denial. The CFPB will maintain the requester's statement with the record that the requester sought to amend and any disclosure of the record will include a copy of the requester's statement of disagreement.

(2) When practicable and appropriate, the CFPB will provide a copy of the statement of disagreement to any prior recipients of the record.

§ 1070.59 Restrictions on disclosure.

The CFPB will not disclose any record about an individual contained in a system of records to any person or agency without the prior written consent of that individual unless the disclosure is authorized by 5 U.S.C. 552a(b). Disclosures authorized by 5 U.S.C. 552a(b) include disclosures that are compatible with one or more routine uses that are contained within the CFPB's Systems of Records Notices, which are available on the CFPB's website, at <http://www.consumerfinance.gov>.

§ 1070.60 Exempt records.

(a) *Exempt systems of records.* Pursuant to 5 U.S.C. 552a(k)(2), the CFPB exempts the systems of records listed in paragraphs (a)(1) through (4) of this

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section from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G)–(H), and (f), and §§ 1070.53 through 1070.59, to the extent that such systems of records contain investigatory materials compiled for law enforcement purposes, provided, however, that if any individual is denied any right, privilege, or benefit to which he or she would otherwise be entitled under Federal law, or for which he or she would otherwise be eligible as a result of the maintenance of such material, such material shall be disclosed to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the CFPB under an express promise that the identity of the source would be held in confidence:

- (1) CFPB.002 Depository Institution Supervision Database.
- (2) CFPB.003 Non-Depository Institution Supervision Database.
- (3) CFPB.004 Enforcement Database.
- (4) CFPB.005 Consumer Response System.

(b) *Information compiled for civil actions or proceedings.* This subpart does not permit an individual to have access to any information compiled in reasonable anticipation of a civil action or proceeding.

§ 1070.61 Training; rules of conduct; penalties for non-compliance.

(a) *Training.* The Chief Privacy Officer shall institute a training program to instruct CFPB employees and contractor personnel covered by 5 U.S.C. 552a(m), who are involved in the design, development, operation, or maintenance of any CFPB system of records, on a continuing basis with respect to the duties and responsibilities imposed on them and the rights conferred on individuals by the Privacy Act, the regulations in this subpart, and any other related regulations. Such training shall provide suitable emphasis on the civil and criminal penalties imposed on the CFPB and the individual employees or contractor personnel by the Privacy Act for non-compliance with specified requirements of the Act as implemented by the regulations in this subpart.

(b) *Rules of conduct.* The following rules of conduct are applicable to em-

ployees of the CFPB (including, to the extent required by the contract or 5 U.S.C. 552a(m), Government contractors and employees of such contractors), who are involved in the design, development, operation or maintenance of any system of records, or in maintaining any records, for or on behalf of the CFPB.

(1) The head of each office of the CFPB shall be responsible for assuring that employees subject to such official's supervision are advised of the provisions of the Privacy Act, including the criminal penalties and civil liabilities provided therein, and the regulations in this subpart, and that such employees are made aware of their individual and collective responsibilities to protect the security of personal information, to assure its accuracy, relevance, timeliness and completeness, to avoid unauthorized disclosure either orally or in writing, and to ensure that no system of records is maintained without public notice.

(2) Employees of the CFPB involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record shall:

(i) Collect no information of a personal nature from individuals unless authorized to collect it to achieve a function or carry out a responsibility of the CFPB;

(ii) Collect information, to the extent practicable, directly from the individual to whom it relates;

(iii) Inform each individual asked to supply information, on the form used to collect the information or on a separate form that can be retained by the individual of—

(A) The authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) The principal purpose or purposes for which the information is intended to be used;

(C) The routine uses which may be made of the information, as published pursuant to 5 U.S.C. 552a(e)(4)(D); and

(D) The effects on the individual, if any, of not providing all or any part of the requested information;

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(iv) Not collect, maintain, use or disseminate information concerning an individual's religious or political beliefs or activities or membership in associations or organizations, unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(v) Advise their supervisors of the existence or contemplated development of any record system which is capable of retrieving information about individuals by individual identifier;

(vi) Assure that no records maintained in a CFPB system of records are disseminated without the permission of the individual about whom the record pertains, except when authorized by 5 U.S.C. 552a(b);

(vii) Maintain and process information concerning individuals with care in order to ensure that no inadvertent disclosure of the information is made either within or without the CFPB;

(viii) Prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to 5 U.S.C. 552a(b)(2), make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes; and

(ix) Assure that an accounting is kept in the prescribed form, of all dissemination of personal information outside the CFPB, whether made orally or in writing, unless disclosed under 5 U.S.C. 552 or subpart B of this part.

(3) The head of each office of the CFPB shall, at least annually, review the record systems subject to their supervision to ensure compliance with the provisions of the Privacy Act of 1974 and the regulations in this subpart.

§ 1070.62 Preservation of records.

The CFPB will preserve all correspondence pertaining to the requests that it receives under this part, as well as copies of all requested records, until disposition or destruction is authorized by title 44 of the United States Code or the National Archives and Records Administration's General Records Schedule 14. Records will not be disposed of or destroyed while they are the subject

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of a pending request, appeal, proceeding, or lawsuit.

§ 1070.63 Use and collection of Social Security numbers.

The CFPB will ensure that employees authorized to collect information are aware:

(a) That individuals may not be denied any right, benefit, or privilege as a result of refusing to provide their Social Security numbers, unless the collection is authorized either by a statute or by a regulation issued prior to 1975; and

(b) That individuals requested to provide their Social Security numbers must be informed of:

(1) Whether providing Social Security numbers is mandatory or voluntary;

(2) Any statutory or regulatory authority that authorizes the collection of Social Security numbers; and

(3) The uses that will be made of the numbers.

PART 1071—RULE IMPLEMENTING EQUAL ACCESS TO JUSTICE ACT

Subpart A—General

Sec.

- 1071.100 Purpose.
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AUTHORITY: 5 U.S.C. 504.

SOURCE: 77 FR 39119, June 29, 2012, unless otherwise noted.

Subpart A—General**§ 1071.100 Purpose.**

(a) *In general.* The Equal Access to Justice Act (the Act), 5 U.S.C. 504, provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (adversary adjudications) before the Bureau of Consumer Financial Protection (the Bureau). An eligible party may receive an award when it prevails over the Bureau, unless the Bureau's position in the proceeding was substantially justified or special circumstances make an award unjust. This part describes the parties eligible for awards and the proceedings that are covered. This part also explains how to apply for awards, and the procedures and standards that the Bureau will use in ruling on those applications.

(b) *When an eligible party will receive an award.* An eligible party will receive an award when:

(1) It prevails in the adversary adjudication, unless the Bureau's position in the proceeding was substantially justified or special circumstances make an award unjust. Whether or not the position of the Bureau was substantially justified will be determined on the basis of the administrative record as a whole that is made in the adversary proceeding for which fees and other expenses are sought; or

(2) The Bureau's demand is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with that decision, under all the facts and circumstances of the case, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. "Demand" means the express final written demand made by the Bureau prior to initiation of the adversary adjudication, but does not include a recitation by the Bureau of the statutory penalty in the notice of charges or elsewhere when accompanied by an express demand for a lesser amount. The relief requested in the Bureau's notice of

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charges issued pursuant to 12 CFR 1081.200(b)(3) may constitute the Bureau's demand only where the notice of charges was not preceded by an express final written demand.

§ 1071.101 When the Act applies.

The Act applies to any adversary adjudication pending before the Bureau at any time after July 21, 2011.

§ 1071.102 Proceedings covered.

The Act applies to all adjudicative proceedings under part 1081 as defined in § 1081.103.

§ 1071.103 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adversary adjudication for which it seeks an award. The term "party" is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than \$2 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than \$7 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees; or

(5) Any other partnership, corporation, association, or public or private organization with a net worth of not more than \$7 million and not more than 500 employees.

(6) For purposes of receiving an award for fees and expenses for defending against an excessive Bureau demand, any small entity, as that term is defined under 5 U.S.C. 601(6).

(c) For purposes of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(d) An applicant who owns an unincorporated business will be considered

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an “individual” rather than a “sole owner of an unincorporated business” if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant’s direction and control. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual or group of individuals, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate of that business for purposes of this part, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

§ 1071.104 Standards for awards.

(a) For a prevailing party:

(1) An eligible prevailing applicant may receive an award for fees and expenses incurred after initiation of the adversary adjudication in connection with the entire adversary adjudication, or on a substantive portion of the adversary adjudication that is sufficiently significant and discrete to merit treatment as a separate unit, unless the position of the Bureau was substantially justified. The burden of proof that an award should not be made to an eligible prevailing appli-

cant because the Bureau’s position was substantially justified is on counsel for the Bureau. However, no presumption arises that the Bureau’s position was not substantially justified simply because the Bureau did not prevail.

(2) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

(b) For a party defending against an excessive demand:

(1) An eligible applicant will receive an award for fees and expenses incurred after initiation of the adversary adjudication related to defending against the portion of a Bureau demand that is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with that decision under all the facts and circumstances of the case.

(2) An award will be denied if the applicant has committed a willful violation of law or otherwise acted in bad faith or if special circumstances make an award unjust.

§ 1071.105 Allowable fees and other expenses.

(a) Subject to the limitations in paragraph (b) of this section, awards will be based on rates customarily charged, in the locale of the hearing, by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b) No award for the fee of any attorney or agent under this rule may exceed the hourly rate specified in 5 U.S.C. 504(b)(1)(A). No award to compensate an expert witness may exceed the reasonable rate at which the Bureau pays witnesses with similar expertise. However an award may also include the reasonable expenses of the attorney, agent or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the adjudicative officer shall consider the following:

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(1) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the services does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

(e) An award of fees or expenses under the Act is limited to fees and expenses incurred after initiation of the adversary adjudication and, with respect to excessive demands, the fees and expenses incurred in defending against the excessive portion of the demand.

§ 1071.106 Delegations of authority.

The Director may delegate authority to take final action on matters pertaining to the Equal Access to Justice Act in particular cases.

Subpart B—Information Required from Applicants**§ 1071.200 Contents of application.**

An application for an award of fees and expenses under the Act shall contain the following:

(a) Identity of the applicant and the proceeding for which the award is sought;

(b) A showing that the applicant has prevailed; or, if the applicant has not prevailed, a showing that the Bureau's demand was substantially in excess of the decision of the adjudicative officer and was unreasonable when compared with that decision, under the facts and circumstances of that case;

(c) Identification of the Bureau position(s) in the proceeding that the applicant alleges was (were) not substantially justified; or, identification of the Bureau's demand that is alleged to be excessive and unreasonable and an explanation as to why the demand was excessive and unreasonable;

(d) A brief description of the type and purpose of the organization or business (unless the applicant is an individual).

(e) A statement of how the applicant meets the eligibility criteria of § 1071.103;

(f) The amount of fees and expenses incurred after the initiation of the adversary adjudication, or in the case of a claim for defending against an allegedly excessive demand, the amount of fees and expenses incurred after the initiation of the adjudicative proceeding attributable to the allegedly excessive portion of the demand;

(g) Any other matter the applicant wishes the Bureau to consider in determining whether and in what amount an award should be made; and

(h) A written verification under oath or under penalty of perjury that the information provided is true and correct, accompanied by the signature of the applicant or an authorized officer or attorney.

§ 1071.201 Net worth exhibit.

(a) The application shall also include a detailed exhibit showing that the applicant's net worth did not exceed \$2 million (if an individual) or \$7 million (for all other applicants, including their affiliates) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this subpart. The adjudicative officer may require an applicant to file additional information to determine its eligibility for an award.

(b) However, an applicant may omit this exhibit if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or, in the

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case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section;

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a));

(3) In the case of an application for an award related to an allegedly excessive demand by the Bureau, it demonstrates that it is a small entity as that term is defined by 5 U.S.C. 601(6).

(c) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that exhibit directly to the adjudicative officer in a sealed envelope labeled "Confidential Financial Information," accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(1) through (9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on Bureau counsel but need not be served on any other party to the proceeding. If the adjudicative officer finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be handled in accordance with the Bureau's established procedures under the Freedom of Information Act, 12 CFR subpart B.

§ 1071.202 Documentation of fees and expenses.

The application shall be accompanied by full documentation of the fees and expenses incurred after initiation of the adversary adjudication, including the cost of any study, engineering report, test, or project for which an

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award is sought. With respect to a claim for fees and expenses involving an excessive demand by the Bureau, the application shall be accompanied by full documentation of the fees and expenses incurred after initiation of the adversary adjudication, including the cost of any study, engineering report, test, or project for which an award is sought attributable to the portion of the demand alleged to be excessive and unreasonable. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The adjudicative officer may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

§ 1071.203 When an application may be filed.

(a) An application may be filed not later than 30 days after the final disposition of the proceeding to which the application relates.

(b) If review or reconsideration is sought or taken of a decision, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

(c) For purposes of this subpart, *final disposition* means the later of—

(1) The date that the Director's final order issued pursuant to § 1081.405 is final and unappealable, both within the agency and to the courts; or

(2) The date that the Bureau issues any other final resolution of a proceeding, such as a consent agreement, settlement or voluntary dismissal, that is not subject to a petition for reconsideration.

Consumer Financial Protection Bureau**§ 1071.305****Subpart C—Procedures for Considering Applications****§ 1071.300 Filing and service of documents.**

(a) Any application for an award or other pleading or document related to an application shall be filed and served on all parties to the proceeding in the same manner as other pleadings in proceedings under part 1081.

(b) In addition, a copy of each application for fees and expenses shall be served on the General Counsel of the Bureau.

§ 1071.301 Answer to application.

(a) Within 30 days after service of an application, counsel representing the Bureau may file an answer to the application. Unless Bureau counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30-day period may be treated as consent to the award requested.

(b) If Bureau counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days and further extensions may be granted by the adjudicative officer upon joint request by Bureau counsel and the applicant.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of Bureau counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, Bureau counsel shall include with the answer either supporting affidavits or a request for further proceedings under § 1071.305 of this part.

§ 1071.302 Reply.

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under § 1071.305 of this part.

§ 1071.303 Comments by other parties.

Any party to a proceeding other than the applicant and Bureau counsel may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the adjudicative officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

§ 1071.304 Settlement.

The applicant and Bureau counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding or after the underlying proceeding has been concluded, in accordance with the Bureau's standard settlement procedures. If a prevailing party and Bureau counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement. If a proposed settlement of an underlying proceeding provides that each side shall bear its own expenses and the settlement is accepted, no application may be filed.

§ 1071.305 Further proceedings.

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or Bureau counsel, or on his or her own initiative, the adjudicative officer may order further proceedings, such as an informal conference, oral argument, additional written submissions or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible.

(b) A request that the adjudicative officer order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

§ 1071.306**§ 1071.306 Recommended decision.**

The adjudicative officer shall issue a recommended decision on the application within 60 days after the time for filing a reply, or where further proceedings are held, within 60 days after completion of such proceedings.

(a) For a decision involving a prevailing party: The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall include, if at issue, findings on whether the agency's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust.

(b) For a decision involving an allegedly excessive Bureau demand: The decision on the application shall include written findings and conclusions on the applicant's eligibility and an explanation of the reasons why the Bureau's demand was or was not determined to be substantially in excess of the underlying decision of the adjudicative officer and was or was not unreasonable when compared with that decision. That determination shall be based upon all the facts and circumstances of the case. The decision on the application shall also include, if at issue, findings on whether the applicant has committed a willful violation of law or otherwise acted in bad faith, or whether special circumstances make an award unjust.

§ 1071.307 Bureau review.

Either the applicant or Bureau counsel may seek review of the recommended decision on the fee application by filing a notice of appeal under § 1081.402(a), or the Director may decide to review the decision on his or her own initiative, in accordance with § 1081.402(b). If neither the applicant nor Bureau counsel seeks review and the Director does not take review on his or her own initiative, the Director will adopt the recommended decision on the application as the final decision of the Bureau within 30 days of the issuance of the recommended decision. Whether to review a decision is a mat-

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ter within the discretion of the Director. If review is taken, the Director will issue a final decision on the application or remand the application to the adjudicative officer for further proceedings.

§ 1071.308 Judicial review.

Judicial review of final Bureau decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

§ 1071.309 Payment of award.

An applicant seeking payment of an award shall submit to the Bureau a copy of the Bureau's final decision granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. An applicant shall be paid the amount awarded within 60 days of entry of the final decision unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

PART 1072—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF DISABILITY IN PROGRAMS AND ACTIVITIES CONDUCTED BY THE BUREAU OF CONSUMER FINANCIAL PROTECTION

Sec.

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AUTHORITY: 29 U.S.C. 794; 29 U.S.C. 794d.

SOURCE: 77 FR 46609, August 6, 2012, unless otherwise noted.

Consumer Financial Protection Bureau**§ 1072.103****§ 1072.101 Purpose.**

(a) This part implements section 504 of the Rehabilitation Act of 1973, as amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Sec. 119 (Pub. L. 95-602, 92 Stat. 2982), the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810), the Workforce Investment Act of 1998 (Pub. L. 105-220, 112 Stat. 936), and the Americans with Disabilities Act Amendments of 2008 (Pub. L. 110-325, 122 Stat. 3553), to prohibit discrimination on the basis of disability in programs or activities conducted by Executive agencies or the United States Postal Service.

(b) This part is also intended to implement section 508 of the Rehabilitation Act of 1973 as amended to ensure that employees and members of the public with disabilities have access to, and are able to use, electronic and information technology (EIT) to the same extent as individuals without disabilities, unless an undue burden would be imposed on the department or the Bureau. Specifically, this part clarifies that individuals with disabilities may utilize the complaint procedures established in section 504 to enforce rights guaranteed under section 508.

§ 1072.102 Application.

This part applies to all programs, activities, and electronic and information technology developed, procured, maintained, used, or conducted by the Bureau.

§ 1072.103 Definitions.

For purposes of this part *Auxiliary aids* means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the Bureau. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunications devices for deaf persons (TDD's), interpreters, Computer-

aided real-time transcription (CART), captioning, note takers, written materials, and other similar services and devices.

Bureau means the Bureau of Consumer Financial Protection.

Complete complaint means a written statement or a complaint in audio, Braille, electronic, and/or video format, that contains the complainant's name and address, and describes the Bureau's alleged discriminatory action in sufficient detail to inform the Bureau of the nature and date of the alleged violation of section 504 or section 508. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints in audio, Braille, electronic, and/or video formats shall contain an affirmative identity statement of the individual, which for this purpose shall be considered to be functionally equivalent to a complaint's signature. Complaints filed on behalf of classes of individuals with disabilities shall also identify (where possible) the alleged victims of discrimination.

Electronic and information technology means information technology and any equipment or interconnected system or subsystem of equipment that is used in the creation, conversion, or duplication of data or information. The term includes, but is not limited to, telecommunications products (such as telephones), information kiosks and transaction machines, world-wide web sites, multimedia, and office equipment such as copiers and fax machines. The term does not include any equipment that contains embedded information technology that is used as an integral part of the product, but the principal function of which is not the acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. For example, HVAC (heating, ventilation, and air conditioning) equipment such as thermostats or temperature control devices, and medical equipment where information technology is integral to its operation are not electronic and information technology.

Facility means all or any portion of a building, structure, equipment, road, walk, parking lot, rolling stock or

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other conveyance, or other real or personal property.

Has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more of the individual's major life activities.

Is regarded as having an impairment means—

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the Bureau as constituting such a limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (1) of this definition but is treated by the Bureau as having such an impairment.

Individual with a disability means any person who has a physical or mental impairment that substantially limits one or more of the individual's major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

Major life activities includes without limitation—

(1) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

(2) The operation of major bodily functions of the immune system, special sense organs and skin, normal cell growth, and digestive genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

(3) In determining other examples of major life activities, the Bureau will follow the guidance provided by EEOC in its 2011 regulations interpreting the Americans with Disabilities Act Amendments Act of 2008.

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Physical or mental impairment includes without limitation:

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genitourinary; hemic and lymphatic; skin; and endocrine.

(2) Any mental or psychological disorder such as an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(3) Diseases and conditions such as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, drug addiction and alcoholism.

Program or Activity means any activity of the Bureau permitted or required by its enabling statutes, including but not limited to any proceeding, investigation, hearing, or meeting.

Qualified individual with a disability means:

(1) In reference to individuals other than employees of the Bureau—

(i) With respect to any Bureau program or activity under which an individual is required to perform services or to achieve a level of accomplishment, an individual with a disability who, with or without reasonable accommodations, meets the essential eligibility requirements for participation in the program or activity, and who can achieve the purpose of the program or activity without modifications in the program or activity that would result in a fundamental alteration in its nature; or

(ii) With respect to any other program or activity, an individual with a disability who, with or without reasonable modification to rules, policies, or practices that do not change the fundamental nature of the activity, or the provision of auxiliary aids, meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; or

(2) In reference to individuals employed by the Bureau, the definition of that term for purposes of employment

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contained in 29 CFR 1630.2(m), which is made applicable to this part by § 1072.101.

Section 504 means section 504 of the Rehabilitation Act of 1973 as amended. As used in this part, § 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

Section 508 means section 508 of the Rehabilitation Act of 1973 as amended.

§ 1072.104 Review of compliance.

(a) The Bureau shall, within two years of the promulgation of this regulation, review its current policies and practices in view of advances in relevant technology and achievability. Based on this review, the Bureau shall modify its practices and procedures to ensure that the Bureau's programs and activities are fully accessible.

(b) The Bureau shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the review process.

(c) The Bureau shall maintain on file and make available for public inspection until three years following the completion of the compliance review—

- (1) A description of areas examined and any problems identified; and
- (2) A description of any modifications made.

§ 1072.105 Notice.

The Bureau shall make available to all Bureau employees, applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the programs or activities conducted by the Bureau in a manner that apprises them of the protections against discrimination provided by § 504 and this regulation.

§ 1072.106 General prohibitions against discrimination.

(a) No qualified individual with a disability in the United States, shall, on the basis of disability, be excluded from the participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the Bureau.

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(b) *Discriminatory actions prohibited.* (1) The Bureau, in providing any aid, benefit, or service, may not directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not substantially equivalent to that afforded others;

(iii) Provide different or separate aid, benefits or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aid, benefits or services that are as effective as those provided to others;

(iv) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for individuals with disabilities and for persons who are not so identified, but must afford individuals with disabilities a reasonable opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement in the most integrated setting appropriate to the individual's needs.

(3) Even if the Bureau is permitted, under paragraph (b)(1)(iv) of this section, to operate a separate or different program for individuals with disabilities or for any class of individuals with disabilities, to the extent reasonably feasible, the Bureau must permit any qualified individual with a disability who wishes to participate in the program that is not separate or different to do so.

(4) The Bureau may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

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(i) Subject qualified individuals with disabilities to unlawful discrimination on the basis of disability; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with disabilities.

(5) The Bureau may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with disabilities from, deny them the benefits of, or otherwise subject them to unlawful discrimination under any program or activity conducted by the Bureau; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with disabilities.

(6) The Bureau, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to unlawful discrimination on the basis of disability.

(7) The Bureau may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to unlawful discrimination on the basis of disability, nor may the Bureau establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to unlawful discrimination on the basis of disability. However, the programs or activities of entities that are licensed or certified by the Bureau are not, themselves, covered by this part.

(8) The Bureau shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the Bureau can demonstrate that making the modifications would fundamentally alter the nature of the program, service, or activity.

(c) The exclusion of persons who have not self-identified as having disabilities from the benefits of a program limited by federal statute or Executive order to individuals with disabilities or the exclusion of a specific class of individuals with disabilities from a program limited by federal statute or Executive order to a different class of individuals with disabilities is not prohibited by this part.

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(d) The Bureau shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

§ 1072.107 Employment.

No qualified individual with disability shall, on the basis of disability, be subjected to unlawful discrimination in employment under any program or activity conducted by the Bureau. The definitions, requirements and procedures of § 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791, as established by the Equal Employment Opportunity Commission in 29 CFR parts 1614 and 1630, shall apply to employment in federally conducted programs or activities.

§ 1072.108 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 1072.109 no qualified individual with a disability shall, because the Bureau's facilities are inaccessible to or unusable by individuals with disabilities, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the Bureau.

§ 1072.109 Program accessibility: Existing facilities.

(a) *General.* The Bureau shall operate each program or activity so that the program or activity, when viewed in its entirety, is accessible to and usable by individuals with disabilities. This paragraph does not require the Bureau

(1) To make structural alterations in each of its existing facilities in order to make them accessible to and usable by individuals with disabilities where other methods are effective in achieving compliance with this section; or

(2) To take any action that would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. If an action would result in such an alteration or such burdens, the Bureau shall take any other action

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that would not result in such an alteration or such burdens but would nevertheless to the extent reasonably feasible ensure that individuals with disabilities receive the benefits and services of the program or activity.

(b) *Methods.* The Bureau may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with disabilities. The Bureau, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the Bureau shall give priority to those methods that offer programs and activities to qualified individuals with disabilities in the most integrated setting appropriate.

(c) *Time period for compliance.* The Bureau shall comply with the obligations established under this section within ninety (90) days of the effective date of this part except that where structural changes in facilities are undertaken, such changes in facilities are undertaken, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

§ 1072.110 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the Bureau shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with disabilities. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as implemented in 41 CFR 101-19.600 through 101-19.607, apply to buildings covered by this section.

§ 1072.111 Communications.

(a) The Bureau shall take appropriate steps to effectively communicate with applicants, participants, personnel of other federal entities, and members of the public.

(1) The Bureau shall furnish appropriate auxiliary aids where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the Bureau.

(i) In determining what type of auxiliary aid is necessary, the Bureau shall give consideration to any reasonable request of the individual with a disability.

(ii) The Bureau need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature to applicants or participants in programs.

(2) Where the Bureau communicates with applicants and beneficiaries by telephone, the Bureau shall use a telecommunication device for deaf persons (TDD's) or equally effective telecommunication systems to communicate with persons with impaired hearing.

(b) The Bureau shall make available to interested persons, including persons with impaired vision or hearing, information as to the existence and location of accessible services, activities, and facilities.

(c) The Bureau shall post notices at a primary entrance to each of its inaccessible facilities, directing users to an accessible facility, or to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the Bureau to take any action that would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens.

§ 1072.112 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of disability in programs and activities conducted by the Bureau and

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denial of access to electronic and information technology.

(b) The Bureau shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1614 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) All other complaints alleging violations of section 504 or section 508 may be sent to Labor and Employee Relations, Office of the Chief Human Capital Officer Consumer Financial Protection Bureau, 1700 G Street NW., Washington, DC 20052. The Office of the Chief Human Capital Officer shall be responsible for coordinating implementation of this section.

(d) *Complaint-filing procedures.* (1) Any person who believes that he or she has been subjected to discrimination prohibited by this part may by himself or herself or by his or her authorized representative file a complaint. Any person who believes that any specific class of persons has been subjected to discrimination prohibited by this part and who is a member of that class or the authorized representative of a member of that class may file a class complaint.

(2) The Bureau shall accept and investigate each timely filed, complete complaint over which it has jurisdiction.

(3) A complete complaint must be filed within 180 days of the alleged act of discrimination. A complaint submitted to the Bureau via first-class mail will be deemed to have been filed when postmarked. A complaint submitted to the Bureau via any other means of delivery will be deemed to have been filed when received by the Bureau. The Bureau may extend this time period for good cause.

(e) If the Bureau receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The Bureau shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architec-

tural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), is not readily accessible to and usable by individuals with disabilities.

(g)(1) Within 180 days of the receipt of a timely filed, complete complaint over which it has jurisdiction, the Bureau shall notify the complainant of the results of the investigation in a letter containing:

- (i) Findings of fact and conclusions of law;
- (ii) A description of a remedy for each violation found; and
- (iii) A notice of the right to appeal.

(2) Bureau employees are required to cooperate in the investigation and attempted resolution of complaints. Employees who are required to participate in any investigation under this section shall do so as part of their official duties and during the course of regular duty hours.

(3) If a complaint is resolved informally, the terms of the agreement shall be reduced to writing and made part of the complaint file, with a copy of the agreement provided to the complainant. The written agreement shall describe the subject matter of the complaint and any corrective action to which the parties have agreed.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 30 days of receipt from the Bureau of the letter required by § 1072.112(g). The Bureau may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the Chief Human Capital Officer, who will issue the final agency decision which may include appropriate corrective action to be taken by the Bureau.

(j) The Bureau shall notify the complainant of the results of the appeal within 60 days of the receipt of the timely appeal. If the Bureau determines that it needs additional information from the complainant, it shall have 60 days from the date it received the additional information to make its determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended for an individual case when the Chief Human Capital Officer determines there is good cause, based on the

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particular circumstances of that case, for the extension.

(l) The Bureau may delegate its authority for conducting complaint investigations to other federal agencies or may contract with a nongovernment investigator to perform the investigation, but the authority for making the final determination may not be delegated to another entity.

PART 1073—PROCEDURES FOR BUREAU DEBT COLLECTION**Subpart A—Scope, Purpose, and Definitions**

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Subpart D—Administrative Wage Garnishment

1073.401 Administrative wage garnishment.

Subpart E—Tax Refund Offset

1073.501 Tax refund offset.

AUTHORITY: 5 U.S.C. 301; 5 U.S.C. 5514; 31 U.S.C. 3711, *et seq.*

SOURCE: 78 FR 41678, July 11, 2013, unless otherwise noted.

Subpart A—Scope, Purpose, and Definitions**§ 1073.101 Scope.**

This part establishes Bureau procedures for the collection of certain debts owed to the United States.

(a) This part applies to collections by the Bureau from:

- (1) Federal employees who are indebted to the Bureau;
- (2) Employees of the Bureau who are indebted to other agencies; and
- (3) Other persons, organizations, or entities that are indebted to the United States, except those excluded in paragraph (b) of this section.

(b) This part does not apply:

- (1) To debts or claims arising under the Internal Revenue Code (Title 26, U.S. Code), the Social Security Act (42 U.S.C. 301 *et seq.*), or the tariff laws of the United States;

(2) To a situation to which the Contract Disputes Act (41 U.S.C. 7101 *et seq.*) applies; or

(3) To debts arising out of acquisition contracts subject to the Federal Acquisition Regulation. These debts shall be determined, collected, compromised, terminated, or settled in accordance with that regulation (see 48 CFR part 32).

(4) In any other case where collection of a debt is exclusively provided for or prohibited by another statute or applicable regulation.

(c) In addition to the procedures set forth in this part, the Bureau shall also follow the procedures set forth in 5 CFR part 550, subpart K, for the collection by offset from indebted government employees, and in 31 CFR part 285 and the Federal Claims Collection Standards (FCCS) (31 CFR chapter IX

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and parts 900 through 904) for the collection of debts owed to the United States.

(d) Nothing in this part precludes the compromise, suspension, or termination of collection actions, where appropriate, under standards implementing the Debt Collection Improvement Act (DCIA) (31 U.S.C. 3711 *et seq.*), the FCCS, or any other applicable law.

§ 1073.102 Purpose.

The purpose of this part is to implement Federal statutes and regulatory standards authorizing the Bureau to collect debts owed to the United States. This part is intended to be consistent with the following Federal statutes and regulations:

(1) DCIA at 31 U.S.C. 3711 (collection and compromise of claims), section 3716 (administrative offset), section 3717 (interest and penalty on claims), and section 3718 (contracts for collection services); 31 CFR part 285 (debt collection authorities under the DCIA)

(2) 31 CFR chapter IX and parts 900 through 904 (FCCS);

(3) 5 U.S.C. 5514, 5 CFR part 550, subpart K (salary offset);

(4) 5 U.S.C. 5584 (waiver of claims for overpayment);

(5) 31 U.S.C. 3720D, 31 CFR 285.11 (administrative wage garnishment); and

(6) 26 U.S.C. 6402(d), 31 U.S.C. 3720A, and 31 CFR 285.2 (tax refund offset).

§ 1073.103 Definitions.

Except where the context clearly indicates otherwise, the following definitions shall apply to this part.

Administrative offset means withholding funds payable by the United States to, or held by the United States for, a person to satisfy a debt.

Agency means a department, agency, court, court administrative office, or instrumentality in the executive, judicial, or legislative branch of the Federal government, including government corporations.

Bureau or *CFPB* means the Bureau of Consumer Financial Protection.

Centralized administrative offset means an offset initiated by referral to the Secretary of the Treasury, or where applicable a debt collection center designated by the Department of the Treasury, by a creditor agency of a

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past due debt for the purpose of collection under the Treasury's centralized offset program.

Certification means a written statement transmitted from a creditor agency to a paying agency for purposes of administrative or salary offset, to the Financial Management Service (FMS) for offset or to the Secretary of the Treasury for centralized administrative offset. The certification confirms the existence and amount of the debt and verifies that the creditor agency has afforded the debtor the required procedural protections. Where the debtor requests a hearing on a claimed debt, the decision by a hearing official or administrative law judge constitutes a certification.

Compromise means the settlement or forgiveness of a debt under 31 U.S.C. 3711, in accordance with standards set forth in the FCCS and applicable Federal law.

Creditor agency means an agency of the Federal Government to which the debt is owed, or a debt collection center when acting on behalf of a creditor agency to collect a debt. An agency may be both the creditor agency and the paying agency.

Debt or *claim* means an amount of money, funds, or property that has been determined by an agency official to be due the United States from any person, organization, or entity, except another Federal entity. For purposes of this part, a debt or claim owed to the Bureau constitutes a debt or claim owed to the United States.

Debt collection center means the Department of the Treasury or other government agency or division designated by the Secretary of the Treasury with authority to collect debts on behalf of creditor agencies in accordance with 31 U.S.C. 3711(g).

Debtor means a person who owes a debt or a claim. The term "person" includes any individual, organization, or entity, except another Federal agency.

Director means the Director of the Bureau of Consumer Financial Protection or the Director's designee.

Disposable pay means that part of current adjusted basic pay, special pay, incentive pay, retired pay, retainer pay, and, in the case of an employee not entitled to adjusted basic pay,

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other authorized pay, remaining for each pay period after the deduction of any amount required by law to be withheld.

Federal Claims Collection Standards (FCCS) means standards published at 31 CFR Parts 900 through 904.

Financial Management Service (FMS) is a Bureau of the Department of the Treasury.

Garnishment means the process of withholding amounts from the disposable pay of a person employed outside the Federal Government, and the paying of those amounts to a creditor in satisfaction of a withholding order.

Non-centralized administrative offset means offsets that an agency conducts, at the agency's discretion, internally or in cooperation with the agency certifying or authorizing payment to the debtor.

Notice of Intent to Offset or Notice of Intent means a written notice from a creditor agency to an employee, organization, entity, or restitution debtor that claims a debt and informs the debtor that the creditor agency intends to collect the debt by administrative or salary offset. The notice also informs the debtor of certain procedural rights with respect to the claimed debt and respective offset procedure.

Paying agency means the agency of the Federal Government that withholds funds payable to a person who owes a debt to an agency of the Federal Government. The term "person" includes any individual, organization, or entity, except another Federal agency. An agency may be both the creditor agency and the paying agency.

Recoupment means a special method of adjusting debts arising under the same transaction or occurrence.

Salary offset means an administrative offset to collect a debt under 5 U.S.C. 5514 by deduction(s) at one or more officially established pay intervals from the current pay account of a Federal employee without his or her consent.

Withholding order means any order for withholding or garnishment of pay issued by an agency, or judicial or administrative body.

Subpart B—Administrative Offset**§ 1073.201 Applicability and scope.**

(a) *Applicability.* The provisions of this subpart apply to the collection of debts owed to the United States arising out of the activities of, or referred to, the Bureau. This subpart is intended to be consistent with the Federal Claims Collection Standards (31 CFR chapter IX and parts 900 through 904) on administrative offset issued by the Department of Treasury and the Department of Justice.

(b) *Centralized administrative offset.* (1) The Director will refer any eligible debt over 180 days delinquent to the Department of the Treasury or a designated debt collection center for collection by centralized administrative offset. The Director may also refer any eligible debt less than 180 days delinquent to the Department of the Treasury for offset.

(2) At least 60 days prior to referring a debt to the Department of the Treasury in accordance with paragraph (b)(1) of this section, the Director will send notice to the debtor in accordance with the requirements of § 1073.204 of this subpart.

(c) *Non-centralized administrative offset.* (1) When centralized administrative offset is not available or appropriate, the Director may collect past-due, legally enforceable debts through non-centralized administrative offset. In these cases, the Director may offset a payment internally or make an offset request directly to a paying agency.

(2) At least 30 days prior to offsetting a payment internally or requesting a paying agency to offset a payment in accordance with paragraph (c)(1) of this section, the Director will send notice to the debtor in accordance with the requirements of § 1073.204 of this subpart.

§ 1073.202 Collection.

(a) The Director may collect a claim from a person by administrative offset of monies payable by the Government only after:

(1) Providing the debtor with the procedures of this subpart; and

(2) Providing the paying agency with written certification that the debtor owes the debt in the amount stated and

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that the Bureau, as creditor agency, has complied with this part.

(b) The Director will initiate collection by administrative offset of only those debts for which that remedy is permissible under 31 CFR 901.3(a).

(c) Unless otherwise provided, debts or payments not subject to administrative offset under 31 U.S.C. 3716 may be collected by administrative offset under common law, or any other applicable statutory authority.

§ 1073.203 Omission of procedures.

The Bureau shall not be required to follow the procedures described in § 1073.204 where:

(a) The offset is in the nature of a recoupment;

(b) The debt arises under a contract as set forth in *Cecile Industries, Inc. v. Cheney*, 995 F.2d 1052 (Fed. Cir. 1993); or

(c) In the case of non-centralized administrative offsets, the Bureau first learns of the existence of the amount owed by the debtor when there is insufficient time before payment would be made to the debtor/payee to allow for prior notice and an opportunity to review. When prior notice and an opportunity to review are omitted, the Director shall give the debtor such notice and an opportunity for review as soon as practicable and shall promptly refund any money ultimately found not to be due to the U.S. Government.

§ 1073.204 Debtor's rights.

(a) *Debtor's rights prior to collection or referral.* Prior to collecting any claim by administrative offset or referring such claim to another agency for collection through administrative offset, the Director shall provide the debtor with the following:

(1) A Notice of Intent to Offset, which shall include written notice of the type and amount of the debt, the intention of the Director to use administrative offset to collect the debt, and an explanation of the debtor's rights under 31 U.S.C. 3716;

(2) An opportunity to inspect and copy Bureau records related to the debt, unless such records are exempt from disclosure;

(3) An opportunity for review within the Bureau of the determination of indebtedness; and

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(4) An opportunity to enter into a written agreement to repay the debt.

(b) *Opportunity for review.* (1) Any request by the debtor for such review shall be in writing and shall be submitted to the Bureau within 30 calendar days of the date of the Notice of Intent to Offset. The Director may waive the time limit for requesting review for good cause shown by the debtor;

(2) Upon receipt of a request for review by the debtor, the Director shall provide the debtor with a reasonable opportunity for an oral hearing when the Director determines that the question of the indebtedness cannot be resolved by review of the documentary evidence alone (e.g., when the determination turns on an issue of credibility or veracity). Unless otherwise required by law, an oral hearing under this section is not required to be a formal evidentiary hearing, although all significant matters discussed at the hearing shall be documented.

(3) In cases where an oral hearing is not required by this section, the Bureau shall make its determination based on a documentary hearing consisting of a review of the written record.

§ 1073.205 No requirement for duplicate notice.

Where the Director previously has given a debtor any of the required notice and review opportunities with respect to a particular debt, the Director is not required to duplicate such notice and review opportunities prior to initiating administrative offset.

§ 1073.206 Interest, penalties, and administrative costs.

(a) Pursuant to 31 U.S.C. 3717, the Director shall assess interest, penalties, and administrative costs on debts owed to the United States. Interest, penalties, and administrative costs will be assessed in accordance with 31 CFR 901.9.

(b) The Director shall waive collection of interest on a debt or any portion of the debt which is paid in full within 30 days after the date on which the interest began to accrue.

(c) The Director may waive interest accrued during a period a disputed debt

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is under investigation or review by the Bureau, *i.e.*, from the date the Bureau receives a request for review until the date the Bureau issues a final agency decision. The Director may only grant this waiver for good cause shown by the debtor. This waiver must be requested by the debtor before the expiration of the 30-day waiver period described in paragraph (b) of this section.

(d) The Director may at any time waive collection of interest, penalties, or administrative costs if he or she finds that one or more of the following conditions exists:

(1) The Debtor is unable to pay any significant sum toward the debt within a reasonable period of time;

(2) Collection of interest, penalties, or administrative costs will jeopardize collection of the principal of the debt;

(3) The Bureau is unable to enforce collection in full within a reasonable period of time through collection proceedings; or

(4) Collection is against equity and good conscience or is not in the best interest of the United States.

(e) The Director is authorized to assess interest, penalties, administrative costs, or other related charges on debts that are not subject to 31 U.S.C. 3717 to the extent authorized under the common law or other applicable statutory authority.

§ 1073.207 Termination or suspension of collection action.

The Director may suspend or terminate collection action on a claim not in excess of \$100,000, or such other amount as the Attorney General may direct, exclusive of interest, penalties, and administrative costs, after deducting the amount of partial payments or collections, if any. Any such termination or suspension shall be conducted in accordance with the requirements of 31 U.S.C. 3711 under the procedures established in 31 CFR part 903.

§ 1073.208 Refunds.

Amounts recovered by administrative offset but later found not to be owed to the Government shall be promptly refunded. Unless required by law or contract, such refunds shall not bear interest.

§ 1073.209 Request for offset to other Federal agencies.

The Director may request that a debt owed to the Bureau be administratively offset against funds due and payable to a debtor by another Federal agency. In requesting administrative offset, the Bureau, as the creditor agency, will provide written certification to the Federal agency holding funds payable to the debtor, stating:

- (a) That the debtor owes the debt;
- (b) The amount and basis of the debt; and

- (c) That the Bureau has fully complied with the requirements of its own administrative offset regulations and the applicable provisions of 31 U.S.C. 3716.

§ 1073.210 Request for offset from other Federal agencies.

Any Federal agency may request that funds due and payable to its debtor by the Bureau be administratively offset by the Bureau in order to collect a debt owed to such agency by the debtor. The Director shall initiate the requested offset only upon:

- (a) Receipt of written certification from the creditor agency stating:

- (1) That the debtor owes the debt;
- (2) The amount and basis of the debt; and

- (3) That the creditor agency has fully complied with its own administrative offset regulations and with the applicable provisions of 31 U.S.C. 3716; and

- (b) A determination that collection by offset against funds payable by the Bureau would be in the best interest of the United States and that such offset would not be contrary to law.

Subpart C—Salary Offset**§ 1073.301 Scope.**

(a) These salary offset regulations should be read in conjunction with 5 U.S.C. 5514 and 5 CFR part 550, subpart K, and apply to the collection of debts owed by employees of the Bureau or other Federal agencies.

(b) These salary offset procedures do not apply:

- (1) Where an employee consents to the recovery of a debt from his current pay account;

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(2) To debts arising under the Internal Revenue Code (Title 26, U.S. Code), the tariff laws of the United States, or to any case where collection of a debt by salary offset is explicitly provided for or prohibited by another statute.

(c) These procedures do not preclude an employee from requesting a waiver of an erroneous payment under 5 U.S.C. 5584, or from questioning the amount or validity of a debt, in the manner specified by law or these agency regulations. This subpart also does not preclude an employee from requesting waiver of the collection of a debt under any other applicable statutory authority.

(d) When possible, salary offset through centralized administrative offset procedures should be attempted before seeking salary offset from a paying agency different than the creditor agency.

§ 1073.302 Notice requirement where CFPB is creditor agency.

Where the Bureau seeks salary offset under 5 U.S.C. 5514 as the creditor agency, the Director shall first provide the employee with a written Notice of Intent to Offset at least 30 calendar days before salary offset is to commence. The Notice of Intent to Offset shall include the following information and statements:

(a) That the Director has determined that a debt is owed to the Bureau, and the origin, nature, and amount of the debt;

(b) That the Director intends to collect the debt by means of deduction from the employee's current disposable pay account;

(c) The frequency and amount of the intended deduction, stated as a fixed dollar amount or as a percentage of disposable pay, not to exceed 15 percent of disposable pay;

(d) That the Director intends to continue the deductions until the debt is paid in full or otherwise resolved;

(e) The opportunity (under terms agreeable to the Director) to establish a schedule for the voluntary repayment of the debt or enter into a written agreement to establish a schedule for repayment of the debt in lieu of offset. The agreement must be in writing, signed by both the employee and the

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Director, and documented in the Bureau's files;

(f) The Bureau's policy concerning interest, penalties, and administrative costs, including a statement that such assessments must be made unless excused in accordance with the FCCS or these regulations;

(g) That the employee has the right to inspect and copy Bureau records not exempt from disclosure that relate to the debt or, if the employee or his or her representative cannot personally inspect the records, to request and receive a copy of such records;

(1) Such requests must be made in writing, and identify by name and address the designated individual to whom the request should be sent.

(2) Upon receipt of such a request, the designated official shall notify the employee of the time and location where the records may be inspected and copied;

(h) That the employee has a right to a hearing regarding the existence and amount of the debt claimed or the salary offset schedule proposed by the Director, provided that the employee files a request for such a hearing with the Bureau in accordance with § 1073.303. Such a hearing will be conducted by an impartial official who is an administrative law judge or who is an other hearing official not under the supervision or control of the Director;

(i) The procedure and deadline for requesting a hearing, including the name, address, and telephone number of the designated individual to whom a request for hearing must be sent;

(j) That a request for hearing must be received by the Bureau within 15 calendar days following receipt of the Notice of Intent, and that filing of a request for hearing will stay the commencement of collection proceedings;

(k) That the Director will initiate salary offset procedures not less than 30 days from the date of the employee's receipt of the Notice of Intent to Offset, unless the employee files a timely request for a hearing;

(l) That if a hearing is held, the administrative law judge or other hearing official will issue a decision on the hearing at the earliest practical date,

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but not later than 60 days after the filing of the request for the hearing, unless the employee requests and the hearing official grants a delay in the proceedings;

(m) That any knowingly false or frivolous statements, representations, or evidence may subject the employee to:

(1) Disciplinary procedures appropriate under 5 U.S.C. chapter 75, 5 CFR part 752, or any other applicable statutes or regulations;

(2) Penalties under the False Claims Act, 31 U.S.C. 3729 through 3731, or under any other applicable statutory authority; or

(3) Criminal penalties under 18 U.S.C. 286, 287, 1001, and 1002 or under any other applicable statutory authority;

(n) That the employee also has the right to request waiver of overpayment pursuant to 5 U.S.C. 5584, and may exercise any other rights and remedies available under statutes or regulations governing the program for which the collection is being made; and

(o) That amounts paid on or deducted from the debt which are later waived or found not to be owed to the United States will be promptly refunded to the employee, unless there are applicable contractual or statutory provisions to the contrary.

§ 1073.303 Procedures to request a hearing.

(a) To request a hearing, an employee must send a written request to the designated official indicated in the Notice of Intent stating why the employee believes the determination concerning the existence or amount of debt is in error. The request must be received by the Bureau within 15 calendar days following the employee's receipt of the Notice of Intent.

(b) The request must be signed by the employee and fully identify and explain with reasonable specificity all the facts, evidence, and witnesses, if any, which the employee believes support his or her position. The request for hearing must state whether the employee is requesting an oral or documentary hearing. If an oral hearing is requested, the request shall explain why the matter cannot be resolved by a review of documentary evidence alone.

§ 1073.304 Failure to timely submit request for a hearing.

If the Bureau does not receive an employee's request for hearing within the 15-day period set forth in § 1073.303, the employee shall not be entitled to a hearing, and salary offset may be initiated. However, the Bureau may accept an untimely request for hearing if the employee can show that the delay was because of circumstances beyond his or her control or because of failure to receive notice of the time limit (unless otherwise aware of it).

§ 1073.305 Procedures for hearing.

(a) *Obtaining the services of a hearing official.* The Director must obtain the services of an impartial hearing official who is an administrative law judge or who is an other official not under the supervision or control of the Director. The Director shall designate an administrative law judge or contact an agent of another agency designated in appendix A to 5 CFR part 581 to arrange for a hearing official.

(b) *Notice and format of hearing—(1) Notice.* The hearing official shall determine whether the hearing shall be oral or documentary and shall notify the employee of the form of the hearing. If the hearing will be oral, the notice shall set forth the date, time, and location of the hearing, which must be held within 30 calendar days after the request is received, unless the employee requests that the hearing be delayed. If the hearing will be documentary, the employee shall be notified to submit evidence and written arguments in support of his or her case to the hearing official within 30 calendar days.

(2) *Oral hearing.* The hearing official may grant a request for an oral hearing if he or she determines that the issues raised by the employee cannot be resolved by review of documentary evidence alone (e.g., where credibility or veracity is at issue). Witnesses who testify in oral hearings shall do so under written or recorded oath or affirmation. An oral hearing is not required to be a formal evidentiary hearing. Oral hearings may take the form of, but are not limited to:

(i) Informal conferences with the hearing official in which the employee and Bureau representative are given

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full opportunity to present evidence, witnesses, and argument;

(ii) Informal meetings in which the hearing official interviews the employee; or

(iii) Formal written submissions with an opportunity for oral presentation.

(3) *Documentary hearing.* If the hearing official determines that an oral hearing is not necessary, he or she will make the determination based upon a review of the available written record, including any documentation submitted by the employee in support of his or her position.

(4) *Record.* The hearing official shall maintain a summary record of any hearing conducted under this section.

(c) *Rescheduling of the hearing date.* The hearing official shall reschedule a hearing if requested to do so by both parties, who shall be given reasonable notice of the time and place of this new hearing.

(d) *Failure to appear or submit documentary evidence.* In the absence of good cause shown, an employee who fails to appear at an oral hearing, or fails to submit documentary evidence for a documentary hearing, will have waived the right to a hearing. Furthermore, the employee will have been deemed to admit the existence and amount of the debt as described in the Notice of Intent. If the representative of the creditor agency fails to appear without good cause shown, the hearing official shall proceed with the hearing as scheduled, and issue a decision based upon the oral testimony presented and the documentation submitted by both parties.

(e) *Date of decision.* The hearing official shall issue a written decision based upon the evidence and information developed at the hearing, as soon as practicable after the hearing, but not later than 60 calendar days after the date on which the request for hearing was received by the Bureau, unless the hearing was delayed at the request of the employee. In the event of such a delay, the 60-day decision period shall be extended by the number of days by which the hearing was postponed. The decision of the hearing official shall be final.

(f) *Content of decision.* The written decision shall include:

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(1) The facts purported to evidence the nature and origin of the proposed debt;

(2) The hearing official's analysis, findings and conclusions, in light of the hearing, as to the employee's and/or Bureau's grounds, the amount and validity of the alleged debt and, where applicable, the repayment schedule.

§ 1073.306 Salary offset process.

(a) *Method and source of deductions.* Salary offsets under this subpart shall be deducted from current disposable pay, except as provided in paragraph (e) of this section.

(b) *Determination of disposable pay.* The Bureau's Office of the Chief Financial Officer will consult with the Bureau's Office of Human Capital to determine the amount of a Bureau employee's disposable pay and will implement the salary offset. If the debtor is not employed by the Bureau, the agency employing the debtor will determine the amount of the employee's disposable pay and will implement the salary offset.

(c) *When salary offset may begin.* Deductions shall begin within three official pay periods following, as applicable, the initiation of salary offset without a hearing under § 1073.304, the decision of the hearing official under § 1073.305, or receipt of the creditor agency's request for offset where the Bureau is not the creditor agency.

(d) *Amount of salary offset.* The amount to be offset from each salary payment will be up to 15 percent of a debtor's disposable pay, as follows:

(1) If the amount of the debt is equal to or less than 15 percent of the disposable pay, such debt generally will be collected in one lump sum payment;

(2) If the employee is financially unable to pay in one lump sum or the amount of the debt exceeds 15 percent of disposable pay for an officially established pay interval, collection will be made in installments. Installment deductions will be made over a period of no greater than the anticipated period of employment, except as provided in paragraph (e) of this section. Installment deductions must ordinarily bear a reasonable relationship to the size of the debt and the employee's ability to pay. An installment deduction will not

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exceed 15 percent of the disposable pay from which the deduction is made unless the employee has agreed in writing to the deduction of a greater amount. The creditor agency may determine that smaller deductions are appropriate based on the employee's ability to pay.

(e) *Final salary or other payment.* After the employee has separated either voluntarily or involuntarily from the payment agency, the payment agency may, pursuant to 31 U.S.C. 3716, make a lump sum deduction exceeding 15 percent of disposable pay from any final salary or other payments in order to satisfy a debt. If the debt cannot be liquidated by offset from any final payment due the former employee as of the date of separation, it may be offset under 31 U.S.C. 3716 from later payments of any kind due the former employee from the United States, unless prohibited by law.

§ 1073.307 Voluntary repayment agreements as alternative to salary offset where the CFPB is the creditor agency.

(a) In response to a Notice of Intent, an employee may propose to voluntarily repay the debt through scheduled voluntary payments, in lieu of salary offset. An employee who wishes to repay a debt in this manner shall submit to the Bureau a written agreement proposing a repayment schedule. This proposal must be received by the Bureau within 30 calendar days following the date of the Notice of Intent.

(b) The Director shall notify the employee whether the employee's proposed voluntary repayment agreement is acceptable. It is within the discretion of the Director whether to accept or reject the debtor's proposal, or whether to propose to the debtor a modification of the proposed repayment agreement:

(1) If the Director decides that the proposed repayment agreement is unacceptable, he or she shall notify the employee and the employee shall have 30 calendar days from the date he or she received notice of the decision in which to file a request for a hearing on the proposed repayment agreement, as provided in § 1073.303; or

(2) If the Director decides that the proposed repayment agreement is acceptable or the debtor agrees to a modification proposed by the Director, the agreement shall be put in writing and signed by both the employee and the Director.

§ 1073.308 Special review of repayment agreement or salary offset due to changed circumstances.

(a) An employee subject to a voluntary repayment agreement or salary offset payable to the Bureau as creditor agency may request a special review by the Director of the amount of the salary offset or voluntary repayment, based on materially changed circumstances, including, but not limited to, catastrophic illness, divorce, death, or disability. A request for special review may be made at any time.

(b) In support of a request for special review, the employee shall submit to the Bureau a detailed statement and supporting documents for the employee, his or her spouse, and dependents indicating:

- (1) Income from all sources;
- (2) Assets;
- (3) Liabilities;
- (4) Number of dependents;
- (5) Monthly expenses for food, housing, clothing, and transportation;
- (6) Medical expenses; and
- (7) Exceptional expenses, if any.

(c) The employee shall also file an alternative proposed offset or payment schedule and a statement, with supporting documents, showing why the current salary offset or payments result in extreme financial hardship to the employee.

(d) The Director shall evaluate the statement and supporting documents and determine whether the original salary offset or repayment schedule imposes extreme financial hardship on the employee, for example, by preventing the employee from meeting essential subsistence expenses such as food, housing, clothing, transportation, and medical care. The Director shall notify the employee in writing within 30 calendar days of his or her determination.

(e) If the special review results in a revised salary offset or repayment

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schedule, the Director shall provide a new certification to the paying agency.

§ 1073.309 Interest, penalties, and administrative costs.

Where the Bureau is the creditor agency, it shall assess interest, penalties, and administrative costs pursuant to the procedures set forth in § 1073.206 and in accordance with 31 U.S.C. 3717 and 31 CFR parts 900 through 904.

§ 1073.310 Refunds.

(a) Where the Bureau is the creditor agency, it shall promptly refund any amount deducted under the authority of 5 U.S.C. 5514 when the debt is waived or otherwise found not to be owing to the United States (unless expressly prohibited by statute or regulation), or when an administrative or judicial order directs the Bureau to refund amounts deducted from the employee's current pay.

(b) Unless required by law or contract, such refunds shall not bear interest.

§ 1073.311 Non-waiver of rights by payment.

An employee's involuntary payment of all or any portion of a debt being collected under 5 U.S.C. 5514 shall not be construed as a waiver of any rights which the employee may have under 5 U.S.C. 5514 or any other provision of contract or law, unless there are statutory or contractual provisions to the contrary.

§ 1073.312 Exception to procedures.

(a) The procedures set forth in this subpart shall not apply to the following:

(1) Any adjustment to pay arising out of an employee's election of coverage or a change in coverage under a Federal benefits program requiring periodic deductions from pay, if the amount to be recovered was accumulated over four pay periods or less;

(2) A routine intra-agency adjustment of pay that is made to correct an overpayment attributable to clerical or administrative errors or delays in processing pay documents, if the overpayment occurred within the four pay periods preceding the adjustment and, at

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the time of such adjustment, or as soon thereafter as practical, the individual is provided written notice of the nature and amount of the adjustment and a point of contact for contesting such adjustment; or

(3) Any adjustment to collect a debt amounting to \$50 or less, if, at the time of such adjustment, or as soon thereafter as practical, the individual is provided written notice of the nature and amount of the adjustment and a point of contact for contesting such adjustment.

(b) In the event of a negative adjustment to pay, as described in subsection (a)(1), the Bureau will provide a clear and concise statement in the employee's earnings statement advising the employee of the previous overpayment at the time the adjustment is made.

Subpart D—Administrative Wage Garnishment**§ 1073.401 Administrative wage garnishment.**

The Director may collect debts from a debtor's wages by means of administrative wage garnishment in accordance with the requirements of 31 U.S.C. 3720D under the procedures established in 31 CFR 285.11.

Subpart E—Tax Refund Offset**§ 1073.501 Tax refund offset.**

The provisions of 26 U.S.C. 6402(d) and 31 U.S.C. 3720A authorize the Secretary of the Treasury to offset a debt owed to the United States Government from the tax refund due a taxpayer. The Director may administer tax refund offsets in accordance with the requirements of 31 U.S.C. 3720A under the procedures established in 31 CFR 285.2.

PART 1074—RULEMAKING AND GUIDANCE**Subpart A—Procedure for Issuance of Bureau Rules**

Sec.

1074.1 Date of issuance of Bureau rules.

Subpart B—Use of Supervisory Guidance

1074.2 Purpose.

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1074.3 Implementation of the Statement Clarifying the Role of Supervisory Guidance.

APPENDIX A TO PART 1074—STATEMENT CLARIFYING THE ROLE OF SUPERVISORY GUIDANCE

AUTHORITY: 12 U.S.C. 5492(a)(1), 5512(b).

SOURCE: 77 FR 76354, Dec. 28, 2012, unless otherwise noted.

Subpart A—Procedure for Issuance of Bureau Rules

§ 1074.1 Date of issuance of Bureau rules.

A final Bureau of Consumer Financial Protection (Bureau) rule is deemed issued upon the earlier of the following:

- (a) When the final rule is posted on the Bureau's Web site; or
- (b) When the final rule is published in the FEDERAL REGISTER.

Subpart B—Use of Supervisory Guidance

SOURCE: 86 FR 9268, Feb. 12, 2021, unless otherwise noted.

§ 1074.2 Purpose.

The Bureau issues regulations and guidance as part of its supervisory function. This subpart reiterates the distinctions between regulations and guidance, as stated in the Statement Clarifying the Role of Supervisory Guidance (appendix A to this part) (Statement), and provides that the Statement is binding on the Bureau.

§ 1074.3 Implementation of the Statement Clarifying the Role of Supervisory Guidance.

The Statement describes the official policy of the Bureau with respect to the use of supervisory guidance in the supervisory process. The Statement is binding on the Bureau.

APPENDIX A TO PART 1074—STATEMENT CLARIFYING THE ROLE OF SUPERVISORY GUIDANCE

STATEMENT CLARIFYING THE ROLE OF SUPERVISORY GUIDANCE

The Bureau is issuing this statement to explain the role of supervisory guidance and to

describe the Bureau's approach to supervisory guidance.

Difference Between Supervisory Guidance and Laws or Regulations

Supervisory agencies like the Bureau issue various types of supervisory guidance, including interagency statements, advisories, bulletins, policy statements, questions and answers, or frequently asked questions, to their respective supervised institutions. A law or regulation has the force and effect of law.¹ Unlike a law or regulation, supervisory guidance does not have the force and effect of law, and the Bureau does not take enforcement actions based on supervisory guidance. Rather, supervisory guidance outlines the Bureau's supervisory expectations or priorities and articulates the Bureau's general views regarding appropriate practices for a given subject area. Supervisory guidance often provides examples of practices that the Bureau generally considers consistent with applicable laws and regulations, including those designed to protect consumers. Supervised institutions at times request supervisory guidance, and such guidance is important to provide insight to industry, as well as supervisory staff, in a transparent way that helps to ensure consistency in the supervisory approach.

Ongoing Efforts To Clarify the Role of Supervisory Guidance

The Bureau is clarifying the following policies and practices related to supervisory guidance:

- The Bureau intends to limit the use of numerical thresholds or other “bright-lines” in describing expectations in supervisory guidance. Where numerical thresholds are used, the Bureau intends to clarify that the thresholds are exemplary only and not suggestive of requirements. The Bureau will continue to use numerical thresholds to tailor, and otherwise make clear, the applicability of supervisory guidance or programs to supervised institutions, and as required by statute.
- Examiners will not criticize (through the issuance of matters requiring attention, matters requiring immediate attention, matters requiring board attention, documents of resolution, and supervisory recommendations) a supervised financial institution for, and the Bureau will not issue an enforcement action on the basis of, a “violation” of or “non-compliance” with supervisory guidance. In some situations, examiners may reference (including in writing) supervisory guidance to provide examples of appropriate consumer protection and risk management practices and other actions for addressing compliance with laws or regulations.
- Supervisory criticisms should continue to be specific as to practices, operations or

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other matters that could cause consumer harm or could cause violations of laws, regulations, final agency orders, or other legally enforceable conditions.

- The Bureau may decide to seek public comment on supervisory guidance. Seeking public comment on supervisory guidance does not mean that the guidance is intended to be a regulation or have the force and effect of law. The comment process helps the Bureau to improve its understanding of an issue, to gather information on institutions' risk management practices, or to seek ways to achieve a supervisory objective most effectively and with the least burden on institutions.

- The Bureau will aim to reduce the issuance of multiple supervisory guidance documents on the same topic and will generally limit such multiple issuances going forward.

- The Bureau will continue efforts to make the role of supervisory guidance clear in communications to examiners and to supervised financial institutions and encourages supervised institutions with questions about this statement or any applicable supervisory guidance to discuss the questions with their appropriate agency contact.

[86 FR 9268, Feb. 12, 2021]

PART 1075—CONSUMER FINANCIAL CIVIL PENALTY FUND RULE

Sec.

- 1075.100 Scope and purpose.
- 1075.101 Definitions.
- 1075.102 Fund administrator.
- 1075.103 Eligible victims.
- 1075.104 Payments to victims.
- 1075.105 Allocating funds from the Civil Penalty Fund—in general.
- 1075.106 Allocating funds to classes of victims.
- 1075.107 Allocating funds to consumer education and financial literacy programs.
- 1075.108 Distributing payments to victims.
- 1075.109 When payments to victims are impracticable.
- 1075.110 Reporting requirements.

AUTHORITY: 12 U.S.C. 5512(b)(1), 5497(d).

SOURCE: 78 FR 26501, May 7, 2013, unless otherwise noted.

§ 1075.100 Scope and purpose.

Section 1017(d)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111-203, 124 Stat. 1978 (12 U.S.C. 5497(d)) (Dodd-Frank Act) establishes the "Consumer Financial Civil Penalty Fund." This part describes the conditions under which victims will be eligible for pay-

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ments from the Consumer Financial Civil Penalty Fund and the amounts of the payments they may receive. This part also establishes procedures and guidelines for allocating funds from the Consumer Financial Civil Penalty Fund to classes of victims and distributing such funds to individual victims, and for allocating funds to consumer education and financial literacy programs. This part also establishes reporting requirements.

§ 1075.101 Definitions.

For the purposes of this part, the following definitions apply:

Bureau means the Bureau of Consumer Financial Protection.

Bureau enforcement action means any judicial or administrative action or proceeding in which the Bureau has obtained relief with respect to a violation.

Chief Financial Officer means the Chief Financial Officer of the Bureau or any Bureau employee to whom that officer has delegated authority to act under this part. In the absence of a Chief Financial Officer of the Bureau, the Director shall designate an alternative official of the Bureau to perform the functions of the Chief Financial Officer under this part.

Civil Penalty Fund means the Consumer Financial Civil Penalty Fund established by 12 U.S.C. 5497(d).

Civil Penalty Fund Governance Board means the body, comprised of senior Bureau officials, established by the Director of the Bureau to advise on matters relating to the Civil Penalty Fund.

Class of victims means a group of similarly situated victims who suffered harm from the same or similar violations for which the Bureau obtained relief in a Bureau enforcement action.

Defendant means a party in a Bureau enforcement action that is found or alleged to have committed a violation.

Final order means a consent order or settlement issued by a court or by the Bureau, or an appealable order issued by a court or by the Bureau as to which the time for filing an appeal has expired and no appeals are pending. For purposes of this definition, "appeals" include petitions for reconsideration, review, rehearing, and certiorari.

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Person means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

Redress means any amounts—including but not limited to restitution, refunds, and damages—that a final order requires a defendant:

- (1) To distribute, credit, or otherwise pay to those harmed by a violation; or
- (2) To pay to the Bureau or another intermediary for distribution to those harmed by the violation.

Victim means a person harmed as a result of a violation.

Violation means any act or omission that constitutes a violation of law for which the Bureau is authorized to obtain relief pursuant to 12 U.S.C. 5565(a).

§ 1075.102 Fund administrator.

(a) *In general.* There is established the position of Civil Penalty Fund Administrator (Fund Administrator). The Fund Administrator will report to the Chief Financial Officer. The Chief Financial Officer may, to the extent permitted by applicable law, relieve the Fund Administrator of the duties of that position without notice, without cause, and prior to the naming of a successor Fund Administrator.

(b) *Powers and duties.* The Fund Administrator will have the powers and duties assigned to that official in this part.

(c) *Interpretation of these regulations.* (1) On its own initiative or at the Fund Administrator's request, the Civil Penalty Fund Governance Board may advise or direct the Fund Administrator on the administration of the Civil Penalty Fund, including regarding the interpretation of this part and its application to particular facts and circumstances.

(2) The Fund Administrator must follow any written directions that the Civil Penalty Fund Governance Board provides pursuant to paragraph (c)(1) of this section.

(d) *Unavailability of the Fund Administrator.* If there is no Fund Administrator or if the Fund Administrator is otherwise unavailable, the Chief Financial Officer will perform the functions and duties of the Fund Administrator.

§ 1075.103 Eligible victims.

A victim is eligible for payment from the Civil Penalty Fund if a final order in a Bureau enforcement action imposed a civil penalty for the violation or violations that harmed the victim.

§ 1075.104 Payments to victims.

(a) *In general.* The Bureau will use funds in the Civil Penalty Fund for payments to compensate eligible victims' uncompensated harm, as described in paragraph (b) of this section.

(b) *Victims' uncompensated harm.* (1) A victim's uncompensated harm is the victim's compensable harm, as described in paragraph (c) of this section, minus any compensation for that harm that the victim has received or is reasonably expected to receive.

(2) For purposes of paragraph (b)(1) of this section, a victim has received or is reasonably expected to receive compensation in the amount of:

(i) Any Civil Penalty Fund payment that the victim has previously received or will receive as a result of a previous allocation from the Civil Penalty Fund to the victim's class;

(ii) Any redress that a final order in a Bureau enforcement action orders to be distributed, credited, or otherwise paid to the victim, and that has not been suspended or waived and that the Chief Financial Officer has not determined to be uncollectible; and

(iii) Any other redress that the Bureau knows that has been distributed, credited, or otherwise paid to the victim, or has been paid to an intermediary for distribution to the victim, to the extent that:

(A) That redress compensates the victim for the same harm as would be compensated by a Civil Penalty Fund payment; and

(B) It is not unduly burdensome, in light of the amounts at stake, to determine the amount of that redress or the extent to which it compensates the victim for the same harm as would be compensated by a Civil Penalty Fund payment.

(3) If the Fund Administrator deems it impracticable to assess the uncompensated harm of individual victims in a class, each individual victim's uncompensated harm will be the victim's

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share of the aggregate uncompensated harm of the victim's class.

(c) *Victims' compensable harm.* Victims' compensable harm for purposes of this part is as follows:

(1) If a final order in a Bureau enforcement action ordered redress for a class of victims, the compensable harm of each victim in the class is equal to that victim's share of the total redress ordered, including any amounts that are suspended or waived.

(2) If a final order in a Bureau enforcement action does not order redress for a class of victims, those victims' compensable harm is as follows:

(i) If the Bureau sought redress for a class of victims but a court or administrative tribunal denied that request for redress in the final order, the victims in that class have no compensable harm.

(ii) Except as provided in paragraph (c)(2)(i) of this section, if the final order in the Bureau enforcement action specifies the amount of the victims' harm, including by prescribing a formula for calculating that harm, each victim's compensable harm is equal to that victim's share of the amount specified.

(iii) Except as provided in paragraph (c)(2)(i) of this section, if the final order in the Bureau enforcement action does not specify the amount of the victims' harm, each victim's compensable harm is equal to the victim's out-of-pocket losses that resulted from the violation or violations for which a civil penalty was imposed, except to the extent such losses are impracticable to determine.

§ 1075.105 Allocating funds from the Civil Penalty Fund—in general.

(a) *In general.* The Fund Administrator will allocate Civil Penalty Fund funds specified in paragraph (c) of this section to classes of victims and to consumer education and financial literacy programs as appropriate according to the schedule established in paragraph (b) of this section and the guidelines established in §§ 1075.106 and 1075.107.

(b) *Schedule for making allocations.* (1) Within 60 days of May 7, 2013, the Fund Administrator will establish, and publish on www.consumerfinance.gov, a

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schedule for allocating funds in the Civil Penalty Fund, in accordance with the following:

(i) The schedule will establish six-month periods and identify the start and end dates of those periods. The start date of one period will be the day immediately after the end date of the preceding period.

(ii) Notwithstanding paragraph (b)(1)(i) of this section, the first and second periods may be longer or shorter than six months to allow future six-month periods to start and end on dates that better serve administrative efficiency. The first and second periods will constitute "six-month periods" under this part regardless of their actual length.

(iii) The start date of the first period is July 21, 2011.

(2) Within 60 days after the end of a six-month period, the Fund Administrator will allocate available funds in the Civil Penalty Fund in accordance with §§ 1075.106 and 1075.107.

(3) If the Civil Penalty Fund Governance Board determines that the schedule established under paragraph (b)(1) of this section should be changed to better serve administrative efficiency, it may change that schedule by directing the Fund Administrator to publish the new schedule on www.consumerfinance.gov. Any new schedule must comply with paragraph (b)(1)(i) of this section. The first period of any new schedule may be shorter or longer than six months. That first period will constitute a "six-month period" under this part regardless of its actual length.

(c) *Funds available for allocation.* The funds available for allocation following the end of a six-month period are those funds that were in the Civil Penalty Fund on the end date of that six-month period, minus:

(1) Any funds already allocated,

(2) Any funds that the Fund Administrator determines are necessary for authorized administrative expenses, and

(3) Any funds collected pursuant to an order that has not yet become a final order.

Consumer Financial Protection Bureau**§ 1075.106****§ 1075.106 Allocating funds to classes of victims.**

(a) *Allocations when there are sufficient funds available to compensate all uncompensated harm.* If the funds available under § 1075.105(c) are sufficient, the Fund Administrator will allocate to each class of victims the amount necessary to compensate fully the uncompensated harm, determined under § 1075.104(b) as of the last day of the most recently concluded six-month period, of all victims in that class to whom it is practicable to make payments.

(b) *Allocations when there are insufficient funds available to compensate all uncompensated harm.* If the funds available under § 1075.105(c) are not sufficient to make the allocations described in paragraph (a) of this section, the Fund Administrator will allocate the available funds to classes of victims as follows:

(1) *Priority to classes of victims from the most recent six-month period.* The Fund Administrator will first allocate funds to classes of victims from the most recently concluded six-month period, as determined under paragraph (b)(2) of this section. If funds remain after allocating to each class of victims from that six-month period the amount necessary to compensate fully the uncompensated harm, determined under § 1075.104(b) as of the last day of the most recently concluded six-month period, of all victims in that class to whom it is practicable to make payments, the Fund Administrator next will allocate funds to classes of victims from the preceding six-month period, and so forth until no funds remain.

(2) *Assigning classes of victims to a six-month period.* For purposes of this paragraph (b), the Fund Administrator will assign each class of victims to the six-month period in which the victims first had uncompensated harm as described in § 1075.104(b). When a class of victims first had uncompensated harm as described in § 1075.104(b) will be determined as follows:

(i) If redress was ordered for a class of victims in a Bureau enforcement action but suspended or waived in whole or in part, the class of victims first had uncompensated harm as described in

§ 1075.104(b) on the date the suspension or waiver became effective.

(ii) If redress was ordered for a class of victims in a Bureau enforcement action but determined by the Chief Financial Officer to be uncollectible in whole or in part, the class of victims first had uncompensated harm as described in § 1075.104(b) on the date the Chief Financial Officer made that determination.

(iii) If no redress was ordered for a class of victims in a Bureau enforcement action, the class of victims first had uncompensated harm as described in § 1075.104(b) on the date the order imposing a civil penalty became a final order.

(c) *No allocation to a class of victims if making payments would be impracticable.* Notwithstanding any other provision in this section, the Fund Administrator will not allocate funds available under § 1075.105(c) to a class of victims if she determines that making payments to that class of victims would be impracticable.

(d) *Fund Administrator's discretion.* (1) Notwithstanding any provision in this part, the Fund Administrator, in her discretion, may depart from the procedures specified by this section, including by declining to make, or altering the amount of, any allocation provided for by this section. Whenever the Fund Administrator exercises this discretion, she will provide the Civil Penalty Fund Governance Board a written explanation of the reason for departing from the procedures specified by this section.

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

§ 1075.107**§ 1075.107 Allocating funds to consumer education and financial literacy programs.**

(a) If funds available under § 1075.105(c) remain after the Fund Administrator allocates funds as described in § 1075.106(a), the Fund Administrator may allocate those remaining funds for consumer education and financial literacy programs.

(b) The Fund Administrator shall not have the authority to allocate funds to particular consumer education or financial literacy programs or otherwise to select the particular consumer education or financial literacy programs for which allocated funds will be used.

§ 1075.108 Distributing payments to victims.

(a) *Designation of a payments administrator.* Upon allocating Civil Penalty Fund funds to a class of victims pursuant to § 1075.106, the Fund Administrator will designate a payments administrator who will be responsible for distributing payments to the victims in that class. A payments administrator may be any person, including a Bureau employee or contractor.

(b) *Distribution plan.* The payments administrator must submit to the Fund Administrator a proposed plan for the distribution of funds allocated to a class of victims. The Fund Administrator will approve, approve with modifications, or disapprove the proposed distribution plan. If the Fund Administrator disapproves a proposed plan, the payments administrator must submit a new proposed plan.

(c) *Contents of plan.* The Fund Administrator will instruct the payments administrator to prepare a distribution plan and may require that plan to include:

(1) Procedures for determining the amount each victim will receive. Such procedures may, but need not, include a process for submitting and approving claims.

(2) Procedures for locating and notifying victims eligible or potentially eligible for payment.

(3) The method or methods by which the payments will be made.

(4) The method or methods by which potentially eligible victims may contact the payments administrator.

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(5) Any other provisions that the Fund Administrator deems appropriate.

(d) *Distribution of payments.* The payments administrator will make payments to victims in a class, except to the extent such payments are impracticable, in accordance with the distribution plan approved under paragraph (b) of this section and subject to the Fund Administrator's supervision.

(e) *Disposition of funds remaining after attempted distribution to a class of victims.* If funds allocated to a class of victims remain after a payments administrator distributes payments to that class, the payments administrator will distribute those remaining funds as follows:

(1) To the extent practicable, the payments administrator will distribute those remaining funds to victims in that class up to the amount of their remaining uncompensated harm as described in § 1075.104(b).

(2) Any remaining funds that cannot be distributed pursuant to paragraph (e)(1) of this section will be returned to the Civil Penalty Fund.

§ 1075.109 When payments to victims are impracticable.

(a) *Individual payments.* Making a payment to an individual victim will be deemed impracticable if:

(1) The payment to the victim would be of such a small amount that the victim would not be likely to redeem the payment;

(2) The payment to the victim is too small to justify the cost of locating the victim and making the payment;

(3) The victim cannot be located with effort that is reasonable in light of the amount of the payment;

(4) The victim does not timely submit information that a distribution plan requires to be submitted before a payment will be made;

(5) The victim does not redeem the payment within a reasonable time; or

(6) The Fund Administrator determines that other circumstances make it unreasonable to make a payment to the victim.

(b) *Payments to a class of victims.* Making payments to a class of victims will be deemed impracticable if:

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(1) The expected aggregate actual payment to the class of victims is too small to justify the costs of locating the victims in the class and making payments to them;

(2) It would be impracticable under paragraph (a) of this section to make a payment to any victim in the class; or

(3) The Fund Administrator determines that other circumstances make it unreasonable to make payments to the class.

§ 1075.110 Reporting requirements.

The Fund Administrator must issue regular reports, on at least an annual basis, that describe how funds in the Civil Penalty Fund have been allocated, the basis for those allocations, and how funds that have been allocated to classes of victims have been distributed. These reports will be made available on www.consumerfinance.gov.

PART 1076—CLAIMS AGAINST THE UNITED STATES

AUTHORITY: 12 U.S.C. 5492(a)(1), (11); 28 U.S.C. 2672; 28 CFR 14.11.

SOURCE: 78 FR 47153, Aug. 5, 2013, unless otherwise noted.

§ 1076.101 Claims against a Bureau employee based on negligence, wrongful act or omission.

(a) *Procedure for filing claims.* A claimant, or the claimant's duly authorized agent or legal representative may present a claim against a Bureau employee based on negligence, or wrongful act or omission, as specified in 28 CFR 14.3. Claimant or claimant's duly authorized agent or legal representative must file with the General Counsel of the Bureau a completed Claim for Damage or Injury (*Standard Form 95*), together with appropriate evidence and information, as specified in 28 CFR 14.4. Standard Form 95 may be obtained at http://www.justice.gov/civil/docs_forms/, or from the CFPB. Claimants also may submit a claim in the form of a letter or any other writing, a written statement, an audio file, a Braille or electronic document, and/or a video, as long as the submission contains all of the requirements of an administrative claim specified in 28 CFR part 14.

Claims should be mailed or delivered to the General Counsel, Legal Division, CFPB, 1700 G Street NW., Washington, DC 20552, or emailed to CFPB_tortclaims@cfpb.gov.

(b) *Determination of claims—(1) Delegation of authority to determine claims.* The General Counsel, and such employees of the Legal Division as the General Counsel may designate are authorized to consider, ascertain, adjust, determine, compromise, and settle claims pursuant to the FTCA, as amended, and the regulations contained in 28 CFR part 14 and in this section.

(2) *Disallowance of claims.* If the General Counsel, or the General Counsel's designee, denies a claim, the General Counsel or designee shall notify the claimant, or the claimant's duly authorized agent or legal representative.

PART 1080—RULES RELATING TO INVESTIGATIONS

Sec.

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- 1080.2 Definitions.
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- 1080.12 Orders requiring witnesses to testify or provide other information and granting immunity.
- 1080.13 Custodians.
- 1080.14 Confidential treatment of demand material and non-public nature of investigations.

AUTHORITY: Pub. L. 111-203, title X, 12 U.S.C. 5481 *et seq.*

SOURCE: 77 FR 39108, June 29, 2012, unless otherwise noted.

§ 1080.1 Scope.

The rules of this part apply to Bureau investigations conducted pursuant to section 1052 of the Dodd-Frank Act, 12 U.S.C. 5562.

§ 1080.2 Definitions.

For the purposes of this part, unless explicitly stated to the contrary:

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Bureau means the Bureau of Consumer Financial Protection.

Bureau investigation means any inquiry conducted by a Bureau investigator for the purpose of ascertaining whether any person is or has been engaged in any conduct that is a violation.

Bureau investigator means any attorney or investigator employed by the Bureau who is charged with the duty of enforcing or carrying into effect any Federal consumer financial law.

Custodian means the custodian or any deputy custodian designated by the Bureau for the purpose of maintaining custody of information produced pursuant to this part.

Director means the Director of the Bureau or a person authorized to perform the functions of the Director in accordance with the law.

Documentary material means the original or any copy of any book, document, record, report, memorandum, paper, communication, tabulation, chart, log, electronic file, or other data or data compilation stored in any medium, including electronically stored information.

Dodd-Frank Act means the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010, as amended, Public Law 111-203 (July 21, 2010), title X, codified at 12 U.S.C. 5481 *et seq.*

Electronically stored information (ESI) means any information stored in any electronic medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.

Office of Enforcement means the office of the Bureau responsible for enforcement of Federal consumer financial law.

Person means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

Violation means any act or omission that, if proved, would constitute a violation of any provision of Federal consumer financial law.

12 CFR Ch. X (1-1-24 Edition)**§ 1080.3 Policy as to private controversies.**

The Bureau shall act only in the public interest and will not initiate an investigation or take other enforcement action when the alleged violation is merely a matter of private controversy and does not tend to affect adversely the public interest.

§ 1080.4 Initiating and conducting investigations.

The Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement have the nondelegable authority to initiate investigations. Bureau investigations are conducted by Bureau investigators designated and duly authorized under section 1052 of the Dodd-Frank Act, 12 U.S.C. 5562, to conduct such investigations. Bureau investigators are authorized to exercise and perform their duties in accordance with the laws of the United States and the regulations of the Bureau.

§ 1080.5 Notification of purpose.

Any person compelled to furnish documentary material, tangible things, written reports or answers to questions, oral testimony, or any combination of such material, answers, or testimony to the Bureau shall be advised of the nature of the conduct constituting the alleged violation that is under investigation and the provisions of law applicable to such violation.

§ 1080.6 Civil investigative demands.

(a) *In general.* In accordance with section 1052(c) of the Act, the Director of the Bureau, the Assistant Director of the Office of Enforcement, and the Deputy Assistant Directors of the Office of Enforcement, have the nondelegable authority to issue a civil investigative demand in any Bureau investigation directing the person named therein to produce documentary material for inspection and copying or reproduction in the form or medium requested by the Bureau; to submit tangible things; to provide a written report or answers to questions; to appear before a designated representative at a designated time and place to testify about documentary material, tangible things, or other information; and to

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furnish any combination of such material, things, answers, or testimony.

(1) *Documentary material.* (i) Civil investigative demands for the production of documentary material shall describe each class of material to be produced with such definiteness and certainty as to permit such material to be fairly identified, prescribe a return date or dates that will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction, and identify the custodian to whom such material shall be made available. Documentary material for which a civil investigative demand has been issued shall be made available as prescribed in the civil investigative demand.

(ii) Production of documentary material in response to a civil investigative demand shall be made under a sworn certificate, in such form as the demand designates, by the person to whom the demand is directed or, if not a natural person, by any person having knowledge of the facts and circumstances relating to such production, to the effect that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian.

(2) *Tangible things.* (i) Civil investigative demands for tangible things shall describe each class of tangible things to be produced with such definiteness and certainty as to permit such things to be fairly identified, prescribe a return date or dates which will provide a reasonable period of time within which the things so demanded may be assembled and submitted, and identify the custodian to whom such things shall be submitted.

(ii) Submissions of tangible things in response to a civil investigative demand shall be made under a sworn certificate, in such form as the demand designates, by the person to whom the demand is directed or, if not a natural person, by any person having knowledge of the facts and circumstances relating to such production, to the effect that all of the tangible things required by the demand and in the possession, custody, or control of the person to

whom the demand is directed have been submitted to the custodian.

(3) *Written reports or answers to questions.* (i) Civil investigative demands for written reports or answers to questions shall propound with definiteness and certainty the reports to be produced or the questions to be answered, prescribe a date or dates at which time written reports or answers to questions shall be submitted, and identify the custodian to whom such reports or answers shall be submitted.

(ii) Each reporting requirement or question in a civil investigative demand shall be answered separately and fully in writing under oath. Responses to a civil investigative demand for a written report or answers to questions shall be made under a sworn certificate, in such form as the demand designates, by the person to whom the demand is directed or, if not a natural person, by any person responsible for answering each reporting requirement or question, to the effect that all of the information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted to the custodian.

(4) *Oral testimony.* (i) Civil investigative demands for the giving of oral testimony shall prescribe a date, time, and place at which oral testimony shall be commenced, and identify a Bureau investigator who shall conduct the investigation and the custodian to whom the transcript of such investigation shall be submitted. Oral testimony in response to a civil investigative demand shall be taken in accordance with the procedures for investigational hearings prescribed by §§ 1080.7 and 1080.9 of this part.

(ii) Where a civil investigative demand requires oral testimony from an entity, the civil investigative demand shall describe with reasonable particularity the matters for examination and the entity must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf. Unless a single individual is designated by the entity, the entity must designate the matters on which each designee will testify.

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The individuals designated must testify about information known or reasonably available to the entity and their testimony shall be binding on the entity.

(b) *Manner and form of production of ESI.* When a civil investigative demand requires the production of ESI, it shall be produced in accordance with the instructions provided by the Bureau regarding the manner and form of production. Absent any instructions as to the form for producing ESI, ESI must be produced in the form in which it is ordinarily maintained or in a reasonably usable form.

(c) *Meet and confer.* The recipient of a civil investigative demand shall meet and confer with a Bureau investigator within 10 calendar days after receipt of the demand or before the deadline for filing a petition to modify or set aside the demand, whichever is earlier, to discuss and attempt to resolve all issues regarding compliance with the civil investigative demand. The Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement may authorize the waiver of this requirement for routine third-party civil investigative demands or in other circumstances where he or she determines that a meeting is unnecessary. The meeting may be in person or by telephone.

(1) *Personnel.* The recipient must make available at the meeting personnel with the knowledge necessary to resolve any issues relevant to compliance with the demand. Such personnel could include individuals knowledgeable about the recipient's information or records management systems and/or the recipient's organizational structure.

(2) *ESI.* If the civil investigative demand seeks ESI, the recipient shall ensure that a person familiar with its ESI systems and methods of retrieval participates in the meeting.

(3) *Petitions.* The Bureau will not consider petitions to set aside or modify a civil investigative demand unless the recipient has meaningfully engaged in the meet and confer process described in this subsection and will consider only issues raised during the meet and confer process.

(d) *Compliance.* The Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement are authorized to negotiate and approve the terms of satisfactory compliance with civil investigative demands and, for good cause shown, may extend the time prescribed for compliance.

(e) *Petition for order modifying or setting aside demand—in general.* Any petition for an order modifying or setting aside a civil investigative demand shall be filed with the Executive Secretary of the Bureau with a copy to the Assistant Director of the Office of Enforcement within 20 calendar days after service of the civil investigative demand, or, if the return date is less than 20 calendar days after service, prior to the return date. Such petition shall set forth all factual and legal objections to the civil investigative demand, including all appropriate arguments, affidavits, and other supporting documentation. The attorney who objects to a demand must sign any objections.

(1) *Statement.* Each petition shall be accompanied by a signed statement representing that counsel for the petitioner has conferred with counsel for the Bureau pursuant to section 1080.6(c) in a good-faith effort to resolve by agreement the issues raised by the petition and has been unable to reach such an agreement. If some of the matters in controversy have been resolved by agreement, the statement shall specify the matters so resolved and the matters remaining unresolved. The statement shall recite the date, time, and place of each such meeting between counsel, and the names of all parties participating in each such meeting.

(2) *Extensions of time.* The Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement are authorized to rule upon requests for extensions of time within which to file such petitions. Requests for extensions of time are disfavored.

(3) *Bureau investigator response.* Bureau investigators may, without serving the petitioner, provide the Director with a statement setting forth any factual and legal response to a petition for

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an order modifying or setting aside the demand.

(4) *Disposition.* The Director has the authority to rule upon a petition for an order modifying or setting aside a civil investigative demand. The order may be served on the petitioner via email, facsimile, or any other method reasonably calculated to provide notice of the order to the petitioner.

(f) *Stay of compliance period.* The timely filing of a petition for an order modifying or setting aside a civil investigative demand shall stay the time permitted for compliance with the portion challenged. If the petition is denied in whole or in part, the ruling will specify a new return date.

(g) *Public disclosure.* All such petitions and the Director's orders in response to those petitions are part of the public records of the Bureau unless the Bureau determines otherwise for good cause shown. Any showing of good cause must be made no later than the time the petition is filed.

§ 1080.7 Investigational hearings.

(a) Investigational hearings, as distinguished from hearings in adjudicative proceedings, may be conducted pursuant to a civil investigative demand for the giving of oral testimony in the course of any Bureau investigation, including inquiries initiated for the purpose of determining whether or not a respondent is complying with an order of the Bureau.

(b) Investigational hearings shall be conducted by any Bureau investigator for the purpose of hearing the testimony of witnesses and receiving documentary material, tangible things, or other information relating to any subject under investigation. Such hearings shall be under oath or affirmation and stenographically reported, and a transcript thereof shall be made a part of the record of the investigation. The Bureau investigator conducting the investigational hearing also may direct that the testimony be recorded by audio, audiovisual, or other means, in which case the recording shall be made a part of the record of the investigation as well.

(c) In investigational hearings, the Bureau investigators shall exclude from the hearing room all persons ex-

cept the person being examined, his or her counsel, the officer before whom the testimony is to be taken, any investigator or representative of an agency with which the Bureau is engaged in a joint investigation, and any individual transcribing or recording such testimony. At the discretion of the Bureau investigator, and with the consent of the person being examined, persons other than those listed in this paragraph may be present in the hearing room. The Bureau investigator shall certify or direct the individual transcribing the testimony to certify on the transcript that the witness was duly sworn and that the transcript is a true record of the testimony given by the witness. A copy of the transcript shall be forwarded promptly by the Bureau investigator to the custodian designated in section 1080.13.

§ 1080.8 Withholding requested material.

(a) Any person withholding material responsive to a civil investigative demand or any other request for production of material shall assert a claim of privilege not later than the date set for the production of material. Such person shall, if so directed in the civil investigative demand or other request for production, submit, together with such claim, a schedule of the items withheld which states, as to each such item, the type, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item; and the specific grounds for claiming that the item is privileged. The person who submits the schedule and the attorney stating the grounds for a claim that any item is privileged must sign it.

(b) A person withholding material solely for reasons described in this subsection shall comply with the requirements of this subsection in lieu of filing a petition for an order modifying or setting aside a civil investigative demand pursuant to section 1080.6(e).

(c) Disclosure of privileged or protected information or communications produced pursuant to a civil investigative demand shall be handled as follows:

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(1) The disclosure of privileged or protected information or communications shall not operate as a waiver with respect to the Bureau if:

- (i) The disclosure was inadvertent;
- (ii) The holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (iii) The holder promptly took reasonable steps to rectify the error, including notifying a Bureau investigator of the claim of privilege or protection and the basis for it.

(2) After being notified, the Bureau investigator must promptly return, sequester, or destroy the specified information and any copies; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if he or she disclosed it before being notified; and, if appropriate, may sequester such material until such time as a hearing officer or court rules on the merits of the claim of privilege or protection. The producing party must preserve the information until the claim is resolved.

(3) The disclosure of privileged or protected information or communications shall waive the privilege or protection with respect to the Bureau as to undisclosed information or communications only if:

- (i) The waiver is intentional;
- (ii) The disclosed and undisclosed information or communications concern the same subject matter; and
- (iii) They ought in fairness to be considered together.

§ 1080.9 Rights of witnesses in investigations.

(a) Any person compelled to submit documentary material, tangible things, or written reports or answers to questions to the Bureau, or to testify in an investigational hearing, shall be entitled to retain a copy or, on payment of lawfully prescribed costs, request a copy of the materials, things, reports, or written answers submitted, or a transcript of his or her testimony. The Bureau, however, may for good cause deny such a request and limit the witness to inspection of the official transcript of the testimony. Upon completion of transcription of the testimony of the witness, the witness shall be of-

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ferred an opportunity to read the transcript of his or her testimony. Any changes by the witness shall be entered and identified upon the transcript by the Bureau investigator with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness and submitted to the Bureau unless the witness cannot be found, is ill, waives in writing his or her right to signature, or refuses to sign. If the signed transcript is not submitted to the Bureau within 30 calendar days of the witness being afforded a reasonable opportunity to review it, the Bureau investigator, or the individual transcribing the testimony acting at the Bureau investigator's direction, shall sign the transcript and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with any reasons given for the failure to sign.

(b) Any witness compelled to appear in person at an investigational hearing may be accompanied, represented, and advised by counsel as follows:

(1) Counsel for a witness may advise the witness, in confidence and upon the initiative of either counsel or the witness, with respect to any question asked of the witness where it is claimed that a witness is privileged to refuse to answer the question. Counsel may not otherwise consult with the witness while a question directed to the witness is pending.

(2) Any objections made under the rules in this part shall be made only for the purpose of protecting a constitutional or other legal right or privilege, including the privilege against self-incrimination. Neither the witness nor counsel shall otherwise object or refuse to answer any question. Any objection during an investigational hearing shall be stated concisely on the record in a nonargumentative and non-suggestive manner. Following an objection, the examination shall proceed and the testimony shall be taken, except for testimony requiring the witness to divulge information protected by the claim of privilege or work product.

(3) Counsel for a witness may not, for any purpose or to any extent not allowed by paragraphs (b)(1) and (2) of

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this section, interrupt the examination of the witness by making any objections or statements on the record. Petitions challenging the Bureau's authority to conduct the investigation or the sufficiency or legality of the civil investigative demand shall be addressed to the Bureau in advance of the hearing in accordance with § 1080.6(e). Copies of such petitions may be filed as part of the record of the investigation with the Bureau investigator conducting the investigational hearing, but no arguments in support thereof will be allowed at the hearing.

(4) Following completion of the examination of a witness, counsel for the witness may, on the record, request that the Bureau investigator conducting the investigational hearing permit the witness to clarify any of his or her answers. The grant or denial of such request shall be within the sole discretion of the Bureau investigator conducting the hearing.

(5) The Bureau investigator conducting the hearing shall take all necessary action to regulate the course of the hearing to avoid delay and to prevent or restrain disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language. Such Bureau investigator shall, for reasons stated on the record, immediately report to the Bureau any instances where an attorney has allegedly refused to comply with his or her obligations under the rules in this part, or has allegedly engaged in disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language in the course of the hearing. The Bureau will thereupon take such further action, if any, as the circumstances warrant, including actions consistent with those described in 12 CFR 1081.107(c) to suspend or disbar the attorney from further practice before the Bureau or exclude the attorney from further participation in the particular investigation.

§ 1080.10 Noncompliance with civil investigative demands.

(a) In cases of failure to comply in whole or in part with Bureau civil investigative demands, appropriate action may be initiated by the Bureau, including actions for enforcement.

(b) The Director, the Assistant Director of the Office of Enforcement, and the General Counsel of the Bureau are authorized to:

(1) Institute, on behalf of the Bureau, an enforcement proceeding in the district court of the United States for any judicial district in which a person resides, is found, or transacts business, in connection with the failure or refusal of such person to comply with, or to obey, a civil investigative demand in whole or in part if the return date or any extension thereof has passed; and

(2) Seek civil contempt or other appropriate relief in cases where a court order enforcing a civil investigative demand has been violated.

§ 1080.11 Disposition.

(a) When the facts disclosed by an investigation indicate that an enforcement action is warranted, further proceedings may be instituted in Federal or State court or pursuant to the Bureau's administrative adjudicatory process. Where appropriate, the Bureau also may refer investigations to appropriate Federal, State, or foreign governmental agencies.

(b) When the facts disclosed by an investigation indicate that an enforcement action is not necessary or would not be in the public interest, the investigational file will be closed. The matter may be further investigated, at any time, if circumstances so warrant.

(c) The Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement are authorized to close Bureau investigations.

§ 1080.12 Orders requiring witnesses to testify or provide other information and granting immunity.

The Director has the nondelegable authority to request approval from the Attorney General of the United States for the issuance of an order requiring a witness to testify or provide other information and granting immunity under 18 U.S.C. 6004.

§ 1080.13 Custodians.

(a) The Bureau shall designate a custodian and one or more deputy custodians for material to be delivered

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pursuant to a civil investigative demand in an investigation. The custodian shall have the powers and duties prescribed by 12 CFR 1070.3 and section 1052 of the Act, 12 U.S.C. 5562. Deputy custodians may perform all of the duties assigned to custodians.

(b) Material produced pursuant to a civil investigative demand, while in the custody of the custodian, shall be for the official use of the Bureau in accordance with the Act; but such material shall upon reasonable notice to the custodian be made available for examination by the person who produced such material, or his or her duly authorized representative, during regular office hours established for the Bureau.

§ 1080.14 Confidential treatment of demand material and non-public nature of investigations.

(a) Documentary materials, written reports, answers to questions, tangible things or transcripts of oral testimony the Bureau receives in any form or format pursuant to a civil investigative demand are subject to the requirements and procedures relating to the disclosure of records and information set forth in part 1070 of this title.

(b) Bureau investigations generally are non-public. Bureau investigators may disclose the existence of an investigation to potential witnesses or third parties to the extent necessary to advance the investigation.

PART 1081—RULES OF PRACTICE FOR ADJUDICATION PROCEEDINGS

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AUTHORITY: 12 U.S.C. 5512(b)(1), 5563(e).

SOURCE: 87 FR 10034, Feb. 22, 2022, unless otherwise noted.

Subpart A—General Rules

§ 1081.100 Scope of the rules of practice.

This part prescribes rules of practice and procedure applicable to adjudication proceedings authorized by section 1053 of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5563). The rules of practice in this part do not govern the conduct of Bureau investigations, investigational hearings or other proceedings that do not arise from proceedings after a notice of charges.

§ 1081.101 Expedition and fairness of proceedings.

To the extent practicable, consistent with requirements of law, the Bureau's policy is to conduct such adjudication proceedings fairly and expeditiously. In the conduct of such proceedings, the hearing officer and counsel for all parties must make every effort at each stage of a proceeding to avoid delay. With the consent of the parties, the Director, at any time, or the hearing officer at any time prior to the filing of the hearing officer's preliminary findings and conclusions, may change any time limit prescribed by this part.

§ 1081.102 Rules of construction.

For the purposes of this part:

- (a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;
(b) Any use of a masculine, feminine, or neutral gender encompasses all three, if such use would be appropriate;
(c) Unless context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party; and

(d) To the extent this part uses terms defined by section 1002 of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5481), such terms have the same meaning as set forth therein, unless defined differently by § 1081.103.

§ 1081.103 Definitions.

For the purposes of this part, unless explicitly stated to the contrary:

Adjudication proceeding means a proceeding conducted pursuant to section 1053 of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5563) and intended to lead to the formulation of a final order other than a temporary order to cease and desist issued pursuant to section 1053(c) of that Act (12 U.S.C. 5563(c)).

Bureau means the Consumer Financial Protection Bureau.

Chief hearing officer means the hearing officer charged with assigning hearing officers to specific proceedings, in the event there is more than one hearing officer available to the Bureau.

Counsel means any person representing a party pursuant to § 1081.107.

Decisional employee means any employee of the Bureau who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Director or the hearing officer, respectively, in preparing orders, preliminary findings and conclusions, decisions, and other documents under this part.

Director means the Director of the Bureau or a person authorized to perform the functions of the Director in accordance with the law.

Enforcement counsel means any individual who files a notice of appearance as counsel on behalf of the Office of Enforcement in an adjudication proceeding.

Final order means an order issued by the Bureau with or without the consent of the respondent, which has become final, without regard to the pendency of any petition for reconsideration or review.

General Counsel means the General Counsel of the Bureau or any Bureau employee to whom the General Counsel has delegated authority to act under this part.

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Hearing officer means an administrative law judge or any other person duly authorized to preside at a hearing.

Notice of charges means the pleading that commences an adjudication proceeding, as described in § 1081.200, except that it does not include a stipulation and consent order under § 1081.200(d).

Office of Administrative Adjudication means the office of the Bureau responsible for conducting adjudication proceedings.

Office of Enforcement means the office of the Bureau responsible for enforcement of Federal consumer financial law or other laws enforceable by the Bureau.

Party means the Office of Enforcement, any person named as a party in any notice of charges issued pursuant to this part, and, to the extent applicable, any person who intervenes in the proceeding pursuant to § 1081.119(a) to seek a protective order.

Person means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

Person employed by the Bureau means Bureau employees, contractors, agents, and others acting for or on behalf of the Bureau, or at its direction, including consulting experts.

Respondent means the party named in the notice of charges.

State means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, or the United States Virgin Islands or any federally recognized Indian tribe, as defined by the Secretary of the Interior under section 104(a) of the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a-1(a).

§ 1081.104 Authority of the hearing officer.

(a) *General rule.* The hearing officer will have all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay. No provision of this part may be construed to limit the powers of the hearing officers provided by the Ad-

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ministrative Procedure Act, 5 U.S.C. 556, 557.

(b) *Powers.* The powers of the hearing officer include but are not limited to the power:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas *duces tecum*, and protective orders, as authorized by this part, and to quash or modify any such subpoenas or orders;

(3) To take depositions or cause depositions to be taken;

(4) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(5) To regulate the course of a proceeding and the conduct of parties and their counsel;

(6) To reject written submissions that materially fail to comply with the requirements of this part, and to deny confidential status to documents and testimony without prejudice until a party complies with all relevant rules of this chapter;

(7) To hold conferences for settlement, simplification of the issues, or any other proper purpose and require the attendance at any such conference of at least one representative of each party who has authority to negotiate concerning the resolution of issues in controversy;

(8) To inform the parties as to the availability of one or more alternative means of dispute resolution, and to encourage the use of such methods;

(9) To certify questions to the Director for the Director's determination in accordance with the rules of this part;

(10) To consider and rule upon, as justice may require, all procedural and other motions appropriate in adjudication proceedings;

(11) To issue and file preliminary findings and conclusions;

(12) To recuse oneself by motion made by a party or on the hearing officer's own motion;

(13) To issue such sanctions against parties or their counsel as may be necessary to deter repetition of sanctionable conduct or comparable conduct by others similarly situated,

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as provided for in this part or as otherwise necessary to the appropriate conduct of hearings and related proceedings, provided that no sanction will be imposed before providing the sanctioned person an opportunity to show cause why no such sanction should issue; and

(14) To do all other things necessary and appropriate to discharge the duties of a presiding officer.

§ 1081.105 Assignment, substitution, performance, disqualification of hearing officer.

(a) *How assigned.* In the event that more than one hearing officer is available to the Bureau for the conduct of proceedings under this part, the presiding hearing officer will be designated by the chief hearing officer, who will notify the parties of the hearing officer designated.

(b) *Interference.* Hearing officers will not be subject to the supervision or direction of, or responsible to, any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for the Bureau, and all direction by the Bureau to the hearing officer concerning any adjudication proceedings must appear in and be made part of the record.

(c) *Disqualification of hearing officers.* (1) When a hearing officer deems the hearing officer disqualified to preside in a particular proceeding, the hearing officer must issue a notice stating that the hearing officer is withdrawing from the matter and setting forth the reasons therefore.

(2) Any party who has a reasonable, good faith basis to believe that a hearing officer has a personal bias, or is otherwise disqualified from hearing a case, may make a motion to the hearing officer that the hearing officer withdraw. The motion must be accompanied by an affidavit setting forth the facts alleged to constitute grounds for disqualification. Such motion must be filed at the earliest practicable time after the party learns, or could reasonably have learned, of the alleged grounds for disqualification. If the hearing officer does not disqualify the hearing officer within 14 days, the hearing officer must certify the motion to the Director pursuant to § 1081.211,

together with any statement the hearing officer may wish to have considered by the Director. The Director must promptly determine the validity of the grounds alleged, either directly or on the report of another hearing officer appointed to conduct a hearing for that purpose, and will either direct the reassignment of the matter or confirm the hearing officer's continued role in the matter.

(d) *Unavailability of hearing officer.* If the hearing officer withdraws or is otherwise unable to perform the duties of the hearing officer, the chief hearing officer or the Director will designate another hearing officer to serve.

§ 1081.106 Deadlines.

The deadlines for action by the hearing officer established by §§ 1081.203, 1081.205, 1081.211, 1081.212, and 1081.400, or elsewhere in this part, confer no substantive rights on respondents.

§ 1081.107 Appearance and practice in adjudication proceedings.

(a) *Appearance before the Bureau or a hearing officer—(1) By attorneys.* Any member in good standing of the bar of the highest court of any State may represent others before the Bureau if such attorney is not currently suspended or debarred from practice before the Bureau or by a court of the United States or of any State.

(2) *By non-attorneys.* So long as such individual is not currently suspended or debarred from practice before the Bureau:

(i) An individual may appear on the individual's own behalf;

(ii) A member of a partnership may represent the partnership;

(iii) A duly authorized officer of a corporation, trust, or association may represent the corporation, trust, or association; and

(iv) A duly authorized officer or employee of any government unit, agency, or authority may represent that unit, agency, or authority.

(3) *Notice of appearance.* Any individual acting as counsel on behalf of a party, including Enforcement counsel, must file a notice of appearance at or

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before the time that the individual submits papers or otherwise appears on behalf of a party in the adjudication proceeding. The notice of appearance must include a written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (2) of this section and is authorized to represent the particular party, and if applicable, must include the attorney's jurisdiction of admission or qualification, attorney identification number, and a statement by the appearing attorney attesting to the attorney's good standing within the legal profession. By filing a notice of appearance on behalf of a party in an adjudication proceeding, the counsel agrees and represents that counsel is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, counsel will, if required by the hearing officer, continue to accept service until a new counsel has filed a notice of appearance or until the represented party indicates that the party will proceed on a pro se basis. The notice of appearance must provide the representative's email address, telephone number, and business address and, if different from the representative's addresses, electronic or other address at which the represented party may be served.

(b) *Sanctions.* Dilatory, obstructionist, egregious, contemptuous, or contumacious conduct at any phase of any adjudication proceeding may be grounds for exclusion or suspension of counsel from the proceeding. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(c) *Standards of conduct; disbarment.* (1) All attorneys practicing before the Bureau must conform to the standards of ethical conduct required by the bars of which the attorneys are members.

(2) If for good cause shown, the Director believes that any attorney is not conforming to such standards, or that an attorney or counsel to a party has otherwise engaged in conduct warranting disciplinary action, the Director may issue an order requiring such person to show cause why the attorney should not be suspended or disbarred from practice before the Bureau. The alleged offender will be granted due op-

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portunity to be heard in the alleged offender's own defense and may be represented by counsel. Thereafter, if warranted by the facts, the Director may issue against the attorney or counsel an order of reprimand, suspension, or disbarment.

§ 1081.108 Good faith certification.

(a) *General requirement.* Every filing or submission of record following the issuance of a notice of charges must be signed by at least one counsel of record in counsel's individual name and must state counsel's address, email address, and telephone number. A party who acts as the party's own counsel must sign the party's individual name and state the party's address, email address, and telephone number on every filing or submission of record. Papers filed by electronic transmission may be signed with an “/s/” notation, which will be deemed the signature of the party or representative whose name appears below the signature line.

(b) *Effect of signature.* (1) The signature of counsel or a party constitutes a certification that: The counsel or party has read the filing or submission of record; to the best of one's knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the hearing officer must strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the filer.

(c) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of one's knowledge, information, and belief formed after reasonable inquiry, one's statements are well-grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and

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are not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(d) *Sanctions.* Counsel or a party that fails to abide by the requirements of this section may be subject to sanctions pursuant to § 1081.104(b)(13).

§ 1081.109 Conflict of interest.

(a) *Conflict of interest in representation.* No person may appear as counsel for another person in an adjudication proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The hearing officer may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver.* If any person appearing as counsel represents two or more parties to an adjudication proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by § 1081.107(a)(3):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

(2) That each such party and/or non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any conflicts of interest during the course of the proceeding.

§ 1081.110 Ex parte communication.

(a) *Definitions.* (1) For purposes of this section, *ex parte communication* means any material oral or written communication relevant to the merits of an adjudication proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person not employed by the Bureau (including such person's counsel); and

(ii) The hearing officer handling the proceeding, the Director, or a decisional employee.

(2) A request for status of the proceeding does not constitute an *ex parte communication*.

(3) *Pendency of an adjudication proceeding* means the time from when the Bureau issues a notice of charges, unless the person responsible for the communication has knowledge that a notice of charges will be issued, in which case the pendency of an adjudication will commence at the time of that person's acquisition of such knowledge, or from when an order by a court of competent jurisdiction remanding a Bureau decision and order for further proceedings becomes effective, until the time the Director enters a final decision and order in the proceeding and the time permitted to seek reconsideration of that decision and order has elapsed. For purposes of this section, an order of remand by a court of competent jurisdiction is deemed to become effective when the Bureau's right to petition for review or for a writ of certiorari has lapsed without a petition having been filed, or when such a petition has been denied. If a petition for reconsideration of a Bureau decision is filed pursuant to § 1081.406, the matter will be considered to be a pending adjudication proceeding until the time the Bureau enters an order disposing of the petition.

(b) *Prohibited ex parte communications.* During the pendency of an adjudication proceeding, except to the extent required for the disposition of *ex parte* matters as authorized by law or as otherwise authorized by this part:

(1) No interested person not employed by the Bureau will make or knowingly cause to be made to the Director, or to the hearing officer, or to any decisional employee, an *ex parte communication*; and

(2) The Director, the hearing officer, or any decisional employee will not make or knowingly cause to be made to any interested person not employed by the Bureau any *ex parte communication*.

(c) *Procedure upon occurrence of ex parte communication.* If an *ex parte communication* prohibited by paragraph (b) of this section is received by

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the hearing officer, the Director, or any decisional employee, that person must cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding will have an opportunity, within 14 days of receipt of service of the ex parte communication, to file responses thereto and to recommend any sanctions, in accordance with paragraph (d) of this section, that they believe to be appropriate under the circumstances.

(d) *Sanctions*—(1) *Adverse action on claim*. Upon receipt of an ex parte communication knowingly made or knowingly caused to be made by a party and prohibited by paragraph (b) of this section, the Director or hearing officer, as appropriate, may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why the party's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(2) *Discipline of persons practicing before the Bureau*. The Director may, to the extent not prohibited by law, censure, suspend, or revoke the privilege to practice before the Bureau of any person who makes, or solicits the making of, an unauthorized ex parte communication.

(e) *Separation of functions*. Except to the extent required for the disposition of ex parte matters as authorized by law, the hearing officer may not consult a person or party on any matter relevant to the merits of the adjudication, unless upon notice and opportunity for all parties to participate. An employee or agent engaged in the performance of investigative or prosecuting functions for the Bureau in a case, other than the Director, may not, in that or a factually related case, participate or advise in the decision, preliminary findings and conclusions, or agency review of the preliminary findings and conclusions, except as witness or counsel in public proceedings.

§ 1081.111 Filing of papers.

(a) *Filing*. The following papers must be filed by parties in an adjudication proceeding: The notice of charges, proof of service of the notice of charges, notices of appearance, answer, the disclosure statement required under § 1081.201(e), motion, brief, request for issuance or enforcement of a subpoena, response, opposition, reply, notice of appeal, or petition for reconsideration. The hearing officer or Director (as applicable) will file all written orders, rulings, notices, or requests. Any papers required to be filed must be filed with the Office of Administrative Adjudication, except as otherwise provided in this section.

(b) *Manner of filing*. Unless otherwise specified by the Director or the hearing officer, filing may be accomplished by:

(1) Electronic transmission in accordance with guidance issued by the Office of Administrative Adjudication; or

(2) Any of the following methods if respondent demonstrates, in accordance with guidance issued by the Office of Administrative Adjudication, that electronic filing is not practicable:

(i) Personal delivery;

(ii) Delivery to a reliable commercial courier service or overnight delivery service; or

(iii) Mailing the papers through the U.S. Postal Service by First Class Mail, Registered Mail, Certified Mail or Express Mail.

(c) *Papers filed in an adjudication proceeding are presumed to be public*. Unless otherwise ordered by the Director or the hearing officer, all papers filed in connection with an adjudication proceeding are presumed to be open to the public. The Bureau may provide public access to and publish any papers filed in an adjudication proceeding except if there is a pending motion for a protective order filed pursuant to § 1081.119, or if there is an order from the Director, hearing officer, or a Federal court authorizing the confidential treatment of the papers filed.

§ 1081.112 Formal requirements as to papers filed.

(a) *Form*. All papers filed by parties must:

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(1) Set forth the name, address, telephone number, and email address of the counsel or party making the filing;

(2) Be double-spaced (except for single-spaced footnotes and single-spaced indented quotations) and printed or typewritten on 8½ x 11 inch paper in 12-point or larger font;

(3) Include at the head of the paper, or on a title page, a caption setting forth the title of the case, the docket number of the proceeding, and a brief descriptive title indicating the purpose of the paper;

(4) Be paginated with margins at least one inch wide; and

(5) If filed by other than electronic means, be stapled, clipped, or otherwise fastened in a manner that lies flat when opened.

(b) *Signature.* All papers must be dated and signed as provided in § 1081.108.

(c) *Number of copies.* Unless otherwise specified by the Director or the hearing officer, one copy of all documents and papers must be filed if filing is by electronic transmission. If filing is accomplished by any other means, an original and one copy of all documents and papers must be filed, except that only one copy of transcripts of testimony and exhibits must be filed.

(d) *Authority to reject document for filing.* The Office of Administrative Adjudication or the hearing officer may reject a document for filing that materially fails to comply with this part.

(e) *Sensitive personal information.* Sensitive personal information means an individual's Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver's license number, State-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual's medical records. Sensitive personal information must not be included in, and must be redacted or omitted from, filings unless the person filing the paper determines that such information is relevant or otherwise necessary for the conduct of the proceeding. If the person filing a paper determines the sensitive personal information contained in the paper is relevant or necessary to the

proceeding, the person must file the paper in accordance with paragraph (f) of this section, including filing an expurgated copy of the paper with the sensitive personal information redacted.

(f) *Confidential treatment of information in certain filings.* A party seeking confidential treatment of information contained in a filing must contemporaneously file either a motion requesting such treatment in accordance with § 1081.119 or a copy of the order from the Director, hearing officer, or Federal court authorizing such confidential treatment. The filing must comply with any applicable order of the Director or hearing officer and must be accompanied by:

(1) A complete, sealed copy of the documents containing the materials as to which confidential treatment is sought, with the allegedly confidential material clearly marked as such, and with the first page of the document labeled "Under Seal." If the movant seeks or has obtained a protective order against disclosure to other parties as well as the public, copies of the documents will not be served on other parties; and

(2) An expurgated copy of the materials as to which confidential treatment is sought, with the allegedly confidential materials redacted. The redacted version must indicate any omissions with brackets or ellipses, and its pagination and depiction of text on each page must be identical to that of the sealed version.

(g) *Certificate of service.* Any papers filed in an adjudication proceeding must contain proof of service on all other parties or their counsel in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. The certificate of service must be affixed to the papers filed and signed in accordance with § 1081.108.

§ 1081.113 Service of papers.

(a) *When required.* In every adjudication proceeding, each paper required to be filed by § 1081.111 must be served upon each party in the proceeding in accordance with the provisions of this section; provided, however, that absent

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an order to the contrary, no service is required for motions which are to be heard ex parte.

(b) *Upon a person represented by counsel.* Whenever service is required to be made upon a person represented by counsel who has filed a notice of appearance pursuant to §1081.107(a)(3), service shall be made pursuant to paragraph (c) of this section upon counsel, unless service upon the person represented is ordered by the Director or the hearing officer, as appropriate.

(c) *Method of service.* Except as provided in paragraph (d) of this section or as otherwise ordered by the hearing officer or the Director, service must be made by delivering a copy of the filing by one of the following methods:

(1) Transmitting the papers by electronic transmission where the persons so serving each other have consented to service by specified electronic transmission and provided the Bureau and the parties with notice of the means for service by electronic transmission (e.g., email address or facsimile number);

(2) Handing a copy to the person required to be served; or leaving a copy at the person's office with a clerk or other person in charge thereof, or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling or usual place of abode with some person of suitable age and discretion then residing therein;

(3) Mailing the papers through the U.S. Postal Service by First Class Mail, Registered Mail, Certified Mail or Express Mail delivery addressed to the person; or

(4) Sending the papers through a third-party commercial courier service or express delivery service.

(d) *Service of certain papers by the Office of Enforcement or the Office of Administrative Adjudication—(1) Service of a notice of charges by the Office of Enforcement—(i) To individuals.* Notice of a proceeding shall be made to an individual by delivering a copy of the notice of charges to the individual or to an agent authorized by appointment or by law to receive such notice. Delivery, for purposes of this paragraph (d)(1)(i), means handing a copy of the notice to

the individual; or leaving a copy at the individual's office with a clerk or other person in charge thereof; or leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or sending a copy of the notice addressed to the individual through the U.S. Postal Service by Registered Mail, Certified Mail or Express Mail delivery, or by third-party commercial carrier, for overnight delivery and obtaining a confirmation of receipt.

(ii) *To corporations or entities.* Notice of a proceeding must be made to a person other than a natural person by delivering a copy of the notice of charges to an officer, managing or general agent, or any other agent authorized by appointment or law to receive such notice, by any method specified in paragraph (d)(1)(i) of this section.

(iii) *Upon persons registered with the Bureau.* In addition to any other method of service specified in paragraph (d)(1)(i) or (ii) of this section, notice may be made to a person currently registered with the Bureau by sending a copy of the notice of charges addressed to the most recent business address shown on the person's registration form by U.S. Postal Service certified, registered, or Express Mail and obtaining a confirmation of receipt or attempted delivery.

(iv) *Upon persons in a foreign country.* Notice of a proceeding to a person in a foreign country may be made by any method specified in paragraph (d)(1) of this section, or by any other method reasonably calculated to give notice, provided that the method of service used is not prohibited by the law of the foreign country.

(v) *Record of service.* The Office of Enforcement will maintain and file a record of service of the notice of charges on parties, identifying the party given notice, the method of service, the date of service, the address to which service was made, and the person who made service. If service is made in person, the certificate of service must state, if available, the name of the individual to whom the notice of charges was given. If service is made by U.S. Postal Service Registered Mail, Certified Mail, or Express Mail, the Office

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of Enforcement will maintain the confirmation of receipt or attempted delivery. If service is made to an agent authorized by appointment to receive service, the certificate of service must be accompanied by evidence of the appointment.

(vi) *Waiver of service.* In lieu of service as set forth in paragraph (d)(1)(i) or (ii) of this section, the party may be provided a copy of the notice of charges by First Class Mail or other reliable means if a waiver of service is obtained from the party and placed in the record.

(2) *Service of papers by the Office of Administrative Adjudication.* Unless otherwise ordered by the hearing officer or Director, the Office of Administrative Adjudication must serve papers filed by the hearing officer or Director promptly on each party pursuant to any method of service authorized under paragraph (c) or (d)(1) of this section. Unless otherwise ordered by the hearing officer or Director, if a party is represented by counsel who has filed a notice of appearance pursuant to § 1081.107(a)(3), the Office of Administrative Adjudication serves that party by serving its counsel.

§ 1081.114 Construction of time limits.

(a) *General rule.* In computing any time period prescribed by this part, by order of the Director or a hearing officer, or by any applicable statute, exclude the day of the event that triggers the period, count every day, including intermediate Saturdays, Sundays, and Federal holidays, and include the last day of the period unless it is a Saturday, Sunday, or Federal holiday as set forth in 5 U.S.C. 6103(a). When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday.

(b) *When papers are deemed to be filed or served.* Filing and service are deemed to be effective:

(1) In the case of personal service or same day commercial courier delivery, upon actual receipt by person served;

(2) In the case of overnight commercial delivery service, Express Mail delivery, First Class Mail, Registered Mail, or Certified Mail, upon deposit in

or delivery to an appropriate point of collection; or

(3) In the case of electronic transmission, upon transmission.

(c) *Calculation of time for service and filing of responsive papers.* Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by First Class Mail, Registered Mail, or Certified Mail, add three calendar days to the prescribed period;

(2) If service is made by Express Mail or overnight delivery service, add one calendar day to the prescribed period; or

(3) If service is made by electronic transmission, add one calendar day to the prescribed period.

§ 1081.115 Change of time limits.

(a) *Generally.* Except as otherwise provided by law, the hearing officer may, in any proceeding before him or her, for good cause shown, extend the time limits prescribed by this part or by any notice or order issued in the proceedings. After appeal to the Director pursuant to § 1081.402, the Director may grant extensions of the time limits for good cause shown. Extensions may be granted on the motion of a party after notice and opportunity to respond is afforded all non-moving parties or on the Director's or the hearing officer's own motion, as appropriate.

(b) *Considerations in determining whether to extend time limits or grant postponements, adjournments and extensions.* Motions for extensions of time filed pursuant to paragraph (a) of this section are generally disfavored. In determining whether to grant any motions, the Director or hearing officer, as appropriate, will consider, in addition to any other relevant factors:

(1) The length of the proceeding to date;

(2) The number of postponements, adjournments or extensions already granted;

(3) The stage of the proceedings at the time of the motion;

(4) The impact of the motion on the hearing officer's ability to complete the proceeding in the time specified by § 1081.400(a); and

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(5) Any other matters as justice may require.

(c) *Time limit.* Postponements, adjournments, or extensions of time for filing papers may not exceed 21 days unless the Director or the hearing officer, as appropriate, states on the record or sets forth in a written order the reasons why a longer period of time is necessary.

(d) *No effect on deadline for preliminary findings and conclusions.* The granting of any extension of time pursuant to this section does not affect any deadlines set pursuant to § 1081.400(a).

§ 1081.116 Witness fees and expenses.

Respondents must pay to witnesses subpoenaed for testimony or depositions on their behalf the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, provided that, in the case of a deposition subpoena addressed to a party, no witness fees or mileage need be paid. Fees for witnesses must be tendered in advance by any respondent requesting the issuance of a subpoena, except that fees and mileage need not be tendered in advance where the Office of Enforcement is the party requesting the subpoena. The Bureau must pay to witnesses subpoenaed for testimony or depositions on behalf of the Office of Enforcement the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, but the Bureau need not tender such fees in advance.

§ 1081.117 Bureau's right to conduct examination, collect information.

Nothing contained in this part limits in any manner the right of the Bureau to conduct any examination, inspection, or visitation of any person, to conduct or continue any form of investigation authorized by law, to collect information in order to monitor the market for risks to consumers in the offering or provision of consumer financial products or services, or to otherwise gather information in accordance with law.

§ 1081.118 Collateral attacks on adjudication proceedings.

Unless a court of competent jurisdiction, or the Director for good cause, so directs, if an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudication proceeding, the challenged adjudication proceeding will continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudication proceeding within the times prescribed in this part will be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 1081.119 Confidential information; protective orders.

(a) *Rights of third parties.* Any party that intends to disclose information obtained from a third party that is subject to a claim of confidentiality must provide notice to the third party at least seven days prior to the proposed disclosure of such information. In response to such notice, the third party may consent to the disclosure of such information, which may be conditioned on the entry of an appropriate protective order, or may intervene in the proceeding for the limited purpose of moving for a protective order pursuant to this section. Any written filing by a party that contains such confidential information must be accompanied by a certification that proper notice was provided. The act of making any oral motion or oral argument by any counsel or party which contains such confidential information constitutes a certification that proper notice was provided. A third party wishing to intervene for purposes of protecting its confidential information may file a single motion, in conformity with all applicable rules, setting forth the basis of both the third party's right to intervene and the basis for the protective order, in conformity with paragraph (b) of this section.

(b) *Procedure.* In any adjudication proceeding, a party, including a third party who has intervened pursuant to paragraph (a) of this section, may file a motion requesting a protective order to limit from disclosure to other parties

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or to the public documents or testimony that contain confidential information. The motion should include a general summary or extract of the documents or testimony without revealing confidential details, and a copy of the proposed protective order. A motion for confidential treatment of documents should be filed in accordance with § 1081.112(f), and all other applicable rules of this chapter.

(c) *Basis for issuance.* Documents and testimony introduced in a public hearing, or filed in connection with an adjudication proceeding, are presumed to be public. A motion for a protective order will be granted:

(1) Upon a finding that public disclosure will likely result in a clearly defined, serious injury to the party or third party requesting confidential treatment;

(2) After finding that the material constitutes sensitive personal information, as defined in § 1081.112(e);

(3) If all parties, including third parties to the extent their information is at issue, stipulate to the entry of a protective order; or

(4) Where public disclosure is prohibited by law.

(d) *Requests for additional information supporting confidentiality.* The hearing officer may require a movant under paragraph (b) of this section to furnish in writing additional information with respect to the grounds for confidentiality. Failure to supply the information so requested within seven days from the date of receipt by the movant of a notice of the information required will be deemed a waiver of the objection to public disclosure of that portion of the documents to which the additional information relates, unless the hearing officer otherwise orders for good cause shown at or before the expiration of such seven-day period.

(e) *Confidentiality of documents pending decision.* Pending a determination of a motion under this section, the documents as to which confidential treatment is sought and any other documents that would reveal the confidential information in those documents will be maintained under seal and may be disclosed only in accordance with orders of the hearing officer. Any order issued in connection with a motion

under this section will be public unless the order would disclose information as to which a protective order has been granted, in which case that portion of the order that would reveal the protected information will be nonpublic.

§ 1081.120 Settlement.

(a) *Availability.* Any respondent in an adjudication proceeding instituted under this part, may, at any time, propose in writing an offer of settlement.

(b) *Procedure.* An offer of settlement must state that it is made pursuant to this section; must recite or incorporate as a part of the offer the provisions of paragraphs (c)(3) and (4) of this section; must be signed by the person making the offer, not by counsel; and must be submitted to enforcement counsel.

(c) *Consideration of offers of settlement.*

(1) Offers of settlement will be considered when time, the nature of the proceedings, and the public interest permit.

(2) Any settlement offer will be presented to the Director with a recommendation, except that, if the recommendation is unfavorable, the offer will not be presented to the Director unless the person making the offer so requests.

(3) By submitting an offer of settlement, the person making the offer waives, subject to acceptance of the offer:

(i) All hearings pursuant to the statutory provisions under which the proceeding has been instituted;

(ii) The filing of proposed findings of fact and conclusions of law;

(iii) Proceedings before, and preliminary findings and conclusions by, a hearing officer;

(iv) All post-hearing procedures;

(v) Judicial review by any court; and

(vi) Any objection to the jurisdiction of the Bureau under section 1053 of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5563).

(4) By submitting an offer of settlement the person further waives:

(i) Such provisions of this part or other requirements of law as may be construed to prevent any Bureau employee from participating in the preparation of, or advising the Director as to, any order, opinion, finding of fact,

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or conclusion of law to be entered pursuant to the offer; and

(ii) Any right to claim bias or pre-judgment by the Director based on the consideration of or discussions concerning settlement of all or any part of the proceeding.

(5) If the Director rejects the offer of settlement, the person making the offer will be notified of the Director's action and the offer of settlement will be deemed withdrawn. The rejected offer will not constitute a part of the record in any proceeding against the person making the offer, provided, however, that rejection of an offer of settlement does not affect the continued validity of waivers pursuant to paragraph (c)(4) of this section with respect to any discussions concerning the rejected offer of settlement.

(d) *Consent orders.* If the Director accepts the offer of settlement, all terms and conditions of a settlement entered into under this section will be recorded in a written stipulation signed by each settling respondent, and a consent order concluding the proceeding as to the settling respondents. The stipulation and consent order must be filed pursuant to § 1081.111, and must recite or incorporate as a part of the stipulation the provisions of paragraphs (c)(3) and (4) of this section. The Director will then issue a consent order, which will be a final order concluding the proceeding as to the settling respondents.

§ 1081.121 Cooperation with other agencies.

It is the policy of the Bureau to cooperate with other governmental agencies to avoid unnecessary overlap or duplication of regulatory functions.

Subpart B—Initiation of Proceedings and Prehearing Rules

§ 1081.200 Commencement of proceeding and contents of notice of charges.

(a) *Commencement of proceeding.* A proceeding governed by subparts A through D of this part is commenced when the Bureau, through the Office of Enforcement, files a notice of charges in accordance with § 1081.111. The notice of charges must be served by the

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Office of Enforcement upon the respondent in accordance with § 1081.113(d)(1).

(b) *Contents of a notice of charges.* The notice of charges must set forth:

(1) The legal authority for the proceeding and for the Bureau's jurisdiction over the proceeding;

(2) A statement of the matters of fact and law showing that the Bureau is entitled to relief;

(3) A proposed order or request for an order granting the relief sought;

(4) The time and place of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) That the answer must be filed and served in accordance with subpart A of this part; and

(7) The docket number for the adjudication proceeding.

(c) *Publication of notice of charges.* Unless otherwise ordered by the Director, the notice of charges will be given general circulation by release to the public, by publication on the Bureau's website and, where directed by the hearing officer or the Director, by publication in the FEDERAL REGISTER. The Bureau may publish any notice of charges after 14 days from the date of service except if there is a pending motion for a protective order filed pursuant to § 1081.119.

(d) *Commencement of proceeding through a consent order.* Notwithstanding paragraph (a) of this section, where the parties agree to settlement before the filing of a notice of charges, a proceeding may be commenced by filing a stipulation and consent order. The stipulation and consent order must be filed pursuant to § 1081.111. The stipulation must contain the information required under § 1081.120(d), and the consent order must contain the information required under paragraphs (b)(1) and (2) of this section. The proceeding will be concluded upon issuance of the consent order by the Director.

(e) *Voluntary dismissal—(1) Without an order.* The Office of Enforcement may voluntarily dismiss an adjudication proceeding without an order entered by a hearing officer by filing either:

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(i) A notice of dismissal before the respondent(s) serves an answer; or

(ii) A stipulation of dismissal signed by all parties who have appeared.

(2) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice, and does not operate as an adjudication on the merits.

§ 1081.201 Answer and disclosure statement and notification of financial interest.

(a) *Time to file answer.* Within 14 days of service of the notice of charges, respondent must file an answer as designated in the notice of charges.

(b) *Content of answer.* An answer must specifically respond to each paragraph or allegation of fact contained in the notice of charges and must admit, deny, or state that the party lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice of charges which is not denied in the answer is deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice of charges that constitutes the request for relief or proposed order. A respondent must affirmatively state in the answer any avoidance or affirmative defense, including but not limited to res judicata and statute of limitations. Failure to do so will be deemed a waiver.

(c) *If the allegations of the notice of charges are admitted.* If the respondent elects not to contest the allegations of fact set forth in the notice of charges, the answer will consist of a statement that the respondent admits all the material allegations to be true. Such an answer constitutes a waiver of hearings as to the facts alleged in the notice of charges, and together with the notice of charges will provide a record basis on which the hearing officer will issue preliminary findings and conclusions, containing appropriate findings and conclusions and a proposed order disposing of the proceeding. In such an an-

swer, the respondent may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 1081.305.

(d) *Default.* (1) Failure of a respondent to file an answer within the time provided will be deemed to constitute a waiver of the respondent's right to appear and contest the allegations of the notice of charges and to authorize the hearing officer, without further notice to the respondent, to find the facts to be as alleged in the notice of charges and to enter preliminary findings and conclusions containing appropriate findings and conclusions. In such cases, respondent will have no right to appeal pursuant to § 1081.402, but must instead proceed pursuant to paragraph (d)(2) of this section.

(2) A motion to set aside a default must be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. In order to prevent injustice and on such conditions as may be appropriate, the hearing officer, at any time prior to the filing of the preliminary findings and conclusions, or the Director, at any time, may for good cause shown set aside a default.

(e) *Disclosure statement and notification of financial interest—(1) Who must file; contents.* A respondent, nongovernmental intervenor, or nongovernmental amicus must file a disclosure statement and notification of financial interest that:

(i) Identifies any parent corporation, any publicly owned corporation owning ten percent or more of its stock, and any publicly owned corporation not a party to the proceeding that has a financial interest in the outcome of the proceeding and the nature of that interest; or

(ii) States that there are no such corporations.

(2) *Time for filing; supplemental filing.* A respondent, nongovernmental intervenor, or nongovernmental amicus must:

(i) File the disclosure statement with its first appearance, pleading, motion, response, or other request addressed to the hearing officer or the Bureau; and

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(ii) Promptly file a supplemental statement if any required information changes.

§ 1081.202 Amended pleadings

(a) *Amendments before the hearing.* The notice of charges, answer, or any other pleading may be amended or supplemented only with the opposing party's written consent or leave of the hearing officer. The respondent must answer an amended notice of charges within the time remaining for the respondent's answer to the original notice of charges, or within 14 days after service of the amended notice of charges, whichever is later, unless the hearing officer orders otherwise for good cause.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice of charges or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice of charges or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice of charges or answer, the hearing officer may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the hearing officer that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The hearing officer may grant a continuance to enable the objecting party to meet such evidence.

§ 1081.203 Scheduling conference.

(a) *Meeting of the parties before scheduling conference.* As early as practicable before the scheduling conference described in paragraph (e) of this section, counsel for the parties must meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case. The parties must also discuss and agree, if possible, on the matters set forth in paragraph (e) of this section.

(b) *Scheduling conference disclosure.* After the meeting required in paragraph (a) of this section and at least seven days prior to the scheduling conference described in paragraph (e) of

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this section, the parties must exchange a scheduling conference disclosure, which must be signed by the party or by the party's attorney if one has appeared on behalf of the party. The scheduling conference disclosure must include:

(1) A factual summary of the case, a summary of all factual and legal issues in dispute, and a summary of all factual and legal bases supporting each defense; and

(2) The following information about the evidence that the party may present at the hearing other than solely for impeachment:

(i) The name, address, and telephone number of each witness, together with a summary of the witness's anticipated testimony; and

(ii) An identification of each document or other exhibit, including summaries of other evidence, along with a copy of each document or exhibit identified unless the document or exhibit has already been produced to the other party.

(c) *Duty to supplement.* A party must supplement or correct the scheduling conference disclosure in a timely manner if the party acquires other information that it intends to rely upon at a hearing.

(d) *Failure to disclose—harmless error.* In the event that information required to be disclosed in the scheduling conference disclosure is not disclosed, no rehearing or redetermination of a proceeding already heard or decided will be required unless the other party establishes that the failure to disclose was not harmless error.

(e) *Scheduling conference.* Within 21 days of service of the notice of charges or such other time as the parties and hearing officer may agree, counsel for all parties must appear before the hearing officer in person at a specified time and place or by electronic means for the purpose of scheduling the course and conduct of the proceeding. This meeting is called a *scheduling conference*. At the scheduling conference, counsel for the parties must be prepared to address:

(1) Determination of the dates and location of the hearing, including, in proceedings under section 1053(b) of the Consumer Financial Protection Act of

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2010 (12 U.S.C. 5563(b)), whether the hearing should commence later than 60 days after service of the notice of charges, considering, among other factors, whether the respondent intends to file a dispositive motion or to seek the issuance of subpoenas;

(2) Simplification and clarification of the issues;

(3) Amendments to pleadings;

(4) Settlement of any or all issues;

(5) Production of documents as set forth in § 1081.206 and of witness statements as set forth in § 1081.207, and pre-hearing production of documents in response to subpoenas *duces tecum* as set forth in § 1081.208;

(6) Whether the parties intend to file dispositive motions;

(7) Whether the parties intend to seek the issuance of subpoenas, the identity of any anticipated deponents or subpoena recipients, and a schedule for completing that discovery;

(8) A schedule for the exchange of expert reports and the taking of expert depositions, if any; and

(9) Such other matters as may aid in the orderly disposition of the proceeding.

(f) *Transcript*. The hearing officer may require that a scheduling conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at that party's expense.

(g) *Scheduling order*. At or within seven days following the conclusion of the scheduling conference, the hearing officer will serve on each party an order setting forth the date and location of the hearing and any agreements reached and any procedural determinations made.

(h) *Failure to appear, default*. Any person who is named in a notice of charges as a person against whom findings may be made or sanctions imposed and who fails to appear, in person or through counsel, at a scheduling conference of which the person has been duly notified may be deemed in default pursuant to § 1081.201(d)(1). A party may make a motion to set aside a default pursuant to § 1081.201(d)(2).

(i) *Public access*. The scheduling conference will be public unless the hear-

ing officer determines, based on the standard set forth in § 1081.119(c), that the conference (or any part thereof) should be closed to the public.

§ 1081.204 Consolidation, severance, or bifurcation of proceedings.

(a) *Consolidation*. (1) On the motion of any party, or on the hearing officer's own motion, the hearing officer may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the pre-hearing schedule may be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance*. The hearing officer may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the hearing officer finds that:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

(c) *Bifurcation*. The Director may order that the proceeding be divided into two or more stages, if the Director determines that it would promote efficiency in the proceeding or for other good cause. For example, the Director may order that the proceeding have two stages, so that at the conclusion of the first stage the Director issues a decision on whether there have been violations of law and at the conclusion of the second stage the Director issues a final decision and order, including with respect to any remedies. The Director may make an order under this paragraph (c) either on the motion of a party or on the Director's own motion after inviting submissions by the parties. The Director may include, in that

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order or in later orders, modifications to the procedures in this part in order to effectuate an efficient division into stages, or the Director may assign such authority to the hearing officer. Only the decision and order of the Director after the final stage, and not a decision of the Director after an earlier stage, will be a final decision and order for purposes of §§ 1081.110, 1081.405(d) and (e), 1081.407, and 1081.502 and section 1053(b) of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5563(b)).

§ 1081.205 Non-dispositive motions.

(a) *Scope.* This section applies to all motions except motions to dismiss and motions for summary disposition. A non-dispositive motion filed pursuant to another section of this part must comply with any specific requirements of that section and this section to the extent the requirements in this section are not inconsistent.

(b) *In writing.* (1) Unless made during a hearing or conference, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the hearing officer. Written memoranda, briefs, affidavits or other relevant material or documents may be filed in support of or in opposition to a motion.

(c) *Oral motions.* The Director or the hearing officer, as appropriate, may order that an oral motion be submitted in writing.

(d) *Responses and replies.* (1) Except as otherwise provided in this section, within 14 days after service of any written motion, or within such other period of time as may be established by the hearing officer or the Director, as appropriate, any party may file a written response to a motion. The hearing officer will not rule on any oral or written motion before each party has had an opportunity to file a response.

(2) Reply briefs, if any, may be filed within seven days after service of the response.

(3) The failure of a party to oppose a written motion or an oral motion made

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on the record is deemed consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Length limitations.* No motion subject to this section (together with the brief in support of the motion) or brief in response to the motion may exceed 15 pages in length, exclusive of pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions or rules, and exhibits. No reply brief may exceed six pages in length, exclusive of pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions or rules, and exhibits. Motions for leave to file motions and briefs in excess of these limitations are disfavored.

(f) *Meet and confer requirements.* Each motion filed under this section must be accompanied by a signed statement representing that counsel for the moving party has conferred or made a good faith effort to confer with opposing counsel in a good faith effort to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. If some of the matters in controversy have been resolved by agreement, the statement must specify the matters so resolved and the matters remaining unresolved.

(g) *Ruling on non-dispositive motions.* Unless otherwise provided by a relevant section of this part, a hearing officer will rule on non-dispositive motions. Such ruling must be issued within 14 days after the expiration of the time period allowed for the filing of all motion papers authorized by this section. The Director, for good cause, may extend the time allowed for a ruling.

(h) *Proceedings not stayed.* A motion under consideration by the Director or the hearing officer does not stay proceedings before the hearing officer unless the Director or the hearing officer, as appropriate, so orders.

(i) *Dilatory motions.* Frivolous, dilatory, or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

Consumer Financial Protection Bureau**§ 1081.206****§ 1081.206 Availability of documents for inspection and copying.**

For purposes of this section, the term *documents* includes any book, document, record, report, memorandum, paper, communication, tabulation, chart, logs, electronic files, or other data or data compilations stored in any medium.

(a) *Documents to be available for inspection and copying.* (1) Unless otherwise provided by this section, or by order of the hearing officer, the Office of Enforcement will make available for inspection and copying by any respondent documents obtained by the Office of Enforcement prior to the institution of proceedings, from persons not employed by the Bureau, in connection with the investigation leading to the institution of proceedings. Such documents will include:

(i) Any documents turned over in response to civil investigative demands or other written requests to provide documents or to be interviewed issued by the Office of Enforcement;

(ii) All transcripts and transcript exhibits; and

(iii) Any other documents obtained from persons not employed by the Bureau.

(2) In addition, the Office of Enforcement will make available for inspection and copying by any respondent:

(i) Each civil investigative demand or other written request to provide documents or to be interviewed issued by the Office of Enforcement in connection with the investigation leading to the institution of proceedings; and

(ii) Any final examination or inspection reports prepared by any other Office of the Bureau if the Office of Enforcement either intends to introduce any such report into evidence or to use any such report to refresh the recollection of, or impeach, any witness.

(3) Nothing in paragraph (a) of this section limits the right of the Office of Enforcement to make available any other document, or limits the right of a party to seek access to or production pursuant to subpoena of any other document, or limits the authority of the hearing officer to order the production of any document pursuant to subpoena.

(4) Nothing in paragraph (a) of this section requires the Office of Enforce-

ment to produce a final examination or inspection report prepared by any other Office of the Bureau or any other government agency to a respondent who is not the subject of that report.

(b) *Documents that may be withheld.* (1) The Office of Enforcement may withhold a document if:

(i) The document is privileged;

(ii) The document is an internal memorandum, note, or writing prepared by a person employed by the Bureau or another Government agency, other than an examination or supervision report as specified in paragraph (a)(2)(ii) of this section, or would otherwise be subject to the work product doctrine and will not be offered in evidence;

(iii) The document was obtained from a domestic or foreign governmental entity and is either not relevant to the resolution of the proceeding or was provided on condition that the information not be disclosed;

(iv) The document would disclose the identity of a confidential source;

(v) Applicable law prohibits the disclosure of the document;

(vi) The document reflects only settlement negotiations between the Office of Enforcement and a person or entity who is not a current respondent in the proceeding; or

(vii) The hearing officer grants leave to withhold a document or category of documents as not relevant to the subject matter of the proceeding or otherwise, for good cause shown.

(2) Nothing in paragraph (b)(1) of this section authorizes the Office of Enforcement in connection with an adjudication proceeding to withhold material exculpatory evidence in the possession of the Office that would otherwise be required to be produced pursuant to paragraph (a) of this section.

(c) *Withheld document list.* The hearing officer may require the Office of Enforcement to produce a list of documents or categories of documents withheld pursuant to paragraphs (b)(1)(i)

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through (vi) of this section or to submit to the hearing officer any document withheld, except for any documents that are being withheld pursuant to paragraph (b)(1)(iii) of this section, in which case the Office of Enforcement must inform the other parties of the fact that such documents are being withheld, but no further disclosures regarding those documents will be required. The hearing officer may determine whether any withheld document should be made available for inspection and copying. When similar documents are withheld pursuant to paragraphs (b)(1)(i) through (vi) of this section, those documents may be identified by category instead of by individual document. The hearing officer retains discretion to determine when an identification by category is insufficient.

(d) *Timing of inspection and copying.* Unless otherwise ordered by the hearing officer, the Office of Enforcement must commence making documents available to a respondent for inspection and copying pursuant to this section no later than 14 days after service of the notice of charges.

(e) *Place of inspection and copying.* Documents subject to inspection and copying pursuant to this section will be made available to the respondent for inspection and copying at the Bureau office where they are ordinarily maintained, or at such other place as the parties, in writing, may agree. A respondent will not be given custody of the documents or leave to remove the documents from the Bureau's offices pursuant to the requirements of this section other than by written agreement of the Office of Enforcement. Such agreement must specify the documents subject to the agreement, the date they must be returned, and such other terms or conditions as are appropriate to provide for the safekeeping of the documents. If the Office of Enforcement determines that production of some or all the documents required to be produced under this section can be produced in an electronic format, the Office of Enforcement may instead produce the documents in an electronic format.

(f) *Copying costs and procedures.* The respondent may obtain a photocopy of

any documents made available for inspection or, at the discretion of the Office of Enforcement, electronic copies of such documents. The respondent is responsible for the cost of photocopying. Unless otherwise ordered, charges for copies made by the Office of Enforcement at the request of the respondent will be at the rate charged pursuant to part 1070 of this chapter. The respondent will be given access to the documents at the Bureau's offices or such other place as the parties may agree during normal business hours for copying of documents at the respondent's expense.

(g) *Duty to supplement.* If the Office of Enforcement acquires information that it intends to rely upon at a hearing after making its disclosures under paragraph (a)(1) of this section, the Office of Enforcement must supplement its disclosures to include such information.

(h) *Failure to make documents available—harmless error.* In the event that a document required to be made available to a respondent pursuant to this section is not made available by the Office of Enforcement, no rehearing or redetermination of a proceeding already heard or decided will be required unless the respondent establishes that the failure to make the document available was not harmless error.

(i) *Disclosure of privileged or protected information or communications; scope of waiver; obligations of receiving party.* (1) The disclosure of privileged or protected information or communications by any party during an adjudication proceeding does not operate as a waiver if:

- (i) The disclosure was inadvertent;
- (ii) The holder of the privilege or protection took reasonable steps to prevent disclosure; and

(iii) The holder promptly took reasonable steps to rectify the error, including notifying any party that received the information or communication of the claim and the basis for it.

(2) After being notified, the receiving party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the

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party disclosed it before being notified; and may promptly present the information to the hearing officer under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(3) The disclosure of privileged or protected information or communications by any party during an adjudication proceeding will waive the privilege or protection, with respect to other parties to the proceeding, as to undisclosed information or communications only if:

- (i) The waiver is intentional;
- (ii) The disclosed and undisclosed information or communications concern the same subject matter; and
- (iii) They ought in fairness to be considered together.

§ 1081.207 Production of witness statements.

(a) *Availability.* Any respondent may move that the Office of Enforcement produce for inspection and copying any statement of any person called or to be called as a witness by the Office of Enforcement that pertains, or is expected to pertain, to the witness's direct testimony and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. 3500, if the adjudication proceeding were a criminal proceeding. For purposes of this section, the term "statement" has the meaning set forth in 18 U.S.C. 3500(e). Such production will be made at a time and place fixed by the hearing officer and will be made available to any party, provided, however, that the production must be made under conditions intended to preserve the items to be inspected or copied.

(b) *Failure to produce—harmless error.* In the event that a statement required to be made available to a respondent pursuant to this section is not made available by the Office of Enforcement, no rehearing or redetermination of a proceeding already heard or decided will be required unless the respondent establishes that the failure to make the statement available was not harmless error.

§ 1081.208 Subpoenas.

(a) *Availability.* In connection with any hearing ordered by the hearing officer or any deposition permitted under

§ 1081.209, a party may request the issuance of subpoenas requiring the attendance and testimony of witnesses at such depositions or at the designated time and place of the hearing, or the production of documentary or other tangible evidence returnable at any designated time or place.

(b) *Procedure.* Unless made on the record at a hearing, requests for issuance of a subpoena must be made in writing, and filed and served on each party pursuant to subpart A of this part. The request must contain a proposed subpoena and a brief statement showing the general relevance and reasonableness of the scope of testimony or documents sought.

(c) *Signing may be delegated.* A hearing officer may authorize issuance of a subpoena, and may delegate the manual signing of the subpoena to any other person.

(d) *Standards for issuance of subpoenas requiring the attendance and testimony of witnesses at the hearing or the production of documentary or other tangible evidence.* The hearing officer will promptly issue any subpoena requiring the attendance and testimony of witnesses at the designated time and place of the hearing or the production of documentary or other tangible evidence. Where it appears to the hearing officer that the subpoena sought may be unreasonable, oppressive, excessive in scope, or unduly burdensome, the hearing officer may, as a condition precedent to the issuance of the subpoena, require the person seeking the subpoena to show further the general relevance and reasonable scope of the testimony or other evidence sought. If after consideration of all the circumstances, the hearing officer determines that the subpoena or any of its terms is unreasonable, oppressive, excessive in scope, or unduly burdensome, the hearing officer may refuse to issue the subpoena, or issue it only upon such conditions as fairness requires. In making the foregoing determination, the hearing officer may inquire of the other parties whether they will stipulate to the facts sought to be proved.

(e) *Standards for issuance of subpoenas requiring the deposition of a witness pursuant to § 1081.209.* (1) The hearing officer will promptly issue any subpoena

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requiring the attendance and testimony of witnesses at a deposition only if the subpoena complies with § 1081.209 and if:

(i) The proposed deponent is a witness identified in the other party's scheduling conference disclosure under § 1081.203(b);

(ii) The proposed deponent was a witness of or participant in any event, transaction, occurrence, act, or omission that forms the basis for any claim asserted by the Office of Enforcement, any defense, or anything else required to be included in an answer pursuant to § 1081.201(b), by any respondent in the proceeding (this excludes a proposed deponent whose only knowledge of these matters arises from the Bureau's investigation, the Bureau's examination, or the proceeding);

(iii) The proposed deponent is designated as an "expert witness" under § 1081.210(b); provided, however, that the deposition of an expert who is required to submit a written report under § 1081.210(b) may only occur after such report is served;

(iv) The proposed deponent has custody of documents or electronic data relevant to the claims or defenses of any party (this excludes officers or personnel of the Bureau who have custody of documents or data that was produced by the Office of Enforcement to the respondent); or

(v) The proposed deponent is unavailable for the hearing as set forth in § 1081.209(c).

(2) Where it appears to the hearing officer that the subpoena sought may be unreasonable, oppressive, excessive in scope, or unduly burdensome, the hearing officer may, as a condition precedent to the issuance of the subpoena, require the person seeking the subpoena to show further the general relevance and reasonable scope of the testimony or other evidence sought. If after consideration of all the circumstances, the hearing officer determines that the subpoena or any of its terms is unreasonable, oppressive, excessive in scope, or unduly burdensome, the hearing officer may refuse to issue the subpoena, or issue it only upon such conditions as fairness requires. In making the foregoing determination, the hearing officer may in-

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quire of the other parties whether they will stipulate to the facts sought to be proved.

(f) *Service.* Upon issuance by the hearing officer, the party making the request will serve the subpoena on the person named in the subpoena and on each party in accordance with § 1081.113(c). Subpoenas may be served in any State, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any State, territory, possession of the United States, or the District of Columbia, or as otherwise permitted by law.

(g) *Tender of fees required.* When a subpoena compelling the attendance of a person at a hearing or a deposition is issued at the request of anyone other than an officer or agency of the United States, service is valid only if the subpoena is accompanied by a tender to the subpoenaed person of the fees for one day's attendance and mileage specified by § 1081.116.

(h) *Place of compliance.* A subpoena for a deposition may command a person to attend a deposition only as follows:

(1) Within 100 miles of where the person resides, is employed, or regularly transacts business in person;

(2) Within the State where the person resides, is employed, or regularly transacts business in person, if the person is a party or a party's officer;

(3) At such other location that the parties and proposed deponent stipulate; or

(4) At such other location that the hearing officer determines is appropriate.

(i) *Production of documentary material.* Production of documentary material in response to a subpoena must be made under a sworn certificate, in such form as the subpoena designates, by the person to whom the subpoena is directed or, if not a natural person, by any person having knowledge of the facts and circumstances relating to such production, to the effect that all of the documentary material required by the subpoena and in the possession, custody, or control of the person to whom the subpoena is directed has been produced and made available to the custodian.

(j) *Motion to quash or modify*—(1) *Procedure.* Any person to whom a subpoena is directed, or who is an owner, creator, or the subject of the documents that are to be produced pursuant to a subpoena, or any party may, prior to the time specified therein for compliance, but in no event more than seven days after the date of service of such subpoena, move that the subpoena be quashed or modified. Such motion must be filed and served on all parties pursuant to subpart A of this part. Notwithstanding § 1081.205, the party on whose behalf the subpoena was issued or enforcement counsel may, within seven days of service of the motion, file a response to the motion. Reply briefs are not permitted unless requested by the hearing officer. Filing a motion to modify a subpoena does not stay the movant's obligation to comply with those portions of the subpoena that the person has not sought to modify.

(2) *Standards governing motion to quash or modify.* If compliance with the subpoena would be unreasonable, oppressive, or unduly burdensome, the hearing officer must quash or modify the subpoena, or may order return of the subpoena only upon specified conditions. These conditions may include but are not limited to a requirement that the party on whose behalf the subpoena was issued make reasonable compensation to the person to whom the subpoena was addressed for the cost of copying or transporting evidence to the place for return of the subpoena.

(k) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this part or any order of the hearing officer which directs compliance with all or any portion of a subpoena, the Bureau's General Counsel may, on its own motion or at the request of the party on whose behalf the subpoena was issued, apply to an appropriate United States district court, in the name of the Bureau but on relation of such party, for an order requiring compliance with so much of the subpoena as the hearing officer has not quashed or modified, unless, in the judgment of the General Counsel, the enforcement of such subpoena would be inconsistent with law and the policies of the Con-

sumer Financial Protection Act of 2010. Failure to request that the Bureau's General Counsel seek enforcement of a subpoena constitutes a waiver of any claim of prejudice predicated upon the unavailability of the testimony or evidence sought.

(l) *Relationship to scheduling of hearing.* The parties must disclose at the scheduling conference required under § 1081.203(e) whether they intend to request the issuance of subpoenas under § 1081.209. A respondent's request for issuance of a subpoena constitutes a request that the hearing not be held until after a reasonable period, determined by the hearing officer, for the completion of discovery. The hearing officer will decide whether to grant such a request. If the request is granted, the hearing officer will set a deadline for the completion of discovery and schedule the specific date of the hearing, in consultation with the parties. This paragraph (l) does not apply to a subpoena for the attendance and testimony of a witness at the hearing or a subpoena to depose a witness unavailable for the hearing.

§ 1081.209 Depositions.

(a) *Depositions by oral examination or by written questions.* Depositions by oral examination or by written questions may be taken as set forth in this section and must be taken pursuant to subpoena issued under § 1081.208. Any deposition permitted under this section may be taken and submitted on written questions upon motion of any party, for good cause shown, or as stipulated by the parties. No other depositions will be permitted except as provided in paragraph (c) of this section.

(1) If the proceeding involves a single respondent, the respondent may depose no more than three persons, and the Office of Enforcement may depose no more than three persons.

(2) If the proceeding involves multiple respondents, the respondents collectively may depose no more than five persons, and the Office of Enforcement may depose no more than five persons. The depositions taken under this paragraph (a)(2) cannot exceed a total of five depositions for the Office of Enforcement, and five depositions for all respondents collectively.

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(3) Any side may file a motion with the hearing officer seeking leave to take up to two additional depositions beyond those permitted pursuant to paragraphs (a)(1) and (2) of this section.

(i) *Procedure.* (A) A motion for additional depositions must be filed no later than 28 days prior to the hearing date. If the moving side proposes to take the additional deposition(s) by written questions, the motion must so state and include the proposed questions. Any party opposing the motion may submit an opposition within seven days after service of the motion. No reply will be permitted. The motion and any oppositions each must not exceed seven pages in length.

(B) Upon consideration of the motion and any opposing papers, the hearing officer will issue an order either granting or denying the motion. The hearing officer will consider the motion on an expedited basis.

(ii) *Grounds and standards for motion.* A motion under paragraph (a)(3) of this section will not be granted unless the additional depositions satisfy § 1081.208(d) and the moving side demonstrates a compelling need for the additional depositions by:

(A) Identifying all witnesses the moving side plans to depose under this section;

(B) Describing the role of all witnesses;

(C) Describing the matters concerning which all witnesses are expected to be questioned, and why the deposition of all witnesses is necessary for the moving side's arguments, claims, or defenses; and

(D) Showing that the additional deposition(s) requested will not be unreasonably cumulative or duplicative.

(b) *Additional procedure for depositions by written questions.* (1) Any motion or stipulation seeking a deposition of a witness by written questions must include the written questions the party seeking the deposition will ask the witness. Within seven days after service of the motion and written questions, any party may file objections to such written questions and any party may file cross-questions. When a deposition is taken by written questions, no persons other than the witness, counsel to the witness, the deposition officer, and, if

the deposition officer does not act as reporter, a reporter, may be present at the examination of the witness. No party may be present or represented unless otherwise permitted by order. The deposition officer will propound the questions and cross-questions to the witness in the order submitted.

(2) The order for deposition, filing of the deposition, form of the deposition, and use of the deposition in the record will be governed by paragraphs (d) through (l) of this section, except that no cross-examination will be made.

(c) *Depositions when witness is unavailable.* In addition to depositions permitted under paragraph (a) of this section, the hearing officer may grant a party's request for issuance of a subpoena if the requesting party shows that the prospective witness will likely give testimony material to the proceeding; that it is likely the prospective witness, who is then within the United States, will be unable to attend or testify at the hearing because of age, sickness, infirmity, imprisonment, other disability, or absence from the United States, unless it appears that the absence of the witness was procured by the party requesting the deposition; and that the taking of a deposition will serve the interests of justice.

(d) *Service and contents of notice.* Upon issuance of a subpoena for a deposition, the party taking the deposition must serve a notice on each party pursuant to § 1081.113. A notice of deposition must state that the deposition will be taken before a deposition officer authorized to administer oaths by the laws of the United States or of the place where the deposition is to be held. A notice of deposition also must state:

(1) The name and address of the witness whose deposition is to be taken;

(2) The time and place of the deposition; and

(3) The manner of recording and preserving the deposition.

(e) *Method of recording—(1) Method stated in the notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the hearing officer orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party

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bears the recording costs. Any party may arrange to transcribe a deposition, at that party's expense. Each party will bear its own costs for obtaining copies of any transcripts or audio or audiovisual recordings.

(2) *Additional method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the hearing officer orders otherwise.

(f) *By remote means.* The parties and the deponent may stipulate—or the hearing officer may on motion order—that a deposition be taken by telephone or other electronic means. For the purpose of this section, the deposition takes place where the deponent answers the questions.

(g) *Deposition officer's duties—(1) Before the deposition.* The deposition officer must begin the deposition with an on-the-record statement that includes:

- (i) The deposition officer's name and business address;
- (ii) The date, time, and place of the deposition;
- (iii) The deponent's name;
- (iv) The deposition officer's administration of the oath or affirmation to the deponent; and
- (v) The identity of all persons present.

(2) *Conducting the deposition; avoiding distortion.* If the deposition is recorded non-stenographically, the deposition officer must repeat the items in paragraphs (g)(1)(i) through (iii) of this section at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(3) *After the deposition.* At the end of a deposition, the deposition officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(h) *Order and record of the examination—(1) Order of examination.* The examination and cross-examination of a deponent will proceed as they would at

the hearing. After putting the deponent under oath or affirmation, the deposition officer must record the testimony by the method designated under paragraph (e) of this section. The testimony must be recorded by the deposition officer personally or by a person acting in the presence and under the direction of the deposition officer. The witness being deposed may have counsel present during the deposition.

(2) *Form of objections stated during the deposition.* An objection at the time of the examination—whether to evidence, to a party's conduct, to the deposition officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination may still proceed and the testimony may be taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the hearing officer, or to present a motion to the hearing officer for a limitation on the questioning in the deposition.

(i) *Waiver of objections—(1) To the notice.* An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) *To the deposition officer's qualification.* An objection based on disqualification of the deposition officer before whom a deposition is to be taken is waived if not made:

- (i) Before the deposition begins; or
- (ii) Promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) *To the taking of the deposition—(1) Objection to competence, relevance, or materiality.* An objection to a deponent's competence—or to the competence, relevance, or materiality of testimony—is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(ii) *Objection to an error or irregularity.* An objection to an error or irregularity at an oral examination is waived if:

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(A) It relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(B) It is not timely made during the deposition.

(4) *To completing and returning the deposition.* An objection to how the deposition officer transcribed the testimony—or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition—is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

(j) *Duration; cross-examination; motion to terminate or limit—(1) Duration.* Unless otherwise stipulated or ordered by the hearing officer, a deposition is limited to one day of seven hours, including cross-examination as provided in this paragraph (j)(1). In a deposition conducted by or for a respondent, the Office of Enforcement will be allowed a reasonable amount of time for cross-examination of the deponent. In a deposition conducted by the Office, the respondents collectively will be allowed a reasonable amount of time for cross-examination of the deponent. The hearing officer may allow additional time if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) *Motion to terminate or limit—(i) Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to present the motion to the hearing officer.

(ii) *Order.* Upon a motion under paragraph (j)(2)(i) of this section, the hearing officer may order that the deposition be terminated or may limit its scope. If terminated, the deposition may be resumed only by order of the hearing officer.

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(k) *Review by the witness; changes—(1) Review; statement of changes.* On request by the deponent or a party before the deposition is completed, and unless otherwise ordered by the hearing officer, the deponent must be allowed 14 days after being notified by the deposition officer that the transcript or recording is available, unless a longer time is agreed to by the parties or permitted by the hearing officer, in which:

(i) To review the transcript or recording; and

(ii) If there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) *Changes indicated in the deposition officer's certificate.* The deposition officer must note in the certificate prescribed by paragraph (l)(1) of this section whether a review was requested and, if so, must attach any changes the deponent makes during the 14-day period.

(l) *Certification and delivery; exhibits; copies of the transcript or recording—(1) Certification and delivery.* The deposition officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the hearing officer orders otherwise, the deposition officer must seal the deposition in an envelope or package bearing the title of the action and marked “Deposition of [witness's name]” and must promptly send it to the attorney or party who arranged for the transcript or recording. The attorney or party must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) *Documents and tangible things—(i) Originals and copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(A) Offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(B) Give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition.

(ii) *Order regarding the originals.* Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) *Copies of the transcript or recording.* Unless otherwise stipulated or ordered by the hearing officer, the deposition officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the deposition officer must furnish a copy of the transcript or recording to any party or the deponent, as directed by the party or person paying such charges.

(m) *Presentation of objections or disputes.* Any party or deponent seeking relief with respect to disputes over the conduct of a deposition may file a motion with the hearing officer to obtain relief as permitted by this part.

§ 1081.210 Expert discovery.

(a) At a date set by the hearing officer at the scheduling conference, each party must serve the other with a report prepared by each of its expert witnesses. Each party must serve the other parties with a list of any rebuttal expert witnesses and a rebuttal report prepared by each such witness not later than 28 days after the deadline for service of expert reports, unless another date is set by the hearing officer. A rebuttal report must be limited to rebuttal of matters set forth in the expert report for which it is offered in rebuttal. If material outside the scope of fair rebuttal is presented, a party may file a motion not later than seven days after the deadline for service of rebuttal reports, seeking appropriate relief with the hearing officer, including striking all or part of the report, leave to submit a surrebuttal report by the party's own experts, or leave to call a surrebuttal witness and to submit a surrebuttal report by that witness.

(b) No party may call an expert witness at the hearing unless the expert witness has been listed and has provided reports as required by this sec-

tion, unless otherwise directed by the hearing officer at a scheduling conference. Each side will be limited to calling at the hearing five expert witnesses, including any rebuttal or surrebuttal expert witnesses. A party may file a motion seeking leave to call additional expert witnesses due to extraordinary circumstances.

(c) Each report must be signed by the expert and contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data, materials, or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored or co-authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified or sought to testify as an expert at trial or hearing, or by deposition within the preceding four years. A rebuttal or surrebuttal report need not include any information already included in the initial report of the witness.

(d) A party may depose any person who has been identified as an expert whose opinions may be presented at trial upon subpoena issued under § 1081.208. Unless otherwise ordered by the hearing officer, a deposition of any expert witness will be conducted after the disclosure of a report prepared by the witness in accordance with paragraph (a) of this section, and at least seven days prior to the deadline for submission of rebuttal expert reports. A deposition of an expert witness must be completed no later than 14 days before the hearing unless otherwise ordered by the hearing officer. No expert deposition will exceed seven hours on the record, absent agreement of the parties or an order of the hearing officer for good cause shown. Expert depositions will be conducted pursuant to the procedures set forth in § 1081.209(d) through (l).

(e) A party may not discover facts known or opinions held by an expert who has been retained or specifically employed by another party in anticipation of litigation or preparation for the

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hearing and who is not listed as a witness for the hearing. A party may not discover drafts of any report required by this section, regardless of the form in which the draft is recorded, or any communications between another party's attorney and any of that other party's experts, regardless of the form of the communications, except to the extent that the communications:

(1) Relate to compensation for the testifying expert's study or testimony;

(2) Identify facts or data that the other party's attorney provided and that the testifying expert considered in forming the opinions to be expressed; or

(3) Identify assumptions that the other party's attorney provided and that the testifying expert relied on in forming the opinions to be expressed.

(f) The hearing officer has the discretion to dispense with the requirement of expert discovery in appropriate cases.

§ 1081.211 Interlocutory review.

(a) *Availability.* The Director may, at any time, direct that any matter be submitted to the Director for review. Subject to paragraph (c) of this section, the hearing officer may, upon the hearing officer's motion or upon the motion of any party, certify any matter for interlocutory review by the Director. This section is the exclusive remedy for review of a hearing officer's ruling or order prior to the Director's consideration of the entire proceeding.

(b) *Procedure.* Any party's motion for certification of a ruling or order for interlocutory review must be filed with the hearing officer within seven days of service of the ruling or order, must specify the ruling or order or parts thereof for which interlocutory review is sought, must attach any other portions of the record on which the moving party relies, and must otherwise comply with § 1081.205. Notwithstanding § 1081.205, any response to such a motion must be filed within seven days of service of the motion. The hearing officer must issue a ruling on the motion within seven days of the deadline for filing a response.

(c) *Certification process.* Unless the Director directs otherwise, a ruling or order may not be submitted to the Di-

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rector for interlocutory review unless the hearing officer, upon the hearing officer's motion or upon the motion of a party, certifies the ruling or order in writing. The hearing officer will not certify a ruling or order unless:

(1) The ruling or order would compel testimony of Bureau officers or employees, or those from another governmental agency, or the production of documentary evidence in the custody of the Bureau or another governmental agency;

(2) The ruling or order involves a motion for disqualification of the hearing officer pursuant to § 1081.105(c)(2);

(3) The ruling or order suspended or barred an individual from appearing before the Bureau pursuant to § 1081.107(c); or

(4) Upon motion by a party, the hearing officer is of the opinion that:

(i) The ruling or order involves a controlling question of law as to which there is substantial ground for difference of opinion; and

(ii) An immediate review of the ruling or order is likely to materially advance the completion of the proceeding or subsequent review will be an inadequate remedy.

(d) *Interlocutory review.* A party whose motion for certification has been denied by the hearing officer may petition the Director for interlocutory review.

(e) *Director review.* The Director will determine whether or not to review a ruling or order certified under this section or the subject of a petition for interlocutory review. Interlocutory review is generally disfavored. The Director may decline to review a ruling or order certified by a hearing officer pursuant to paragraph (c) of this section or the petition of a party who has been denied certification if the Director determines that interlocutory review is not warranted or appropriate under the circumstances, in which case the Director may summarily deny the petition. If the Director determines to grant the review, the Director will review the matter and issue a ruling and order in an expeditious fashion, consistent with the Bureau's other responsibilities.

(f) *Proceedings not stayed.* The filing of a motion requesting that the hearing officer certify any of the hearing

officer's prior rulings or orders for interlocutory review or a petition for interlocutory review filed with the Director, and the grant of any such review, will not stay proceedings before the hearing officer unless the hearing officer, or the Director, so orders. The Director will not consider a motion for a stay unless the motion was first been made to the hearing officer.

§ 1081.212 Dispositive motions.

(a) *Dispositive motions.* This section governs the filing of motions to dismiss and motions for summary disposition. The filing of any such motion does not obviate a party's obligation to file an answer or take any other action required by this part or by an order of the hearing officer, unless expressly so provided by the hearing officer.

(b) *Motions to dismiss.* A respondent may file a motion to dismiss asserting that, even assuming the truth of the facts alleged in the notice of charges, it is entitled to dismissal as a matter of law.

(c) *Motion for summary disposition.* A party may make a motion for summary disposition asserting that the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show that:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in the moving party's favor as a matter of law.

(d) *Filing of motions for summary disposition and responses.* (1) After a respondent's answer has been filed and documents have been made available to the respondent for inspection and copying pursuant to § 1081.206, any party may move for summary disposition in its favor of all or any part of the proceeding.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, inves-

tigatory depositions, transcripts, affidavits, and any other evidentiary materials that the moving party contends support the moving party's position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which the opposing party contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as may be submitted in support of a motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(3) Any affidavit or declaration submitted in support of or in opposition to a motion for summary disposition must set forth such facts as would be admissible in evidence, must show affirmatively that the affiant is competent to testify to the matters stated therein, and must be signed under oath and penalty of perjury.

(e) *Page limitations for dispositive motions.* A motion to dismiss or for summary disposition, together with any brief in support of the motion (exclusive of any declarations, affidavits, or attachments) may not exceed 35 pages in length. Motions for extensions of this length limitation are disfavored.

(f) *Opposition and reply response time and page limitation.* Any party, within 21 days after service of a dispositive motion, or within such period as allowed by the hearing officer, may file a response to such motion. The length limitations set forth in paragraph (e) of this section also apply to such responses. Any reply brief filed in response to an opposition to a dispositive motion must be filed within seven days after service of the opposition. Reply briefs may not exceed ten pages.

(g) *Relationship to scheduling of hearing.* A respondent's filing of a dispositive motion constitutes a request that the hearing not be held until after the motion is resolved. The hearing officer will decide whether to grant such a request. If the request is granted, the

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hearing officer will schedule the specific date of the hearing, in consultation with the parties.

§ 1081.213 Rulings on dispositive motions.

(a) *Ruling by Director or hearing officer.* The Director will rule on a dispositive motion, refer the motion to the hearing officer, or rule on the motion in part and refer it in part.

(b) *Timing of ruling.* If the Director rules on the motion, the Director must do so within 42 days following the expiration of the time for filing all responses and replies, unless there is good cause to extend the deadline. If the Director refers the motion to the hearing officer, the Director may set a deadline for the hearing officer to rule.

(c) *Oral argument.* At the request of any party or on the Director or hearing officer's own motion, the Director or hearing officer (as applicable) may hear oral argument on a dispositive motion.

(d) *Types of rulings—(1) Granting motion as to all claims and relief.* If the Director or hearing officer (as applicable) determines that dismissal or summary disposition is warranted as to all claims and relief, then (as applicable) the Director will issue a final decision and order or the hearing officer will issue preliminary findings and conclusions.

(2) *Granting motion as to some claims or relief.* If the Director or hearing officer (as applicable) determines that dismissal or summary disposition is warranted as to some issues, but not all claims and relief, the Director or hearing officer will issue an order that directs further proceedings. Where the dispositive motion is a motion for summary disposition, the order will specify the facts that appear without substantial controversy. The facts so specified are to be deemed established.

(3) *Denial of motion.* If the Director or hearing officer (as applicable) determines that dismissal or summary disposition is not warranted, the Director or hearing officer may make a ruling denying the motion. If it appears that a party, for good cause shown, cannot present by affidavit, prior to hearing, facts essential to justify opposition to a motion for summary disposition, the

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Director or hearing officer must deny or defer the motion, or do so in relevant part.

§ 1081.214 Prehearing conferences.

(a) *Prehearing conferences.* The hearing officer may, in addition to the scheduling conference, upon the hearing officer's motion or at the request of any party, direct counsel for the parties to meet with the hearing officer (in person or by electronic means) at a prehearing conference for further discussion of the issues outlined in § 1081.203, or for discussion of any additional matters that in the view of the hearing officer will aid in an orderly disposition of the proceeding, including but not limited to:

(1) Identification of potential witnesses and limitation on the number of witnesses;

(2) The exchange of any prehearing materials including witness lists, statements of issues, exhibits, and any other materials;

(3) Stipulations, admissions of fact, and the contents, authenticity, and admissibility into evidence of documents;

(4) Matters of which official notice may be taken; and

(5) Whether the parties intend to introduce prior sworn statements of witnesses as set forth in § 1081.303(h).

(b) *Transcript.* The hearing officer has discretion to require that a prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at that party's expense.

(c) *Public access.* Any prehearing conferences will be public unless the hearing officer determines, based on the standard set forth in § 1081.119(c), that the conference (or any part thereof) should be closed to the public.

§ 1081.215 Prehearing submissions.

(a) *Generally.* Within the time set by the hearing officer, but in no case later than 14 days before the start of the hearing, each party must serve on every other party:

(1) A prehearing statement, which must include an outline or narrative summary of the party's case or defense,

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and the legal theories upon which the party will rely;

(2) A final list of witnesses to be called to testify at the hearing, including the name and address of each witness and a short summary of the expected testimony of each witness;

(3) Any prior sworn statements that a party intends to admit into evidence pursuant to § 1081.303(h);

(4) A list of the exhibits to be introduced at the hearing along with a copy of each exhibit; and

(5) Any stipulations of fact or liability.

(b) *Expert witnesses.* Each party who intends to call an expert witness must also serve, in addition to the information required by paragraph (a)(2) of this section, a statement of the expert's qualifications, a listing of other proceedings in which the expert has given or sought to give expert testimony at trial or hearing or by deposition within the preceding four years, and a list of publications authored or co-authored by the expert within the preceding ten years, to the extent such information has not already been provided pursuant to § 1081.210.

(c) *Effect of failure to comply.* No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 1081.216 Amicus participation.

(a) *Availability.* An amicus brief may be filed only if:

(1) A motion for leave to file the brief has been granted;

(2) The brief is accompanied by written consent of all parties;

(3) The brief is filed at the request of the Director or the hearing officer, as appropriate; or

(4) The brief is presented by the United States or an officer or agency thereof, or by a State or a political subdivision thereof.

(b) *Procedure.* An amicus brief may be filed conditionally with the motion for leave. The motion for leave must identify the interest of the movant and state the reasons why a brief of an amicus curiae is desirable. Except as all parties otherwise consent, any amicus

curiae must file its brief within the time allowed the party whose position the amicus will support, unless the Director or hearing officer, as appropriate, for good cause shown, grants leave for a later filing. If a later filing is allowed, the order granting leave to file must specify when an opposing party may reply to the brief.

(c) *Motions.* A motion for leave to file an amicus brief is subject to § 1081.205.

(d) *Formal requirements as to amicus briefs.* Amicus briefs must be filed pursuant to § 1081.111, comply with the requirements of § 1081.112, and are subject to the length limitation in § 1081.212(e).

(e) *Oral argument.* An amicus curiae may move to present oral argument at any hearing before the hearing officer, but such motions will be granted only for extraordinary reasons.

Subpart C—Hearings

§ 1081.300 Public hearings.

All hearings in adjudication proceedings will be public unless a confidentiality order is entered by the hearing officer pursuant to § 1081.119 or unless otherwise ordered by the Director on the grounds that holding an open hearing would be contrary to the public interest.

§ 1081.301 Failure to appear.

Failure of a respondent to appear in person or by a duly authorized counsel at the hearing constitutes a waiver of respondent's right to a hearing and may be deemed an admission of the facts as alleged and consent to the relief sought in the notice of charges. Without further proceedings or notice to the respondent, the hearing officer will file preliminary findings and conclusions containing findings of fact and addressing the relief sought in the notice of charges.

§ 1081.302 Conduct of hearings.

All hearings will be conducted in a fair, impartial, expeditious, and orderly manner. Enforcement counsel will present its case-in-chief first, unless otherwise ordered by the hearing officer, or unless otherwise expressly specified by law or regulation. Enforcement counsel will be the first party to

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present an opening statement and a closing statement, and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree, the hearing officer will fix the order.

§ 1081.303 Evidence.

(a) *Burden of proof.* Enforcement counsel will have the burden of proof of the ultimate issue(s) of the Bureau's claims at the hearing.

(b) *Admissibility.* (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law. Irrelevant, immaterial, and unreliable evidence will be excluded.

(2) Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues; if the evidence would be misleading; or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(3) Evidence that constitutes hearsay may be admitted if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair. Hearsay is a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted. If otherwise meeting the standards for admissibility described in this section, transcripts of depositions, investigational hearings, prior testimony in Bureau or other proceedings, and any other form of hearsay will be admissible and may not be excluded solely on the ground that they are or contain hearsay.

(4) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this part. Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this part solely on that basis.

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(c) *Official notice.* Official notice may be taken of any material fact that is not subject to reasonable dispute in that it is either generally known or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. If official notice is requested or is taken of a material fact not appearing in the evidence in the record, the parties, upon timely request, will be afforded an opportunity to disprove such noticed fact.

(d) *Documents.* (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (b) of this section, any document, including a report of examination, supervisory activity, inspection or visitation, prepared by the Bureau, a prudential regulator, as that term is defined in section 1002(4) of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5481(24)), or by a State regulatory agency, is presumptively admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines, or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the hearing officer's discretion, be used with or without being admitted into evidence.

(4) As respondents are in the best position to determine the nature of documents generated by such respondents and which come from their own files, the burden of proof is on the respondent to introduce evidence to rebut a presumption that such documents are authentic and kept in the regular course of business.

(e) *Objections.* (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which will be included in the record. Rejected exhibits, adequately

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marked for identification, must be retained pursuant to § 1081.306(b) so as to be available for consideration by any reviewing authority.

(3) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(f) *Stipulations.* (1) The parties may, at any stage of the proceeding, stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing and are binding on the parties with respect to the matters therein stipulated.

(2) Unless the hearing officer directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(g) *Presentation of evidence.* (1) A witness at a hearing for the purpose of taking evidence must testify under oath or affirmation.

(2) A party is entitled to present its case or defense by sworn oral testimony and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as, in the discretion of the hearing officer, may be required for a full and true disclosure of the facts.

(3) An adverse party, or an officer, agent, or employee thereof, and any witness who appears to be hostile, unwilling, or evasive, may be interrogated by leading questions and may also be contradicted and impeached by the party calling him or her.

(4) The hearing officer will exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(i) Make the interrogation and presentation effective for the ascertainment of the truth;

(ii) Avoid needless consumption of time; and

(iii) Protect witnesses from harassment or undue embarrassment.

(5) The hearing officer may permit a witness to appear at a hearing via electronic means for good cause shown.

(h) *Introducing prior sworn statements of witnesses into the record.* At a hearing, any party wishing to introduce a

prior, sworn statement of a witness, not a party, otherwise admissible in the proceeding, may make a motion setting forth the reasons therefore. If only part of a statement is offered in evidence, the hearing officer may require that all relevant portions of the statement be introduced. If all of a statement is offered in evidence, the hearing officer may require that portions not relevant to the proceeding be excluded. A motion to introduce a prior sworn statement may be granted if:

(1) The witness is dead;

(2) The witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the prior sworn statement;

(3) The witness is unable to attend or testify because of age, sickness, infirmity, imprisonment, or other disability;

(4) The party offering the prior sworn statement has been unable to procure the attendance of the witness by subpoena; or

(5) In the discretion of the hearing officer, it would be desirable, in the interests of justice, to allow the prior sworn statement to be used. In making this determination, due regard will be given to the presumption that witnesses will testify orally in an open hearing. If the parties have stipulated to accept a prior sworn statement in lieu of live testimony, consideration should also be given to the convenience of the parties in avoiding unnecessary expense.

§ 1081.304 Record of the hearing.

(a) *Reporting and transcription.* Hearings will be stenographically reported and transcribed under the supervision of the hearing officer, and the original transcript will be a part of the record and the sole official transcript. The live oral testimony of each witness may be video recorded digitally, in which case the video recording and the written transcript of the testimony will be made part of the record. Copies of transcripts will be available from the reporter at prescribed rates.

(b) *Corrections.* Corrections of the official transcript may be made only when they involve errors affecting substance and then only in the manner

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provided in this paragraph (b). Corrections ordered by the hearing officer or agreed to in a written stipulation signed by all counsel and parties not represented by counsel, and approved by the hearing officer, will be included in the record, and such stipulations, except to the extent they are capricious or without substance, must be approved by the hearing officer. Corrections will not be ordered by the hearing officer except upon notice and opportunity for the hearing of objections. Such corrections must be made by the official reporter by furnishing substitute type pages, under the usual certificate of the reporter, for insertion in the official record. The original uncorrected pages will be retained in the files of the Bureau.

(c) *Closing of the hearing record.* Upon completion of the hearing, the hearing officer will issue an order closing the hearing record after giving the parties seven days to determine if the record is complete or needs to be supplemented. The hearing officer retains the discretion to permit or order correction of the record as provided in paragraph (b) of this section.

§ 1081.305 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs.* (1) Using the same method of service for each party, the hearing officer will serve notice upon each party that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed promptly after that filing. Any party may file with the hearing officer proposed findings of fact, proposed conclusions of law, and a proposed order within 28 days following service of this notice by the hearing officer or within such longer period as may be ordered by the hearing officer.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document.

(b) *Responsive briefs.* Responsive briefs may be filed within 14 days after the

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date on which the parties' proposed findings, conclusions, and order are due. Responsive briefs must be strictly limited to responding to matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a responsive brief. Unless directed by the hearing officer, reply briefs are not permitted.

(c) *Order of filing.* The hearing officer may not order the filing by any party of any post-hearing brief or responsive brief in advance of the other party's filing of its post-hearing brief or responsive brief.

§ 1081.306 Record in proceedings before hearing officer; retention of documents; copies.

(a) *Contents of the record.* The record of the proceeding consists of:

(1) The notice of charges, the answer, and any amendments thereto;

(2) Each motion, submission, or other paper filed in the proceedings, and any amendments and exceptions to or regarding them;

(3) Each stipulation, transcript of testimony, and any document or other item admitted into evidence;

(4) Any transcript of a conference or hearing before the hearing officer;

(5) Any amicus briefs filed pursuant to § 1081.216;

(6) With respect to a request to disqualify a hearing officer or to allow the hearing officer's withdrawal under § 1081.105(c), each affidavit or transcript of testimony taken and the decision made in connection with the request;

(7) All motions, briefs, and other papers filed on interlocutory appeal;

(8) All proposed findings and conclusions;

(9) Each written order issued by the hearing officer or Director; and

(10) Any other document or item accepted into the record by the hearing officer.

(b) *Retention of documents not admitted.* Any document offered into evidence but excluded will not be considered part of the record. The Office of Administrative Adjudication will retain any such document until the later of the date upon which an order by the

Director ending the proceeding becomes final and not appealable, or upon the conclusion of any judicial review of the Director's order.

(c) *Substitution of copies.* A true copy of a document may be substituted for any document in the record or any document retained pursuant to paragraph (b) of this section.

Subpart D—Decision and Appeals

§ 1081.400 Preliminary findings and conclusions of the hearing officer.

(a) *Time period for filing preliminary findings and conclusions.* Subject to paragraph (b) of this section, the hearing officer must file preliminary findings and conclusions no later than 90 days after the deadline for filing post-hearing responsive briefs pursuant to § 1081.305(b) and in no event later than 360 days after filing of the notice of charges.

(b) *Extension of deadlines.* In the event the hearing officer presiding over the proceeding determines that it will not be possible to issue preliminary findings and conclusions within the time periods specified in paragraph (a) of this section, the hearing officer will submit a written request to the Director for an extension of the time period for filing the preliminary findings and conclusions. This request must be filed no later than 28 days prior to the expiration of the time for issuance of preliminary findings and conclusions. The request will be served on all parties in the proceeding, who may file with the Director briefs in support of or in opposition to the request. Any such briefs must be filed within seven days of service of the hearing officer's request and may not exceed five pages. If the Director determines that additional time is necessary or appropriate in the public interest, the Director will issue an order extending the time period for filing preliminary findings and conclusions.

(c) *Content.* (1) Preliminary findings and conclusions must be based on a consideration of the whole record relevant to the issues decided, and be supported by reliable, probative, and substantial evidence. Preliminary findings and conclusions must include a statement of findings of fact (with specific

page references to principal supporting items of evidence in the record) and conclusions of law, as well as the reasons or basis therefore, as to all the material issues of fact, law, or discretion presented on the record and the appropriate order, sanction, relief or denial thereof. Preliminary findings and conclusions must also state that a notice of appeal may be filed within 14 days after service of the preliminary findings and conclusions and include a statement that, unless a party timely files and perfects a notice of appeal of the preliminary findings and conclusions, the Director may adopt the preliminary findings and conclusions as the final decision and order of the Bureau without further opportunity for briefing or argument.

(2) Consistent with paragraph (a) of this section, when more than one claim for relief is presented in an adjudication proceeding, or when multiple parties are involved, the hearing officer may direct the entry of preliminary findings and conclusions as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of preliminary findings and conclusions.

(d) *By whom made.* Preliminary findings and conclusions must be made and filed by the hearing officer who presided over the hearings, except when that hearing officer has become unavailable to the Bureau.

(e) *Reopening of proceeding by hearing officer; termination of jurisdiction.* (1) At any time from the close of the hearing record pursuant to § 1081.304(c) until the filing of the hearing officer's preliminary findings and conclusions, a hearing officer may reopen the proceeding for the receipt of further evidence for good cause shown.

(2) Except for the correction of clerical errors or pursuant to an order of remand from the Director, the jurisdiction of the hearing officer is terminated upon the filing of the hearing officer's preliminary findings and conclusions with respect to those issues decided pursuant to paragraph (c) of this section.

(f) *Filing, service, and publication.* Upon filing by the hearing officer of

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preliminary findings and conclusions, the Office of Administrative Adjudication will promptly transmit the preliminary findings and conclusions to the Director and serve them upon the parties.

§ 1081.401 Transmission of documents to Director; record index; certification.

(a) *Filing of index.* At the same time the Office of Administrative Adjudication transmits preliminary findings and conclusions to the Director, the hearing officer will furnish to the Director a certified index of the entire record of the proceedings. The certified index must include, at a minimum, an entry for each paper, document or motion filed in the proceeding, the date of the filing, and the identity of the filer. The certified index must also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for each exhibit introduced and admitted into evidence and each exhibit introduced but not admitted into evidence.

(b) *Retention of record items by the Office of Administrative Adjudication.* After the close of the hearing, the Office of Administrative Adjudication will retain originals of any motions, exhibits or any other documents filed with, or accepted into evidence by, the hearing officer, or any other portions of the record that have not already been filed with the Office of Administrative Adjudication.

§ 1081.402 Notice of appeal; review by the Director.

(a) *Notice of appeal—(1) Filing.* Any party may file exceptions to the preliminary findings and conclusions of the hearing officer by filing a notice of appeal with the Office of Administrative Adjudication within 14 days after service of the preliminary findings and conclusions. The notice must specify the party or parties against whom the appeal is taken and must designate the preliminary findings and conclusions or part thereof appealed from. If a timely notice of appeal is filed by a party, any other party may thereafter file a notice of appeal within seven days after service of the first notice, or within 14 days after service of the pre-

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liminary findings and conclusions, whichever period expires last.

(2) *Perfecting a notice of appeal.* Any party filing a notice of appeal must perfect its appeal by filing its opening appeal brief within 28 days of service of the preliminary findings and conclusions. Any party may respond to the opening appeal brief by filing an answering brief within 28 days of service of the opening brief. Any party may file a reply to an answering brief within seven days of service of the answering brief. These briefs must conform to the requirements of § 1081.403.

(b) *Director review other than pursuant to an appeal.* In the event no party perfects an appeal of the hearing officer's preliminary findings and conclusions, the Director will, within 42 days after the date of service of the preliminary findings and conclusions, either issue a final decision and order adopting the preliminary findings and conclusions, or order further briefing regarding any portion of the preliminary findings and conclusions. The Director's order for further briefing must set forth the scope of review and the issues that will be considered and will make provision for the filing of briefs in accordance with the timelines set forth in paragraph (a)(2) of this section (except that that opening briefs will be due within 28 days of service of the order of review) if deemed appropriate by the Director.

(c) *Exhaustion of administrative remedies.* Pursuant to 5 U.S.C. 704, a perfected appeal to the Director of preliminary findings and conclusions pursuant to paragraph (a) of this section is a prerequisite to the seeking of judicial review of a final decision and order, or portion of the final decision and order, adopting the preliminary findings and conclusions.

§ 1081.403 Briefs filed with the Director.

(a) *Contents of briefs.* Briefs must be confined to the particular matters at issue. Each exception to the findings or conclusions being reviewed should be stated succinctly. Exceptions must be supported by citation to the relevant portions of the record, including references to the specific pages relied

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upon, and by concise argument including citation of such statutes, decisions, and other authorities as may be relevant. If the exception relates to the admission or exclusion of evidence, the substance of the evidence admitted or excluded must be set forth in the brief, in an appendix thereto, or by citation to the record. Reply briefs must be confined to matters in answering briefs of other parties.

(b) *Length limitation.* Except with leave of the Director, opening and answering briefs may not exceed 30 pages, and reply briefs may not exceed 15 pages, exclusive of pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions or rules, and exhibits. Motions to file briefs in excess of these limitations are disfavored.

§ 1081.404 Oral argument before the Director.

(a) *Availability.* The Director will consider appeals, motions, and other matters properly before the Director on the basis of the papers filed by the parties without oral argument unless the Director determines that the presentation of facts and legal arguments in the briefs and record and decisional process would be significantly aided by oral argument, in which case the Director will issue an order setting the date on which argument will be held. A party seeking oral argument must so indicate on the first page of that party's opening or answering brief.

(b) *Public arguments; transcription.* All oral arguments will be public unless otherwise ordered by the Director. Oral arguments before the Director will be reported stenographically, unless otherwise ordered by the Director. Motions to correct the transcript of oral argument must be made according to the same procedure provided in § 1081.304(b).

§ 1081.405 Decision of the Director.

(a) Upon appeal from or upon further review of preliminary findings and conclusions, the Director will consider such parts of the record as are cited or as may be necessary to resolve the issues presented and, in addition, will,

to the extent necessary or desirable, exercise all powers which could have exercised if the Director had made the preliminary findings and conclusions. In proceedings before the Director, the record will consist of all items part of the record in accordance with § 1081.306 as follows: Any notices of appeal or order directing review; all briefs, motions, submissions, and other papers filed on appeal or review; and the transcript of any oral argument held. Review by the Director of preliminary findings and conclusions may be limited to the issues specified in the notice(s) of appeal or the issues, if any, specified in the order directing further briefing. On notice to all parties, however, the Director may, at any time prior to issuance of the Director's decision, raise and determine any other matters that the Director deems material, with opportunity for oral or written argument thereon by the parties.

(b) Decisional employees may advise and assist the Director in the consideration and disposition of the case.

(c) In rendering the Director's decision, the Director will affirm, adopt, reverse, modify, set aside, or remand for further proceedings the preliminary findings and conclusions and will include in the decision a statement of the reasons or basis for the Director's actions and the findings of fact upon which the decision is predicated.

(d) At the expiration of the time permitted for the filing of reply briefs with the Director, the Office of Administrative Adjudication will notify the parties that the case has been submitted for final Bureau decision. The Director will issue and the Office of Administrative Adjudication will serve the Director's final decision and order within 90 days after such notice, unless within that time the Director orders that the adjudication proceeding or any aspect thereof be remanded to the hearing officer for further proceedings.

(e) The Office of Administrative Adjudication will serve copies of a final decision and order of the Director upon each party to the proceeding in accordance with § 1081.113(d)(2); upon other persons required by statute, if any;

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and, if directed by the Director or required by statute, upon any appropriate State or Federal supervisory authority. A final decision and order will also be published on the Bureau's website or as otherwise deemed appropriate by the Bureau.

§ 1081.406 Reconsideration.

Within 14 days after service of the Director's decision and order, any party may file with the Director a petition for reconsideration, briefly and specifically setting forth the relief desired and the grounds in support thereof. Any petition filed under this section must be confined to new questions raised by the decision or order and upon which the petitioner had no opportunity to argue, in writing or orally, before the Director. No response to a petition for reconsideration may be filed unless requested by the Director, who will request such response before granting any petition for reconsideration. The filing of a petition for reconsideration does not operate to stay the effective date of the decision or order or to toll the running of any statutory period affecting such decision or order unless specifically so ordered by the Director.

§ 1081.407 Effective date; stays pending judicial review.

(a) Other than consent orders, which become effective at the time specified therein, an order to cease and desist or for other affirmative action under section 1053(b) of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5563(b)) becomes effective at the expiration of 30 days after the date of service pursuant to § 1081.113(d)(2), unless the Director agrees to stay the effectiveness of the order pursuant to this section.

(b) Any party subject to a final decision and order, other than a consent order, may apply to the Director for a stay of all or part of that order pending judicial review.

(c) A motion for stay must state the reasons a stay is warranted and the facts relied upon, and must include supporting affidavits or other sworn statements, and a copy of the relevant portions of the record. The motion must address the likelihood of the

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movant's success on appeal, whether the movant will suffer irreparable harm if a stay is not granted, the degree of injury to other parties if a stay is granted, and why the stay is in the public interest.

(d) A motion for stay must be filed within 28 days of service of the order on the party. Any party opposing the motion may file a response within seven days after receipt of the motion. The movant may file a reply brief, limited to new matters raised by the response, within seven days after receipt of the response.

(e) The commencement of proceedings for judicial review of a final decision and order of the Director does not, unless specifically ordered by the Director or a reviewing court, operate as a stay of any order issued by the Director. The Director has discretion, on such terms as the Director finds just, to stay the effectiveness of all or any part of an order pending a final decision on a petition for judicial review of that order.

§ 1081.408 Issue exhaustion.

(a) *Scope.* This section applies to any argument to support a party's case or defense, including any argument that could be a basis for setting aside Bureau action under 5 U.S.C. 706 or any other source of law.

(b) *Duties to raise arguments.* A party must raise an argument before the hearing officer, or else it is not preserved for later consideration by the Director. A party must raise an argument before the Director, or else it is not preserved for later consideration by a court.

(c) *Manner of raising arguments.* An argument must be raised in a manner that complies with this part and that provides a fair opportunity to consider the argument.

(d) *Discretion to consider unpreserved arguments.* The Director has discretion to consider an unpreserved argument, including by considering it in the alternative. If the Director considers an unpreserved argument in the alternative, the argument remains unpreserved.

Consumer Financial Protection Bureau**§ 1081.502****Subpart E—Temporary Cease-and-Desist Proceedings****§ 1081.500 Scope.**

(a) This subpart prescribes the rules of practice and procedure applicable to the issuance of a temporary cease-and-desist order authorized by section 1053(c) of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5563(c)).

(b) The issuance of a temporary cease-and-desist order does not stay or otherwise affect the proceedings instituted by the issuance of a notice of charges, which are governed by subparts A through D of this part.

§ 1081.501 Basis for issuance, form, and service.

(a) *In general.* The Director or the Director's designee may issue a temporary cease-and-desist order if the Director determines that one or more of the alleged violations specified in a notice of charges, or the continuation thereof, is likely to cause the respondent to be insolvent or otherwise prejudice the interests of consumers before the completion of the adjudication proceeding. A temporary cease-and-desist order may require the respondent to cease and desist from any violation or practice specified in the notice of charges and to take affirmative action to prevent or remedy such insolvency or other condition pending completion of the proceedings initiated by the issuance of a notice of charges.

(b) *Incomplete or inaccurate records.* When a notice of charges specifies, on the basis of particular facts and circumstances, that the books and records of a respondent are so incomplete or inaccurate that the Bureau is unable to determine the financial condition of the respondent or the details or purpose of any transaction or transactions that may have a material effect on the financial condition of the respondent, then the Director or the Director's designee may issue a temporary order requiring:

(1) The cessation of any activity or practice which gave rise, whether in whole or in part, to the incomplete or inaccurate state of the books or records; or

(2) Affirmative action to restore such books or records to a complete and ac-

curate state, until the completion of the adjudication proceeding.

(c) *Content, scope, and form of order.* Every temporary cease-and-desist order accompanying a notice of charges must describe:

(1) The basis for its issuance, including the alleged violations and the harm that is likely to result without the issuance of an order; and

(2) The act or acts the respondent is to take or refrain from taking.

(d) *Effective and enforceable upon service.* A temporary cease-and-desist order is effective and enforceable upon service.

(e) *Service.* Service of a temporary cease-and-desist order will be made pursuant to § 1081.113(d).

§ 1081.502 Judicial review, duration.

(a) *Availability of judicial review.* Judicial review of a temporary cease-and-desist order is available solely as provided in section 1053(c)(2) of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5563(c)(2)). Any respondent seeking judicial review of a temporary cease-and-desist order issued under this subpart must, not later than ten days after service of the temporary cease-and-desist order, apply to the United States district court for the judicial district in which the residence or principal office or place of business of the respondent is located, or the United States District Court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order.

(b) *Duration.* Unless set aside, limited, or suspended by the Director or the Director's designee, or by a court in proceedings authorized under section 1053(c)(2) of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5563(c)(2)), a temporary cease-and-desist order will remain effective and enforceable until:

(1) The effective date of a final order issued upon the conclusion of the adjudication proceeding.

(2) With respect to a temporary cease-and-desist order issued pursuant to § 1081.501(b) only, the Bureau determines by examination or otherwise that the books and records are accurate and reflect the financial condition

of the respondent, and the Director or the Director's designee issues an order terminating, limiting, or suspending the temporary cease-and-desist order.

PART 1082—STATE OFFICIAL NOTIFICATION RULES

AUTHORITY: 12 U.S.C. 5481 *et seq.*

SOURCE: 77 FR 39116, June 29, 2012, unless otherwise noted.

§ 1082.1 Procedures for notifying the Bureau of Consumer Financial Protection when a State Official takes an action to enforce title X of the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010.

(a) *Notice requirement.* (1) Pursuant to 12 U.S.C. 5552(b) and except as provided in paragraph (b) of this section, every State attorney general and State regulator (State Official) shall provide the notice described in paragraph (c) of this section to the Office of Enforcement of the Bureau of Consumer Financial Protection (the Bureau), the office of the Bureau responsible for enforcement of Federal consumer financial law pursuant to title X of the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010, as amended, Public Law 111-203 (July 21, 2010), codified at 12 U.S.C. 5481 *et seq.* (the Dodd-Frank Act), and the Office of the Executive Secretary of the Bureau at least ten calendar days prior to initiating any action against any covered person. For purposes of this section, an action requiring notification is any adjudicative proceeding before a court or an administrative or regulatory body to determine whether a violation of any provision of title X of the Dodd-Frank Act or any regulation prescribed thereunder has occurred. Initiating an action under this section would include but not be limited to the filing of a complaint, motion for relief, or other document which initiates an action or a proceeding.

(2) Notice shall be provided to the Office of Enforcement and the Office of the Executive Secretary, or their successor offices, via electronic mail to Enforcement@cfpb.gov and ExecSec@cfpb.gov. In the event of tech-

nical problems preventing the delivery of notice, the Office of Enforcement or its successor entity should be contacted.

(3) On the same date that notice is provided to the Office of Enforcement and the Office of the Executive Secretary pursuant to paragraph (a)(1) of this section, a copy of the notice shall be sent to the relevant prudential regulator, if any, or the designee thereof, by mail or electronic mail.

(4) Notice shall be deemed to have been provided as of the date of transmitting or mailing the materials described in paragraph (c) of this section.

(5) The Office of Enforcement, or its successor entity, in consultation with a State Official, may provide, for good cause shown, an alternative deadline for the notice described in paragraph (a)(1) of this section.

(b) *Emergency actions.* (1) Pursuant to 12 U.S.C. 5552(b), in the event that a State Official initiates or intends to initiate an action and, in order to protect the public interest or prevent irreparable and imminent harm, is unable to provide timely notice as described in paragraph (a) of this section, the State Official shall provide the notice described in paragraph (c) of this section as soon as is practicable and not later than 48 hours after initiation of the action.

(2) Notice shall be provided in accordance with the procedures set forth in paragraphs (a)(2) through (4) of this section.

(3) The Office of Enforcement, or its successor entity, in consultation with a State Official, may provide, for good cause shown, an alternative deadline for the notice described in paragraph (b)(1) of this section.

(c) *Contents of notice.* (1) Pursuant to 12 U.S.C. 5552(b), the notice required under paragraphs (a) and (b) of this section shall include a written description of the anticipated action, including:

(i) The court or body in which the action is to be initiated;

(ii) The identity of the parties to the action;

(iii) The nature of the action to be initiated;

(iv) The anticipated date of initiating the action;

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(v) The alleged facts underlying the action;

(vi) A contact name, electronic mail address, and phone number of an individual involved with the matter in the office of the State Official with whom the Bureau may consult;

(vii) A determination as to whether there may be a need to coordinate the prosecution of the action so as not to interfere with any action, including any rulemaking, undertaken by the Bureau, a prudential regulator, or another Federal agency; and

(viii) A statement by the State Official setting forth any limitations on the disclosure of the substance or fact of the notice to any person or entity outside of the recipient agency.

(2) The notice required under paragraphs (a) and (b) of this section shall further include a complete and unredacted copy of any complaint, motion for relief, or similar document that is the subject of the notice, in its form as of the date the notice is provided. To the extent the complaint, motion for relief, or similar document contains the information described in paragraph (c)(1) of this section, provision of the complaint, motion for relief, or similar document shall be deemed sufficient notice of that information.

(3) In the event that notice is provided after the initiation of an action, the written description shall also include the following, in addition to the information described in paragraph (c)(1) of this section:

(i) A brief description of any proceeding that occurred as a result of the initiation of the action, including any orders issued by a court or other body;

(ii) Any case number, matter number, or designation assigned to the action; and

(iii) Information on scheduled court or other administrative or regulatory proceedings.

(4) In the event that notice is provided after the initiation of an action, in addition to the requirements set forth in paragraph (c)(3) of this section, the notice shall further include a complete, unredacted copy of any document filed by any party in relation to the action and any orders issued by the court or other body.

(5) If the State Official, after providing the notice described in paragraphs (c)(1) and (c)(2) of this section, intends to file a complaint, motion for relief, or similar document that is materially different from the document included with the notice, the State Official shall provide a copy of that document prior to filing, in accordance with the method described in paragraph (a)(2) of this section.

(d) *Bureau response.* In any action described in paragraphs (a) and (b) of this section, the Bureau may:

- (1) Intervene in the action as a party;
- (2) Upon intervening,

(i) Remove the action to the appropriate United States district court, if the action was not originally brought there; and

(ii) Be heard on all matters arising in the action;

(3) Appeal any order or judgment, to the same extent as any other party in the proceeding may; and

(4) Otherwise participate in the action as appropriate.

(e) *Confidentiality and privilege.* (1) The information described in paragraph (c) of this section, including the complaint, motion for relief, or other document, as well as the fact that notice has been provided, shall be subject to any limitations on disclosure imposed by the State Official pursuant to paragraph (c)(1)(viii) of this section; provided, however, that the recipient may disclose such information:

- (i) As required by law;
- (ii) When the information is or becomes publicly available;

(iii) With the consent of the State Official; or

(iv) To another State or Federal government entity when necessary to protect the public interest, after consultation with the State Official who provided the notice.

(2) Provision of notice by a State Official and disclosure of information pursuant to paragraph (e)(1) of this section shall not be deemed a waiver of any applicable privilege.

(f) *No private right of action or defense.* The requirements set forth in this section are not intended to, do not, and may not be relied upon to create any right, benefit, or defense, substantive or procedural, enforceable at law by a

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party against the United States or any State enforcing the provisions of the Dodd-Frank Act or any regulation prescribed thereunder.

PART 1083—CIVIL PENALTY ADJUSTMENTS

AUTHORITY: 12 U.S.C. 2609(d); 12 U.S.C. 5113(d)(2); 12 U.S.C. 5565(c); 15 U.S.C. 1639e(k); 15 U.S.C. 1717a(a); 28 U.S.C. 2461 note.

§ 1083.1 Adjustment of civil penalty amounts.

(a) The maximum amount of each civil penalty within the jurisdiction of the Consumer Financial Protection Bureau to impose is adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 and further amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (28 U.S.C. 2461 note), as follows:

TABLE 1 TO PARAGRAPH (a)

Law	Penalty description	Adjusted maximum civil penalty amount
12 U.S.C. 5565(c)(2)(A)	Tier 1 penalty	\$6,813
12 U.S.C. 5565(c)(2)(B)	Tier 2 penalty	34,065
12 U.S.C. 5565(c)(2)(C)	Tier 3 penalty	1,362,567
15 U.S.C. 1717a(a)(2)	Per violation	2,374
15 U.S.C. 1717a(a)(2)	Annual cap	2,372,677
12 U.S.C. 2609(d)(1)	Per failure	111
12 U.S.C. 2609(d)(1)	Annual cap	223,229
12 U.S.C. 2609(d)(2)(A)	Per failure, where intentional	223
12 U.S.C. 5113(d)(2)	Per violation	34,401
15 U.S.C. 1639e(k)(1)	First violation	13,627
15 U.S.C. 1639e(k)(2)	Subsequent violations	27,252

(b) The adjustments in paragraph (a) of this section shall apply to civil penalties assessed after January 15, 2023, whose associated violations occurred on or after November 2, 2015.

[88 FR 2, Jan. 3, 2023]

1090.108 Automobile financing market.

AUTHORITY: 12 U.S.C. 5514(a)(1)(B); 12 U.S.C. 5514(a)(2); 12 U.S.C. 5514(b)(7)(A); and 12 U.S.C. 5512(b)(1).

SOURCE: 77 FR 42898, July 20, 2012, unless otherwise noted.

PART 1090—DEFINING LARGER PARTICIPANTS OF CERTAIN CONSUMER FINANCIAL PRODUCT AND SERVICE MARKETS

Subpart A—General

Sec.

- 1090.100 Scope and purpose.
- 1090.101 Definitions.
- 1090.102 Status as larger participant subject to supervision.
- 1090.103 Assessing status as a larger participant.

Subpart B—Markets

- 1090.104 Consumer Reporting Market.
- 1090.105 Consumer debt collection market.
- 1090.106 Student loan servicing market.
- 1090.107 International Money Transfer Market.

Subpart A—General

§ 1090.100 Scope and purpose.

This part defines those nonbank covered persons that qualify as larger participants of certain markets for consumer financial products or services pursuant to 12 U.S.C. 5514(a)(1)(B) and (a)(2). A larger participant of a market covered by this part is subject to the supervisory authority of the Bureau under 12 U.S.C. 5514. This part also establishes rules to facilitate the Bureau's supervision of such larger participants pursuant to 12 U.S.C. 5514(b)(7).

§ 1090.101 Definitions.

For the purposes of this part, the following definitions apply:

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Affiliated company means any company (other than an insured depository institution or insured credit union) that controls, is controlled by, or is under common control with, a person.

(1) For purposes of this definition “company” means any corporation, limited liability company, business trust, general or limited partnership, proprietorship, cooperative, association, or similar organization.

(2) A person has control over another person if:

(i) The person directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 percent or more of any class of voting securities or similar ownership interest of the other person;

(ii) The person controls in any manner the election of a majority of the directors, trustees, members, or general partners of the other person; or

(iii) The person directly or indirectly exercises a controlling influence over the management or policies of the other person.

Assistant Director means the Bureau’s Assistant Director for Nonbank Supervision or her or his designee. The Director of the Bureau may perform the functions of the Assistant Director under this part. In the event there is no such Assistant Director, the Director of the Bureau may designate an alternative Bureau employee to fulfill the duties of the Assistant Director under this part.

Bureau means the Bureau of Consumer Financial Protection.

Completed fiscal year means a tax year including any fiscal year, calendar year, or short tax year. “Fiscal year,” “calendar year,” “tax year,” and “short tax year” have the meanings attributed to them by the IRS as set forth in IRS Publication 538, which provides that:

(1) A “fiscal year” is 12 consecutive months ending on the last day of any month except December 31.

(2) A “calendar year” is 12 consecutive months ending on December 31.

(3) A “tax year” is an annual accounting period for keeping records and reporting income and expenses, or, if appropriate, a short tax year. An annual accounting period does not include a short tax year.

(4) A “short tax year” is a tax year of less than 12 months.

Consumer means an individual or an agent, trustee, or representative acting on behalf of an individual.

Consumer financial product or service means any financial product or service, as defined in 12 U.S.C. 5481(15), that is described in one or more categories under:

(1) 12 U.S.C. 5481(15)(A) and is offered or provided for use by consumers primarily for personal, family, or household purposes; or

(2) Clause (i), (iii), (ix), or (x) of 12 U.S.C. 5481(15)(A) and is delivered, offered, or provided in connection with a consumer financial product or service referred to in paragraph (1) of this definition.

Dodd-Frank Act means the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Larger participant means a nonbank covered person that has met a test under subpart B of this part within the period provided in § 1090.102 of this part.

Nonbank covered person means, except for persons described in 12 U.S.C. 5515(a) and 5516(a):

(1) Any person that engages in offering or providing a consumer financial product or service; and

(2) Any affiliate of a person that engages in offering or providing a consumer financial product or service if such affiliate acts as a service provider to such person.

Person means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

Supervision and supervisory activity mean the Bureau’s exercise, or intended exercise, of supervisory authority, including by initiating or undertaking an examination, or requiring a report of a person, pursuant to 12 U.S.C. 5514.

[77 FR 42898, July 20, 2012, as amended at 80 FR 37526, June 30, 2015]

§ 1090.102 Status as larger participant subject to supervision.

A person qualifying as a larger participant under subpart B of this part shall not cease to be a larger participant under this part until two years

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from the first day of the tax year in which the person last met the applicable test under subpart B.

§ 1090.103 Assessing status as a larger participant.

(a) If a person receives a written communication from the Bureau initiating a supervisory activity pursuant to 12 U.S.C. 5514, such person may respond by asserting that the person does not meet the definition of a larger participant of a market covered by this part within 45 days of the date of the communication. Such response must be sent to the Assistant Director by electronic transmission at the address included in the communication and must include an affidavit setting forth an explanation of the basis for the person's assertion that it does not meet the definition of larger participant of a market covered by this part and therefore is not subject to the Bureau's supervisory authority under 12 U.S.C. 5514. In addition, a person may include with the response copies of any records, documents, or other information on which the person relied in making the assertion.

(b) A person shall be deemed to have waived the opportunity, at any time that it may dispute that it qualifies as a larger participant, to rely on any argument, records, documents, or other information that it fails to submit to the Assistant Director under paragraph (a) of this section. A person who fails to respond to the Bureau's written communication within 45 days will be deemed to have acknowledged that it is a larger participant.

(c) The Assistant Director shall review the affidavit, any attached records, documents, or other information submitted pursuant to paragraph (a) of this section, and any other information the Assistant Director deems relevant, and thereafter send by electronic transmission to the person a statement explaining whether the person meets the definition for a larger participant of a market covered by this part.

(d) At any time, including prior to issuing the written communication referred to in paragraph (a) of this section, the Assistant Director may require that a person provide to the Bu-

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reau such records, documents, and information as the Assistant Director may deem appropriate to assess whether a person qualifies as a larger participant. Persons must provide the requisite records, documents, and other information to the Bureau within the time period specified in the request.

(e) The Assistant Director, in her or his discretion, may modify any time-frame prescribed by this section on her or his own initiative or for good cause shown.

Subpart B—Markets

§ 1090.104 Consumer Reporting Market.

(a) *Market-Related definitions.*

Annual receipts means receipts calculated as follows:

(i) *Receipts* means "total income" (or in the case of a sole proprietorship, "gross income") plus "cost of goods sold" as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; Form 1040, Schedule C for sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers and excluding taxes levied on the entity or its employees; and amounts collected for another (but fees earned in connection with such collections are receipts). Items such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs such as payroll taxes are included in receipts.

(ii) *Period of measurement.* (A) Annual receipts of a person that has been in business for three or more completed fiscal years means the total receipts of the person over its three most recently completed fiscal years divided by three.

(B) Annual receipts of a person that has been in business for less than three completed fiscal years means the total receipts of the person for the period the person has been in business divided by

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the number of weeks in business, multiplied by 52.

(C) Where a person has been in business for three or more completed fiscal years, but one of the years within its period of measurement is a short tax year, annual receipts means the total receipts for the short year and the two full fiscal or calendar years divided by the total number of weeks in the short year and the two full fiscal or calendar years, multiplied by 52.

(iii) *Annual receipts of affiliated companies.* (A) The annual receipts of a person are calculated by adding the annual receipts of the person with the annual receipts of each of its affiliated companies.

(B) If a person has acquired an affiliated company or been acquired by an affiliated company during the applicable period of measurement, the annual receipts of the person and the affiliated company are aggregated for the entire period of measurement (not just the period after the affiliation arose).

(C) Receipts are calculated separately for the person and each of its affiliated companies in accordance with paragraph (ii) of this definition even though this may result in using a different period of measurement to calculate an affiliated company's annual receipts. Thus, for example, if an affiliated company has been in business for a period of less than three years, the affiliated company's receipts are to be annualized in accordance with paragraph (ii)(B) of this definition even if the person has been in business for three or more completed fiscal years.

(D) The annual receipts of a formerly affiliated company are not included in the annual receipts of a nonbank covered person for purposes of this section, if the affiliation ceased before the applicable period of measurement as set forth in paragraph (ii) of this definition. The annual receipts of a nonbank covered person and its formerly affiliated company are aggregated for the entire period of measurement if the affiliation ceased during the applicable period of measurement as set forth in paragraph (ii) of this definition.

Consumer reporting means:

(i) *In general.* Consumer reporting means collecting, analyzing, maintaining, or providing consumer report in-

formation or other account information used or expected to be used in any decision by another person regarding the offering or provision of any consumer financial product or service.

(ii) *Exclusion for transaction and experience information.* Consumer reporting does not include the activities of a person to the extent that a person collects, analyzes, maintains, or provides information that relates solely to the person's transactions or experiences with consumers.

(iii) *Exclusion for furnishing affiliate information to a consumer reporting entity.* Consumer reporting does not include the activities of a person to the extent that a person provides information that solely relates to transactions or experiences between a consumer and an affiliate of such person to another person that is engaged in consumer reporting.

(iv) *Exclusion for certain authorizations or approvals.* Consumer reporting does not include any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device.

(v) *Exclusion for providing information to be used solely in a decision regarding employment, government licensing, or residential leasing or tenancy.* Consumer reporting does not include the activities of a person to the extent that a person provides consumer report or other account information that is used or expected to be used solely regarding a decision for employment, government licensing, or a residential lease or tenancy involving a consumer, or to be used solely in any decision regarding the offering or provision of a product or service that is not a consumer financial product or service.

(b) *Test to define larger participants.* A nonbank covered person that offers or provides consumer reporting is a larger participant of the consumer reporting market if the person's annual receipts resulting from consumer reporting are more than \$7 million.

[77 FR 42898, July 20, 2012, as amended at 80 FR 37526, June 30, 2015]

§ 1090.105 Consumer debt collection market.

(a) *Market-Related definitions.* As used in this subpart:

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Annual receipts means, for the consumer debt collection market, receipts calculated as follows:

(i) *Receipts* means “total income” (or in the case of a sole proprietorship, “gross income”) plus “cost of goods sold” as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; and Form 1040, Schedule C for sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers but excluding taxes levied on the entity or its employees; or amounts collected for another (but fees earned in connection with such collections are receipts). Items such as subcontractor costs, reimbursements for purchases a contractor makes at a customer’s request, and employee-based costs such as payroll taxes are included in receipts.

(ii) *Period of measurement.* (A) Annual receipts of a person that has been in business for three or more completed fiscal years means the total receipts of the person over its three most recently completed fiscal years divided by three.

(B) Annual receipts of a person that has been in business for less than three completed fiscal years means the total receipts of the person for the period the person has been in business divided by the number of weeks in business, multiplied by 52.

(C) Where a person has been in business for three or more completed fiscal years, but one of the years within its period of measurement is a short tax year, annual receipts means the total receipts for the short year and the two full fiscal or calendar years divided by the total number of weeks in the short year and the two full fiscal or calendar years, multiplied by 52.

(iii) *Annual receipts of affiliated companies.* (A) The annual receipts of a person are calculated by adding the annual receipts of the person with the annual receipts of each of its affiliated companies.

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(B) If a person has acquired an affiliated company or been acquired by an affiliated company during the applicable period of measurement, the annual receipts of the person and the affiliated company are aggregated for the entire period of measurement (not just the period after the affiliation arose).

(C) Receipts are calculated separately for the person and each of its affiliated companies in accordance with paragraph (ii) of this definition even though this may result in using a different period of measurement to calculate an affiliated company’s annual receipts. Thus, for example, if an affiliated company has been in business for a period of less than three years, the affiliated company’s receipts are to be annualized in accordance with paragraph (ii) of this definition even if the person has been in business for three or more completed fiscal years.

(D) The annual receipts of a formerly affiliated company are not included in the annual receipts of a nonbank covered person for purposes of this section if the affiliation ceased before the applicable period of measurement as set forth in paragraph (ii) of this definition. The annual receipts of a nonbank covered person and its formerly affiliated company are aggregated for the entire period of measurement if the affiliation ceased during the applicable period of measurement as set forth in paragraph (ii) of this definition.

(E) Annual receipts do not include receipts that result from the collection of debt that was originally owed to a medical provider.

Consumer debt collection is a debt collector’s collection of debt incurred by a consumer primarily for personal, family, or household purposes and related to a consumer financial product or service.

Creditor means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that the person receives an assignment or transfer of a debt in default solely for the purpose of facilitating the collection of debt for another.

Debt collector means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the

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collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due to another. Notwithstanding the exclusion provided by paragraph (iii) of this definition, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. The term does not include:

(i) Any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(ii) Any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors;

(iii) Any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity:

(A) Concerns a debt which was originated by such person; or

(B) Concerns a debt which was not in default at the time it was obtained by such person; and

(iv) Any person engaged solely in enforcing a security interest.

(b) *Test to define larger participants.* A nonbank covered person is a larger participant of the consumer debt collection market if the nonbank covered person's annual receipts resulting from consumer debt collection are more than \$10 million.

[77 FR 65798, Oct. 31, 2012, as amended at 77 FR 72913, Dec. 7, 2012; 80 FR 37526, June 30, 2015]

§ 1090.106 Student loan servicing market.

(a) *Market-related definitions.* As used in this subpart:

Account volume means the number of accounts with respect to which a nonbank covered person is considered

to perform student loan servicing, calculated as follows:

(i) *Number of accounts.* A nonbank covered person has at least one account for each student or prior student with respect to whom the nonbank covered person performs student loan servicing. If a nonbank covered person is receiving separate fees for performing student loan servicing with respect to a given student or prior student, the nonbank covered person has one account for each stream of fees to which the person is entitled.

(ii) *Time of measurement.* The number of accounts is counted as of December 31 of the prior calendar year.

(iii) *Affiliated companies.* (A) The account volume of a nonbank covered person is the sum of the number of accounts of that nonbank covered person and of any affiliated companies of that person.

(B) If two persons become affiliated companies, each person's number of accounts as of the prior calendar year's December 31 is included in the total account volume.

(C) If two affiliated companies cease to be affiliated companies, the number of accounts of each continues to be included in the other's account volume until the succeeding December 31.

Post-secondary education expenses means any of the expenses that are included as part of the cost of attendance of a student as defined in 20 U.S.C. 1087ll.

Post-secondary education loan means a loan that is made, insured or guaranteed under Title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 *et seq.*) or that is extended to a consumer with the expectation that the funds extended will be used in whole or in part to pay post-secondary education expenses. A loan that is extended in order to refinance or consolidate a consumer's existing post-secondary education loans is also a post-secondary education loan. However, no loan under an open-end credit plan (as defined in Regulation Z, 12 CFR 1026.2(a)(20)) or loan that is secured by real property is a post-secondary education loan, regardless of the purpose for the loan.

Student loan servicing means:

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- (i)(A) Receiving any scheduled periodic payments from a borrower or notification of such payments and
 - (B) Applying payments to the borrower's account pursuant to the terms of the post-secondary education loan or of the contract governing the servicing;
 - (ii) During a period when no payment is required on a post-secondary education loan,
 - (A) Maintaining account records for the loan and
 - (B) Communicating with the borrower regarding the loan, on behalf of the loan's holder; or
 - (iii) Interactions with a borrower, including activities to help prevent default on obligations arising from post-secondary education loans, conducted to facilitate the activities described in paragraph (i) or (ii) of this definition.
- (b) *Test to define larger participants.* A nonbank covered person that offers or provides student loan servicing is a larger participant of the student loan servicing market if the nonbank covered person's account volume exceeds one million.

[78 FR 73406, Dec. 6, 2013]

§ 1090.107 International Money Transfer Market.

(a) *Market-related definitions.* As used in this subpart:

Aggregate annual international money transfers means the sum of the annual international money transfers of a nonbank covered person and the annual international money transfers of each of the nonbank covered person's affiliated companies.

(i) *Annual international money transfers.* Annual international money transfers of a nonbank covered person means the international money transfers provided by the nonbank covered person during the preceding calendar year.

(ii) *Agents.* (A) Annual international money transfers of a nonbank covered person include international money transfers in which another person acts as an agent on behalf of the nonbank covered person.

(B) Annual international money transfers of a nonbank covered person do not include international money transfers in which another person pro-

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vided the international money transfers and the nonbank covered person performed activities as an agent on behalf of that other person.

(C) For purposes of this paragraph (ii), agent means an agent or authorized delegate, as defined under State or other applicable law, or affiliated company of a person that provides international money transfers when such agent, authorized delegate, or affiliated company acts for that person.

(iii) *Aggregating the annual international money transfers of affiliated companies.* (A) The annual international money transfers of each affiliated company of a nonbank covered person are calculated separately in accordance with paragraphs (i) and (ii) of this definition, treating the affiliated company as if it were an independent nonbank covered person for purposes of the calculation.

(B) The annual international money transfers of a nonbank covered person must be aggregated with the annual international money transfers of any person that was an affiliated company of the nonbank covered person at any time during the preceding calendar year. The annual international money transfers of the nonbank covered person and its affiliated companies are aggregated for the entire preceding calendar year, even if the affiliation did not exist for the entire calendar year.

Designated recipient means any person specified by the sender as the authorized recipient of an international money transfer to be received at a location in a foreign country.

International money transfer means the electronic transfer of funds requested by a sender to a designated recipient that is sent by an international money transfer provider. The term applies regardless of whether the sender holds an account with the international money transfer provider, and regardless of whether the transaction is also an electronic fund transfer, as defined in § 1005.3(b) of this chapter. The term does not include any transfer that is excluded from the definition of "electronic fund transfer" under § 1005.3(c)(4) of this chapter.

International money transfer provider means any nonbank covered person that provides international money

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transfers for a consumer, regardless of whether the consumer holds an account with such person.

Sender means a consumer in a State who primarily for personal, family, or household purposes requests an international money transfer provider to send an international money transfer to a designated recipient.

State means any State, territory, or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico; or any political subdivision thereof.

(b) *Test to define larger participants.* A nonbank covered person is a larger participant of the international money transfer market if the nonbank covered person has at least one million aggregate annual international money transfers.

[79 FR 56650, Sept. 23, 2014]

§ 1090.108 Automobile financing market.

(a) *Market-related definitions.* As used in this section:

Aggregate annual originations means the sum of the number of annual originations of a nonbank covered person and the number of annual originations of each of the nonbank covered person's affiliated companies, calculated as follows:

(i) *Annual Originations.* (A) Annual originations means the sum of the following transactions for the preceding calendar year:

(1) Credit granted for the purpose of purchasing an automobile;

(2) Automobile leases;

(3) Refinancings of obligations described in (i)(A)(1) of this definition that are secured by an automobile, and any subsequent refinancings thereof that are secured by an automobile; and

(4) Purchases or acquisitions of obligations described in (i)(A)(1), (2), or (3) of this definition.

(B) The term annual originations does not include:

(1) Investments in asset-backed securities; and

(2) Purchases or acquisitions of obligations by a special purpose entity established for the purpose of facilitating asset-backed securities transactions if the purchases or acquisitions are made

for the purpose of facilitating an asset-backed securities transaction.

(ii) *Aggregating the annual originations of affiliated companies.* The annual originations of a nonbank covered person must be aggregated with the annual originations of any person (other than an entity described in paragraph (c) of this section) that was an affiliated company of the nonbank covered person at any time during the preceding calendar year. The annual originations of a nonbank covered person and its affiliated companies are aggregated for the entire preceding calendar year, even if the affiliation did not exist for the entire calendar year.

Automobile means any self-propelled vehicle primarily used for personal, family, or household purposes for on-road transportation. The term does not include motor homes, recreational vehicles (RVs), golf carts, and motor scooters.

Automobile financing means providing or engaging in the transactions identified under the term "Annual originations" as defined in this section.

Automobile lease means a lease that is for the use of an automobile, as defined in this section, and that meets the requirements of 12 U.S.C. 5481(15)(A)(ii) or 12 CFR 1001.2(a).

Refinancing has the same meaning as in 12 CFR 1026.20(a), except that the nonbank covered person need not be the original creditor or a holder or servicer of the original obligation.

(b) *Test to define larger participants.* Except as provided in paragraph (c) of this section, a nonbank covered person that engages in automobile financing is a larger participant of the automobile financing market if the person has at least 10,000 aggregate annual originations.

(c) *Exclusion for dealers.* The following entities do not qualify as larger participants under this section:

(1) Persons excluded from the Bureau's authority by 12 U.S.C. 5519; and

(2) Persons who meet the definition in 12 U.S.C. 5519(f)(2); are identified in 12 U.S.C. 5519(b)(2); and are predominantly engaged in the sale and servicing of motor vehicles (as that term is

defined in 12 U.S.C. 5519(f)(1)), the leasing and servicing of motor vehicles, or both.

[80 FR 37526, June 30, 2015]

PART 1091—PROCEDURAL RULE TO ESTABLISH SUPERVISORY AUTHORITY OVER CERTAIN NONBANK COVERED PERSONS BASED ON RISK DETERMINATION

Subpart A—General

Sec.

1091.100 Scope and purpose.

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AUTHORITY: 12 U.S.C. 5512(b)(1), 5514(a)(1)(C), 5514(b)(7).

SOURCE: 78 FR 40375, July 3, 2013, unless otherwise noted.

Subpart A—General

§ 1091.100 Scope and purpose.

This part sets forth procedures to implement section 1024(a)(1)(C) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111-203 (12 U.S.C. 5514(a)(1)(C)) (Dodd-Frank Act), and establishes

rules to facilitate the Bureau's supervisory authority over certain nonbank covered persons pursuant to section 1024(b)(7) of the Dodd-Frank Act (12 U.S.C. 5514(b)(7)).

§ 1091.101 Definitions.

For the purposes of this part, the following definitions apply:

Assistant Director means an Assistant Director for Supervision. If there is no Assistant Director, the Associate Director may designate an alternative Bureau employee to perform the functions of an Assistant Director under this part.

Associate Director means the Associate Director of the Bureau's Division of Supervision, Enforcement, and Fair Lending, or his or her designee. If there is no Associate Director, the Director may designate an alternative Bureau employee to perform the functions of the Associate Director under this part.

Bureau means the Bureau of Consumer Financial Protection.

Consumer means an individual or an agent, trustee, or representative acting on behalf of an individual.

Consumer financial product or service means any financial product or service, as defined in 12 U.S.C. 5481(15), that is described in one or more categories under:

(1) 12 U.S.C. 5481(15) and is offered or provided for use by consumers primarily for personal, family, or household purposes; or

(2) Clause (i), (iii), (ix), or (x) of 12 U.S.C. 5481(15)(A) and is delivered, offered, or provided in connection with a consumer financial product or service referred to in subparagraph (1) of this paragraph.

Decisional employee means any employee of the Bureau who has not engaged in:

(1) Assisting the initiating official in either determining whether to issue a Notice of Reasonable Cause, or presenting the initiating official's position in support of a Notice of Reasonable Cause, either in writing or in a supplemental oral response, to the Associate Director; or

(2) Assisting the Associate Director in the preparation of a recommended determination.

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Director means the Director of the Bureau or his or her designee. If there is no Director, the term shall mean a person authorized to perform the functions of the Director under this part, or his or her designee.

Executive Secretary means the Executive Secretary of the Bureau.

Initiating official means an Assistant Director or a Bureau employee designated to act as an “initiating official” by an Assistant Director. If there is not an Assistant Director, the Associate Director may designate a Bureau employee to perform the functions of an initiating official under this part.

Nonbank covered person means, except for persons described in 12 U.S.C. 5515(a) and 5516(a):

(1) Any person that engages in offering or providing a consumer financial product or service; and

(2) Any affiliate of a person described in subparagraph (1) of this paragraph if such affiliate acts as a service provider to such person.

Notice of Reasonable Cause and Notice mean a Notice issued under § 1091.102.

Person means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

Respondent means a person who has been issued a Notice of Reasonable Cause under § 1091.102.

Response means the response to a Notice of Reasonable Cause filed by a respondent with the Associate Director under § 1091.105.

Subpart B—Determination and Voluntary Consent Procedures**§ 1091.102 Issuance of Notice of Reasonable Cause.**

(a) An initiating official is authorized to issue a Notice of Reasonable Cause to a person stating that the Bureau may have reasonable cause to determine that the respondent is a nonbank covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.

(b) A Notice of Reasonable Cause shall be based on:

(1) Complaints collected through the system under 12 U.S.C. 5493(b)(3); or

(2) Information from other sources.

(c) Except as provided in § 1091.111, a Notice of Reasonable Cause shall contain the information set forth in § 1091.103, and be served on respondent as described in § 1091.104.

§ 1091.103 Contents of Notice.

(a) A Notice of Reasonable Cause shall contain the following:

(1) A description of the basis for the assertion that the Bureau may have reasonable cause to determine that a respondent is a nonbank covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services, including a summary of the documents, records, or other items relied on by the initiating official to issue a Notice. Such summary will be consistent with the protection of sensitive information, including compliance with federal privacy law and whistleblower protections; and

(2) A statement informing a respondent that:

(i) A respondent may file with the Associate Director a written response to a Notice of Reasonable Cause no later than 30 days after the Notice is served on the respondent;

(ii) The written response shall include the elements addressed in § 1091.105(b);

(iii) A respondent may request in its written response to a Notice an opportunity to present an in-person or telephonic supplemental oral response to the Associate Director as set forth in § 1091.106;

(iv) A failure timely to file a response to a Notice shall constitute a waiver of a respondent's right to respond, and may result in a default determination by the Director, based on the Notice, that a respondent is a nonbank covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services and the issuance of a decision and order subjecting a respondent to the Bureau's supervisory authority pursuant to 12 U.S.C. 5514(a)(1)(C);

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(v) The Associate Director shall serve a respondent with a notice of the date and time of a supplemental oral response, if a respondent has requested the opportunity to present a supplemental oral response, within 14 days of the Associate Director's receipt of a timely-filed response;

(vi) If a respondent has not requested the opportunity to present a supplemental oral response, the Associate Director shall, not later than 45 days after receiving a timely-filed response, or not later than 45 days after the service of a Notice of Reasonable Cause when a respondent fails to file a timely response, provide a recommended determination to the Director including either a proposed decision and order subjecting a respondent to the Bureau's supervisory authority pursuant to 12 U.S.C. 5514(a)(1)(C), or a proposed notification that the Bureau has determined not to subject a respondent to the Bureau's supervisory authority at that time, pursuant to § 1091.108; and

(vii) In connection with a proceeding under this part, including a petition for termination under § 1091.113, all documents, records or other items submitted by a respondent to the Bureau, all documents prepared by, or on behalf of, or for the use of the Bureau, and any communications between the Bureau and a person, shall be deemed confidential supervisory information under 12 CFR 1070.2(i).

(b) A Notice shall be accompanied by a form of consent agreement by which a respondent may voluntarily consent to the Bureau's authority to supervise a respondent under 12 U.S.C. 5514. A completed and executed form of consent agreement under this paragraph:

(1) Shall not constitute an admission that a respondent is a nonbank covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services;

(2) Shall result in an order by the Director that a respondent is subject to the Bureau's supervisory authority under 12 U.S.C. 5514 for a period of two years from the date of such order; and

(3) Shall include a provision that a respondent entering into a consent

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agreement waives any right to judicial review of such consent agreement.

(c) Nothing in this section shall be construed as requiring the Bureau to produce any documents or other information to a respondent other than as set forth in this section.

[78 FR 40375, July 3, 2013, as amended at 85 FR 75220, Nov. 24, 2020]

§ 1091.104 Service of Notice.

(a) A Notice of Reasonable Cause shall be served on a respondent as follows:

(1) *To individuals.* A Notice shall be served on a respondent that is a natural person by delivering a copy of the Notice to the individual or to an agent authorized by appointment or by law to receive such a Notice. Delivery, for purposes of this paragraph, means handing a copy of a Notice to the individual; or leaving a copy at the individual's office with a clerk or other person in charge thereof; or leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or sending a copy of a Notice addressed to the individual through the U.S. Postal Service by Registered Mail, Certified Mail or Express Mail delivery, or by third-party commercial carrier, for overnight delivery and obtaining a confirmation of receipt.

(2) *To corporations or entities.* Notice shall be served on a person other than an individual by delivering a copy of a Notice to an officer, managing or general agent, or any other agent authorized by appointment or law to receive such a Notice, by any method specified in paragraph (a)(1) of this section.

(3) *Upon persons registered with the Bureau.* In addition to any other method of service specified in paragraph (a)(1) or (2) of this section, Notice may be served on a person registered with the Bureau by sending a copy of a Notice addressed to the most recent business address shown on the person's registration form by U.S. Postal Service Certified, Registered, or Express Mail and obtaining a confirmation of receipt or attempted delivery.

(4) *Upon persons in a foreign country.* Notice may be served on a person in a

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foreign country by any method specified in paragraph (a)(1) or (2) of this section, or by any other method reasonably calculated to give notice, provided that the method of service used is not prohibited by the law of the foreign country.

(5) *Record of service.* The Bureau shall maintain a record of service of a Notice on a respondent, identifying the party given Notice, the method of service, the date of service, the address to which service was made, and the person who made service. If service is made in person, the certificate of service shall state, if available, the name of the individual to whom a Notice was given. If service is made by U.S. Postal Service Registered Mail, Certified Mail, or Express Mail, the Bureau shall maintain the confirmation of receipt or attempted delivery.

(6) *Waiver of service.* In lieu of service as set forth in paragraph (a)(1) or (2) of this section, a person may be provided a copy of a Notice by First Class Mail or other reliable means if a written waiver of service is obtained from the person to be served. In the case of a respondent that is not a natural person, a written waiver may be provided by an officer, managing or general member, or partner authorized to represent the respondent.

(b) The initiating official shall promptly submit a copy of a Notice and a copy of the certificate of service to the Associate Director.

§ 1091.105 Response.

(a) *Timing.* Within 30 days of service of a Notice, a respondent shall file any response with the Associate Director according to the instructions set forth in a Notice.

(b) *Content of the response.* (1) The response shall set forth the basis for a respondent's contention that the respondent is not a nonbank covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.

(2) The response shall include all documents, records, or other evidence a respondent wishes to use to support the arguments or assertions set forth in the response.

(3) Any request to present a supplemental oral response, including the respondent's preference for a telephonic or in-person supplemental oral response, must be included in the response. A respondent's failure to request to present a supplemental oral response shall constitute a waiver of the opportunity to present a supplemental oral response.

(4) A response shall include an affidavit or declaration, made by the individual respondent if a natural person, or, if a corporate or other entity that is not a natural person, by an officer, managing or general member, or partner authorized to represent the respondent, affirming that the response is true and accurate and does not contain any omissions that would cause the response to be materially misleading.

(5) Notwithstanding any other provisions of this paragraph, a respondent may respond to a Notice of Reasonable Cause by voluntarily consenting to the Bureau's authority to supervise the respondent under 12 U.S.C. 5514 by completing and executing the consent agreement form provided to the respondent with a Notice of Reasonable Cause in accordance with § 1091.103(b).

(c) *Default.* Failure of a respondent to file a response within the time period set forth in paragraph (a) of this section shall constitute a waiver of the respondent's right to respond, and shall, based on the Notice, authorize the Associate Director, without further notice to the respondent, to issue a proposed decision and order as provided in § 1091.108(c)(1) and the Director to issue a decision and order as provided in § 1091.109(a)(1).

(d) *Waiver.* A respondent shall be deemed to have waived the right, at any future stage of an Associate Director's or the Director's consideration of a matter, and in any petition for judicial review of an order issued pursuant to § 1091.109(a)(1), to rely on any argument, record, document, or other information that the respondent does not raise or include in its response.

(e) *No Discovery.* There shall be no discovery in connection with a response.

§ 1091.106**§ 1091.106 Supplemental oral response.**

(a) A respondent may request in a response under § 1091.105 the opportunity to present to the Associate Director a supplemental oral response in support of a respondent's assertion that the respondent is not a nonbank covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.

(b) The conduct of a supplemental oral response shall be subject to the following procedures:

(1) A supplemental oral response shall be, at the respondent's preference, by telephone or in person at the Bureau's headquarters in Washington, DC. If a respondent requests in its written response a supplemental oral response but does not specify whether such response shall be conducted via telephone or in person, the supplemental oral response will be conducted by telephone unless otherwise directed by the Associate Director;

(2) The Associate Director may impose any limitations on the conduct of a supplemental oral response, including but not limited to establishing a time limit for the presentation of a supplemental oral response, and limiting the subjects to be addressed in a supplemental oral response;

(3) There shall be no discovery permitted or witnesses called in connection with a supplemental oral response;

(4) If a respondent is a corporate or other entity, and not a natural person, the respondent shall be represented in any supplemental oral response by:

(i) An officer, managing or general member, or partner authorized to represent the respondent; or

(ii) An attorney in good standing of the bar of the highest court of any State.

(5) If a respondent is a natural person, the respondent shall be represented in any supplemental oral response by:

(i) Himself or herself; or

(ii) An attorney in good standing of the bar of the highest court of any State.

(6) The Associate Director shall cause an audio recording of a supplemental oral response to be made by a court re-

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porter. A respondent may purchase a copy or transcript of the recording at the respondent's own expense.

(c) The initiating official may participate in any supplemental oral response conducted under this section.

(d) The Associate Director shall serve on a respondent, within 14 days after the Associate Director receives the respondent's timely-filed response requesting a supplemental oral response, a notice setting forth the date, time, and general information relating to the conduct of a supplemental oral response. The date of a supplemental oral response shall be scheduled not less than ten days after the date the respondent is served with the notice of supplemental oral response.

(e) The notice of supplemental oral response shall be served on a respondent pursuant to § 1091.107.

(f) The Associate Director shall send a copy of the notice of supplemental oral response to the initiating official.

(g) A respondent's failure to participate in a supplemental oral response scheduled by the Associate Director shall constitute the respondent's waiver of the opportunity to present a supplemental oral response.

§ 1091.107 Manner of filing and serving papers.

Unless otherwise specified by the Associate Director or Director, a respondent shall file the response and any other paper with the Executive Secretary at the mailing or electronic address provided by the Bureau, and the Associate Director and Director shall serve any paper, other than a Notice as set forth in § 1091.104, on a respondent, by:

(a) Electronic transmission upon any condition specified by the Associate Director or Director; or

(b) Any of the following methods if a respondent demonstrates electronic filing is not practicable and the Associate Director or Director permits:

(1) Personal delivery;

(2) Delivery through a reliable commercial courier service or overnight delivery service; or

(3) Mailing the papers by U.S. Postal Service First Class, Registered, Certified, or Express Mail.

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(a) If a respondent did not voluntarily consent to the Bureau's supervision authority, and did not request the opportunity to present a supplemental oral response, not later than 45 days after receipt of a timely-filed response, or not later than 45 days after the service of a Notice of Reasonable Cause when a respondent fails to file a timely response, the Associate Director shall make a recommended determination whether there is reasonable cause for the Bureau to determine that the respondent is a nonbank covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services which should result in an order subjecting the respondent to the Bureau's authority under 12 U.S.C. 5514(a)(1)(C).

(b) If a respondent did request the opportunity to present a supplemental oral response, not later than 90 days after service of a Notice of Reasonable Cause, the Associate Director shall make a recommended determination whether there is reasonable cause for the Bureau to determine that the respondent is a nonbank covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services which should result in an order subjecting the respondent to the Bureau's authority under 12 U.S.C. 5514(a)(1)(C).

(c) Upon making the recommended determination described in paragraphs (a) or (b) of this section, the Associate Director shall submit to the Director either:

(1) A proposed decision and order that would subject a respondent to the Bureau's supervisory authority pursuant to 12 U.S.C. 5514(a)(1)(C) if adopted by the Director; or

(2) A proposed notification that a respondent should not be subjected to the Bureau's supervisory authority under 12 U.S.C. 5514(a)(1)(C) based on the proceedings. Such a notification shall have no precedential effect and shall not prevent the issuance of another Notice of Reasonable Cause pursuant to

either § 1091.102, or the procedures set forth in § 1091.111, at any time, or from issuance of a decision and order based on another Notice recommending that a respondent be subject to the Bureau's authority pursuant to either of those sections.

(d) Any proposed decision and order issued by the Associate Director pursuant to paragraph (c)(1) of this section shall set forth:

(1) A statement that the Associate Director has preliminarily determined based on reasonable cause that a respondent is a nonbank covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services;

(2) The basis for the Associate Director's determination; and

(3) A proposed order directing that, pursuant to this determination, as of a specified date a respondent shall be subject to the Bureau's supervisory authority under 12 U.S.C. 5514.

(e) The Associate Director shall include with the recommended determination submitted to the Director copies of the following:

(1) The Notice of Reasonable Cause;

(2) The record of service of a Notice of Reasonable Cause;

(3) A respondent's response and any documents, records, or other items filed with the written response;

(4) Any document, record, or other item considered by the Associate Director to be material in making a recommended determination; and

(5) An audio recording of a supplemental oral response, if a supplemental oral response was conducted, and/or a transcript if a transcript was prepared at a respondent's request or if requested by the Director.

(f) The requirement that the Associate Director provide to the Director the items described in paragraph (e) of this section shall confer no substantive rights on a respondent and any omission of an item may be cured by the Associate Director to the extent applicable.

§ 1091.109**§ 1091.109 Determination by the Director.**

(a) Not later than 45 days after receipt of the Associate Director's recommended determination, the Director shall, after considering the recommended determination and all documents, records, and other items submitted therewith by the Associate Director, make a determination either adopting without revision, modifying, or rejecting the Associate Director's recommended determination, and shall issue to respondent, with copies to the Associate Director and the initiating official:

(1) A decision and order subjecting the respondent to the Bureau's supervisory authority pursuant to 12 U.S.C. 5514(a)(1)(C); or

(2) A notification that the Director has determined that the respondent is not subject to the Bureau's supervisory authority under 12 U.S.C. 5514(a)(1)(C) as a result of the proceedings. Such notification shall have no precedential effect and shall not prevent the issuance of another Notice of Reasonable Cause pursuant to either § 1091.102, or the procedures set forth in § 1091.111, at any time, or the issuance of an order based on another Notice subjecting the respondent to the Bureau's authority pursuant to either of those sections.

(b) Any decision and order issued by the Director pursuant to paragraph (a)(1) of this section shall include:

(1) A statement that the Director adopts the Associate Director's proposed decision and order without revision as the Director's decision and order, or that the Director rejects or modifies the Associate Director's proposed determination for reasons set forth by the Director;

(2) A statement that the Director has determined that the Bureau has reasonable cause to determine that a respondent is a nonbank covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services;

(3) The basis for the Director's determination, which may be an adoption of the basis set forth in the Associate Director's proposed decision;

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(4) An order directing that, pursuant to this determination, as of a specified date a respondent shall be subject to the Bureau's supervisory authority under 12 U.S.C. 5514 and informing a respondent that the respondent may petition for termination of the Bureau's supervisory authority no sooner than two years from the date of the order, and no more than annually thereafter; and

(5) A copy of the recommended determination issued by the Associate Director.

(c) Only decisional employees may advise and assist the Director in the consideration and disposition of a proceeding under this part.

(d) A decision and order issued pursuant to paragraph (a)(1) of this section shall constitute final agency action under 5 U.S.C. 704.

(e) Any item required to be served on a respondent under this section shall be served pursuant to § 1091.107.

§ 1091.110 Voluntary consent to Bureau's authority.

(a) Notwithstanding any other provision, pursuant to a consent agreement agreed to by the Bureau, a person may voluntarily consent to the Bureau's supervisory authority under 12 U.S.C. 5514, and such voluntary consent agreement shall not be subject to any right of judicial review.

(b) The consent agreement of any person, pursuant to paragraph (a) of this section, that specifies the duration of time that such person will be subject to the Bureau's authority under 12 U.S.C. 5514 shall not be eligible for a petition for termination of order pursuant to § 1091.113, and a consent agreement shall state that a respondent entering into a consent agreement waives any right to judicial review of such consent agreement.

§ 1091.111 Notice and response included in adjudication proceeding otherwise brought by the Bureau.

(a) Notwithstanding §§ 1091.102 through 1091.106, the Bureau may, in its discretion, provide the notice and opportunity to respond required by 12 U.S.C. 5514(a)(1)(C) in a notice of charges otherwise brought by the Bureau pursuant to 12 CFR 1081.200 and

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the adjudication proceedings pursuant to part 1081. Also, a person may agree to submit to the Bureau's supervisory authority under 12 U.S.C. 5514(a)(1)(C) as part of a consent order entered into in connection with an adjudication proceeding or civil action.

(b) If the Bureau chooses to proceed in the manner described in paragraph (a) of this section, it shall so indicate in the notice of charges, and any order of the Director resulting from the notice of charges shall constitute the order referred to in 12 U.S.C. 5514(a)(1)(C).

(c) If the Bureau proceeds pursuant to paragraph (a) of this section, the provisions of §§ 1091.101 through 1091.110, and 1091.113 through 1091.115 will be inapplicable to such proceeding.

§ 1091.112 No limitation on relief sought in civil action or administrative adjudication.

Nothing in this part shall be construed to limit the relief the Bureau may seek in any civil action or administrative adjudication, including but not limited to, seeking an order to have a person deemed subject to the Bureau's supervisory authority under 12 U.S.C. 5514, including for the reasons set forth in 12 U.S.C. 5514(a)(1)(C).

Subpart C—Post-Determination Procedures**§ 1091.113 Petition for termination of order.**

(a) Any person subject to an order issued pursuant to § 1091.109(a)(1) may, no sooner than two years after issuance of such an order and no more frequently than annually thereafter, petition the Director for termination of the order.

(b) A petition for termination submitted pursuant to paragraph (a) of this section shall set forth the reasons supporting termination of the order, including any actions taken by a respondent since issuance of the order to address the conduct that led to issuance of the order, and may include any supporting information or evidence that the petitioner believes is relevant to the Director's determination of the matter.

(c) A petition for termination shall be filed by the petitioner with the Executive Secretary at the mailing or electronic address provided by the Bureau.

(d) The Director shall, promptly upon receipt of a petition for termination, send a copy of the same to the initiating official.

(1) The initiating official may, within 30 days of his or her receipt of a copy of a petition for termination, file with the Director a response to the petition stating whether the initiating official recommends that the order be terminated, or modified, or that the petition for termination be denied and the basis for such recommendation.

(2) The initiating official shall serve a copy of the response to a petition for termination on the petitioner pursuant to § 1091.107 at the time of filing it with the Director.

(e) Not later than 90 days after submission of a petition under paragraph (a) of this section, the Director shall issue a written decision either terminating or modifying the order, or denying the petition. If the Director modifies the order or denies the petition, the Director shall explain the basis for his or her decision with respect to the petition and send the written decision to the petitioner and the initiating official.

(1) The Director shall serve the written decision on a petition for termination of order on a respondent pursuant to § 1091.107.

(2) The Director shall send a copy of the written decision on a petition for termination of order to the Associate Director and initiating official promptly upon issuing the written decision.

(3) The decision of the Director made pursuant to paragraph (e) of this section shall constitute final agency action under 5 U.S.C. 704.

Subpart D—Time Limits and Deadlines**§ 1091.114 Construction of time limits.**

(a) *General rule.* In computing any period of time prescribed by this part, or by order of the Associate Director or Director, the date of the act or event that commences the designated period of time is not included. The last day so

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computed is included unless it is a Saturday, Sunday, or Federal holiday as set forth in 5 U.S.C. 6103(a). When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time, except when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in paragraph (c) of this section.

(b) *Filing or service of papers.* Filing and service are deemed to be effective:

(1) In the case of personal service or same day commercial courier delivery, upon actual receipt by the person served;

(2) In the case of overnight commercial delivery service, U.S. Postal Service Express Mail delivery, or First Class, Registered, or Certified Mail, upon deposit in or delivery to an appropriate point of collection; or

(3) In the case of electronic transmission, including email, upon transmission.

(c) *Calculation of time for service and filing of responsive papers.* Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by U.S. Postal Service First Class, Registered, or Certified Mail, add three calendar days to the prescribed period;

(2) If service is made by Express Mail or overnight delivery service, add one calendar day to the prescribed period; or

(3) If service is made by electronic transmission, add one calendar day to the prescribed period.

§ 1091.115 Change of time limits and confidentiality of proceedings.

(a) *Change of time limits.* Except as otherwise provided by law, the Associate Director until the issuance of a recommended determination, or the Director at any time thereafter, at their respective discretion, may extend the time limits prescribed by this part or by any notice or order issued pursuant to this part. Any request for an extension of a time limit by a respondent

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must be for good cause shown, in writing, and filed with the Associate Director or Director, as appropriate. The mere filing of a written request for an extension does not alleviate a respondent of the obligation to meet an applicable time limit absent written confirmation that an extension has been granted.

(b) *No substantive rights.* Deadlines for action by the initiating official, Associate Director, or the Director established in this part confer no substantive rights on respondents.

(c) *Confidentiality—(1) General rule.* In connection with a proceeding under this part, including a petition for termination under § 1091.113, all documents, records or other items submitted by a respondent to the Bureau, all documents prepared by, or on behalf of, or for the use of the Bureau, and any communications between the Bureau and a person, shall be deemed confidential supervisory information under 12 CFR 1070.2(i)(1). However, this paragraph does not apply to the version of a document that is released on the Bureau's website under paragraph (c)(2).

(2) *Publication of final decisions and orders by the Director.* The Director will make a determination regarding whether a decision or order under § 1091.103(b)(2), § 1091.109(a), or § 1091.113(e) will be publicly released on the Bureau's website, in whole or in part. The respondent may file a submission regarding that issue, within ten days after service of the decision or order. The Director will not release information in a decision or order to the extent it would be exempt from disclosure under 5 U.S.C. 552(b)(4) or (b)(6) or the Director determines there is other good cause. The Director may also decide that the determination regarding public release will itself be released on the website, in whole or in part. Section 1091.109(c) is not applicable to determinations under this paragraph.

[78 FR 40375, July 3, 2013, as amended at 87 FR 25398, Apr. 29, 2022; 87 FR 70707, Nov. 21, 2022]

PARTS 1092–1099 [RESERVED]

FINDING AIDS

A list of CFR titles, subtitles, chapters, subchapters and parts and an alphabetical list of agencies publishing in the CFR are included in the CFR Index and Finding Aids volume to the Code of Federal Regulations which is published separately and revised annually.

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