



**America's
Credit Unions**

Regulatory Final Rule: Summary and Compliance for Credit Unions

Consumer Financial Protection Bureau: Credit Card Penalty Fees (Regulation Z)

THE ISSUE:

On March 5, 2024, the Consumer Financial Protection Bureau (CFPB or Bureau) issued a final rule amending Regulation Z and its accompanying commentary to address late fees charged by card issuers that, together with their affiliates, have one million or more open credit card accounts (referred to as “Larger Card Issuers”). This final rule adopts a late fee safe harbor threshold of \$8.00 for those issuers and provides that the annual adjustments to reflect changes in the Consumer Price Index (CPI) do not apply to this \$8.00 amount.

EFFECTIVE DATE:

This final rule is effective May 14, 2024.

KEY CONTACTS AND RESOURCES:

- Final Rule: <https://www.federalregister.gov/documents/2024/03/15/2024-05011/credit-card-penalty-fees-regulation-z>
- Questions? Contact Patricia O’Connell, Lead Compliance Counsel, America’s Credit Unions poconnell@americascrreditunions.org
- Agency contact: CFPB Adrien Fernandez, Counsel; Krista Ayoub and Steve Wrone, Senior Counsels, Office of Regulations, at 202–435–7700.

IMPACT TO CREDIT UNIONS:

- While this final rule only applies to a few larger credit unions that meet the rule’s definition of card issuers that have over 1 million open accounts, and the CFPB claims that the rule will have minimal effect on smaller issuers not required to apply the safe harbor late fees \$8.00 cap, the impact of this final rule can significantly alter the economics of offering credit cards. The CFPB states that late fees affect consumers’ financial health and based on data from certain larger card issuers the current safe harbor threshold for late fees is higher than is justified based on consumer conduct and to deter future violations. However, capping the safe harbor late fee at \$8.00 provides little or no incentive for consumers to pay their bills on time and potentially has a negative impact on those who do pay on time as some credit unions may have no choice but to increase other fees to account for this lost revenue. Potentially unintended consequences include the likelihood that some credit unions may have to leave the credit card market because the trickle-down effect can result in them being unable to compete with the pressure to lower fees. This, in turn, can limit credit availability and increase industry consolidation, and restrict credit unions' ability to offer solutions to consumers experiencing real financial hardship.
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- On March 7, two days after the CFPB issued the final rule, six trade groups including the American Bankers Association, the Consumer Bankers Association, the U.S. Chamber of Commerce and three Texas business associations, sued the CFPB alleging that the CFPB rule exceeded its statutory authority in making this ruling and relied on deficient analysis and reasoning. America's Credit Unions supports the lawsuit challenging the rule.

KEY POINTS:

- The final rule adjusts the safe harbor amounts to a flat fee of \$8.00 for all late fees, a decrease from the current amounts of \$30.00 for first violations and \$41.00 for subsequent violations within the next six billing cycles.
- The final rule eliminates the annual inflation adjustments for the safe harbor dollar amounts for late fees.
- The proposed provisions to restrict late fee amounts to 25 percent of the required minimum payment are not being finalized in this final rule with respect to any card issuers, including Smaller Card Issuers. (This had been in the proposed rule).
- The final rule amends the Official Interpretation to clarify that post-charge-off collection costs are excluded from the penalty fee calculation in the cost analysis for determining penalty fee amounts under § 1026.52(b)(1)(i).
- The final rule defines the term "Smaller Card Issuer" to mean a card issuer that together with its affiliates had fewer than one million open credit card accounts for the entire preceding calendar year.
- "Affiliate" means any company that controls, is controlled by, or is under common control with another company, as set forth in the Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.).
- The final rule incorporates the definition of "open credit card account" from § 1026.58(b)(6), which defines the term to mean a credit card account under an open-end (not home-secured) consumer credit plan and either: (1) The cardholder can obtain extensions of credit on the account; or (2) There is an outstanding balance on the account that has not been charged off.

BACKGROUND:

The Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) was signed into law in May 2009 to amend the Truth in Lending Act (TILA) to create new disclosure requirements and “establish fair and transparent practices relating to the extension of credit under an open-end consumer credit plan” and other purposes. The CARD Act added TILA section 149, which provides that the amount of any penalty fee on a credit card account, including any late payment fee or any other penalty fee or charge, must be “reasonable and proportional” to such omission or violation. Before the authority to implement TILA passed to the Bureau in 2011, the Board of Governors of the Federal Reserve System (Board) established rules for how to assess whether a penalty fee was “reasonable and proportional.” The CARD Act required the Board to consider (1) the cost incurred by the creditor from an omission or violation; (2) the deterrence of omissions or violations by the cardholder; (3) the conduct of the cardholder; and (4) such other factors the Board deemed necessary or appropriate. necessary or appropriate by the Board. The CARD Act authorized the Board to establish different standards for different types of fees and charges, as appropriate.

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

The Bureau notes that late fees represent almost all penalty fee volume on credit cards because overlimit fees are practically nonexistent and fees for returned payments account for a negligible share of card penalty fee data.

A card issuer is not required to use the cost analysis provisions in § 1026.52(b)(1)(i) to determine the amount of late fees if it complies with the safe harbor amounts. The safe harbor amounts are currently set at \$30.00 for the first violation and \$41.00 for subsequent violations that occur within the next six billing cycles. The safe harbor amounts are also adjusted annually to align with changes (that result in an increase or decrease of \$1.00) in the CPI. The Bureau’s recent analysis of credit card agreements found no evidence of any issuers using the cost analysis provisions to charge an amount higher than the safe harbor.

On June 22, 2022, the CFPB issued an advance notice of proposed rulemaking (ANPR) inviting comment on questions related to credit card late fees that financial institutions, including credit unions, assess to consumers and the costs associated with late payments. In their comment letters, CUNA and NAFCU clarified that credit card late fees are not surprise or “junk fees” and that the cost of collecting on past due accounts far exceeds the late fee that credit unions charge—not to mention credit unions’ late fees are, on average, the lowest in the market. Both NAFCU and CUNA urged the Bureau not to eliminate or reduce the safe harbor fee amounts for credit card late fees as a legally established safe harbor is not a “regulatory loophole.” Eliminating or reducing this could negatively affect communities by tightening credit and increasing industry consolidation while resulting in more expensive products and services to account for the lost revenue and additional risk, such as increased fees on other products and services and higher interest rates for credit products.

On January 20, 2023, CUNA and NAFCU, along with other financial trade groups, wrote to the CFPB reminding the agency of its obligations under the Small Business Regulatory Enforcement Fairness Act (SBREFA) when proceeding with any rulemaking regarding credit card late fees. Under SBREFA, the CFPB must convene a Small Business Review Panel if it is considering a proposed rule that could have a significant economic impact on a substantial number of small entities. The letter noted that any reduction in, or elimination of, the late fee safe harbor would have a significant adverse impact on many credit unions with assets below \$850 million.

On March 5, 2024, America’s Credit Unions issued a statement in response to the CFPB’s final rule on credit card penalty fees stating that “[w]hile the rule only applies to issuers that have over 1 million open accounts and the bureau claims the rule will have no impact on smaller issuers such as credit unions... it will have negative implications on consumers and financial institutions.”

SECTION-BY-SECTION ANALYSIS:

The following analysis provides a summary of the final rule. See the link above under “Key Contacts and Resources” for the full text of the final rule.

Section 1026.52(b)(1)(ii) – Amendments to the Late Fee Safe Harbor Amounts

Section 1026.52(b) provides that a card issuer must not impose a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan

unless the issuer has determined that the dollar amount of the fee represents a reasonable proportion of the total costs incurred by the issuer for that type of violation as set forth in the cost analysis provisions in § 1026.52(b)(1)(i) or complies with the safe harbor provisions set forth in § 1026.52(b)(1)(ii). It further provides that a card issuer must not impose such a fee unless the fee is consistent with certain prohibitions set forth in § 1026.52(b)(2), including a prohibition in § 1026.52(b)(2)(i)(A) on imposing a penalty fee that exceeds the dollar amount associated with the violation, which currently prohibits late fees that exceed 100 percent of the required minimum payment.

The commentary to § 1026.52(b) explains that penalty fees subject to its provisions include late fees, returned-payment fees, and fees for over-the-limit transactions, among others. Section 1026.52(b)(1)(ii) currently provides that a card issuer may impose a fee for violating the terms or other requirements of an account if the dollar amount of the fee does not exceed \$30.00 (§ 1026.52(b)(1)(ii)(A)), or \$41.00 for a violation of the same type that occurs during the same billing cycle or one of the next six billing cycles (§ 1026.52(b)(1)(ii)(B)). Section 1026.52(b)(1)(ii)(C) provides a special safe harbor that applies when a charge card account becomes seriously delinquent. Under this special safe harbor, when a card issuer has not received the required payment for two or more consecutive billing cycles on a charge card account that requires payment of outstanding balances in full at the end of each billing cycle, the issuer may impose a late payment fee that does not exceed 3 percent of the delinquent balance.

In adopting this final rule, the CFPB has determined that the existing safe harbors in § 1026.52(b)(1)(ii), as applicable to late fees charged by Larger Card Issuers, are too high to be “reasonable and proportional” to a consumer’s late payment. The CFPB therefore is repealing the existing safe harbors in § 1026.52(b)(1)(ii)(A) and (B) with respect to late fees charged by Larger Card Issuers.

The final rule amends § 1026.52(b)(1)(ii) to provide that a card issuer may impose a fee for a late payment on an account under the safe harbor not to exceed \$8.00. This \$8.00 safe harbor amount would apply regardless of whether the fee is imposed for a first or subsequent violation. For all other penalty fees, card issuers could still charge amounts not exceeding the amounts in § 1026.52(b)(1)(ii)(A) and (B). In addition, under the final rule, charge card issuers could still impose a fee pursuant to § 1026.52(b)(1)(ii)(C) when a charge card account becomes seriously delinquent as defined in the rule.

At this time, the CFPB is not amending the safe harbor provisions in § 1026.52(b)(1)(ii) as they apply to other types of penalty fees, including returned-payment fees, fees for over-the-limit transactions, and declined access check fees.

The final rule also adds § 1026.52(b)(1)(ii)(E) to clarify that a smaller card issuer, as defined in paragraph (b)(3) of this section, (which is also added by this final rule), may impose a fee for a late payment on an account if the dollar amount of the fee does not exceed the amount in paragraph (b)(1)(ii)(A) or (B), notwithstanding the limitation on the amount of a late payment fee in this paragraph (b)(1)(ii).

The definition of “small card issuer” is added as § 1026.52(b)(3) to state that a card issuer is a smaller card issuer if the card issuer together with its affiliates had fewer than one million open credit card accounts, as defined in § 1026.58(b)(6), for the entire preceding calendar year. For purposes of this paragraph (b)(3), affiliate means any company that controls, is controlled by, or is under common control with another company, as set forth in the Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.).

Note that If a card issuer together with its affiliates had fewer than one million open credit card accounts for the entire preceding calendar year but meets or exceeds that number of open credit card accounts in the current calendar year, (underline added), the card issuer will no longer be a smaller card issuer for purposes of paragraph (b)(1)(ii)(E) of this section as of 60 days after meeting or exceeding that number of open credit card accounts.

Comment 52(b)(1)(i)-2.i – Penalty Fee Amounts Limited to Pre-Charge-Off Collection Costs

This final rule amended comment 52(b)(1)(i)-2.i to make it explicitly clear that costs for purposes of the cost analysis provisions in § 1026.52(b)(1)(i) for determining penalty fee amounts do not include any collection costs that are incurred after an account is charged off pursuant to loan loss provisions. The CFPB has estimated that for 2021 and 2022, approximately 80 percent of collection costs incurred by card issuers are incurred pre-charge-off, based on data collected after the 2023 proposed rule was issued. Additionally, the Bureau has determined that considering pre-charge-off collection costs as the “costs” of a late payment is consistent with Congress’ intent to: (1) allow card issuers generally to use late fees to pass on to consumers the costs issuers incur to collect late payments or missed payments; (2) ensure that those costs are spread among consumers and that no individual consumer bears an unreasonable or disproportionate share; and (3) prevent card issuers from recovering losses and associated costs through late fees rather than through upfront rates. The CFPB’s analysis indicates that the current safe harbor amounts of \$30.00 and \$41.00 are significantly higher than the pre-charge-off collection costs. The Bureau has preliminarily concluded that a late fee of \$8.00 for the first and subsequent violations is appropriate to cover pre-charge-off costs for card issuers on average while providing issuers compliance certainty and administrative simplicity.

52(b)(1)(ii)(D)

Section 1026.52(b)(1)(ii)(D) provides that the dollar safe harbor amounts for penalty fees set forth in § 1026.52(b)(1)(ii)(A) and (B) will be adjusted annually by the Bureau to reflect the changes in the CPI. The final rule eliminates the annual adjustments to the safe harbor amount for late fees. The final rule accomplishes this by including the \$8.00 late fee safe harbor amount in the lead in text to § 1026.52(b)(1)(ii), instead of including it in § 1026.52(b)(1)(ii)(A) or (B). Thus, § 1026.52(b)(1)(ii)(D), which only applies the annual adjustments to the dollar safe harbor amounts in § 1026.52(b)(1)(ii)(A) and (B), no longer applies to the late fee safe harbor amount. However, § 1026.52(b)(1)(ii)(D) continues to apply to the dollar amount for safe harbors that apply to other penalty fees, such as over-the-limit fees, and returned-payment fees. For the dollar amount of the late fee safe harbor, the Bureau will then monitor the safe harbor amount for potential adjustments, as necessary.

52(b)(1)(ii)(E)

The final rule adds a new § 1026.52(b)(1)(ii)(E) to implement CFPB’s decision with respect to Smaller Card Issuers as defined in § 1026.52(b)(3), to not adopt at this time the \$8.00 late fee safe harbor threshold and elimination of the higher late fee safe harbor amount for subsequent violations. In addition, with respect to Smaller Card Issuers, the CFPB also is not adopting the proposed elimination of the annual adjustments for the late fee safe harbor threshold.

Specifically, § 1026.52(b)(1)(ii)(E) provides that a Smaller Card Issuer, as defined in § 1026.52(b)(3), may impose a fee for a late payment on an account if the dollar amount of the fee does not exceed the safe harbor amount in § 1026.52(b)(1)(ii)(A) or (B), as applicable, notwithstanding the \$8.00 limitation

on the amount of a late fee in the lead-in text to § 1026.52(b)(1)(ii). Thus, Smaller Card Issuers as defined in this final rule may continue imposing a late fee pursuant to the safe harbor in an amount that does not exceed the amount in § 1026.52(b)(1)(ii)(A) for a first violation or the amount in § 1026.52(b)(1)(ii)(B) for a late payment violation that occurs during the same billing cycle or one of the next six billing cycles. Further, because the penalty fee dollar amounts in § 1026.52(b)(1)(ii)(A) and (B) are adjusted annually to reflect changes in the CPI as described in § 1026.52(b)(1)(ii)(D), late fees imposed by Smaller Card Issuers pursuant to § 1026.52(b)(1)(ii)(A) and (B) also will be adjusted annually.

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

Section 1026.52(b)(2)(i)(A) prohibits a card issuer from imposing a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan that exceeds the dollar amount associated with the violation. In other words, a late payment fee cannot exceed the full amount, or 100 percent, of the required minimum periodic payment. The final rule did not adopt the CFPB's proposal for either Larger Card Issuers or Smaller Card Issuers, to amend § 1026.52(b)(2)(i)(A) to limit the dollar amount associated with a late payment to 25 percent of the required minimum periodic payment due immediately prior to assessment of the late payment. Therefore, the CFPB also did not adopt the proposed revision to comment 52(b)(2)(i)-1.

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

Section 1026.52(b)(2)(ii) prohibits card issuers from imposing multiple penalty fees based on a single event or transaction. This final rule amends comment 52(b)(2)(ii)-1 to reflect a late fee amount of \$8.00 for purposes of the examples, consistent with the new late fee safe harbor amount applicable to Larger Card Issuers. This final rule also amends comment 52(b)(2)(ii)-1.i and ii to specify that the card issuer for purposes of the examples is not a Smaller Card Issuer pursuant to § 1026.52(b)(3).

52(b)(3) Smaller Card Issuers

The final rule adds new Section 1026.52(b)(3)(i) to define Smaller Card Issuer. It provides that, except as provided in § 1026.52(b)(3)(ii), a card issuer is a Smaller Card Issuer for purposes of the safe harbor late fee provisions in § 1026.52(b)(1)(ii)(E) if the card issuer together with its affiliates had fewer than one million open credit card accounts, as defined in § 1026.58(b)(6), for the entire preceding calendar year. Thus, a card issuer must include its affiliates' open credit card accounts along with its own in determining whether it meets the Smaller Card Issuer definition.

The final rule also adds Section 1026.52(b)(3)(ii) to clarify an exception to the general definition of Smaller Card Issuer in § 1026.52(b)(3)(i). It provides that if a card issuer together with its affiliates had fewer than one million open credit card accounts for the entire preceding calendar year but meets or exceeds that number of open credit card accounts in the current calendar year, then the card issuer will no longer be a Smaller Card Issuer for purposes of § 1026.52(b)(1)(ii)(E) as of 60 days after meeting or exceeding that number of open credit card accounts.

This means, as explained in new comment 52(b)(3)(ii)-1, the card issuer may not impose a late fee pursuant to § 1026.52(b)(1)(ii)(E) as of 60 days after meeting or exceeding the threshold number of open credit card accounts, because at that point the card issuer is no longer a Smaller Card Issuer. Instead, for purposes of imposing a late fee pursuant to the safe harbor provisions, the card issuer may impose a late fee of no more than \$8.00 pursuant to § 1026.52(b)(1)(ii) as of the 60th day.

Appendix G to art 1026 provides model or sample forms or clauses for complying with disclosure requirements for open-end credit plans, including credit card accounts. The final rule amends the applicable sample forms or clauses to include a late fee amount of \$8.00 and a maximum late fee amount of “Up to \$8” consistent with the late fee safe harbor amount set forth in § 1026.52(b)(1)(ii) applicable to Larger Card Issuers. Specifically, the final rule amends the following 11 sample forms or clauses: (1) G–10(B); (2) G–10(C); (3) G–10(E); (4) G–17(B); (5) G–17(C); (6) G–18(A); (7) G–18(B); (8) G–18(D); (9) G–18(F); (10) G–18(G); and (11) G–21. The 11 revised forms or clauses are samples and card issuers are required to disclose the late fee amounts, or maximum late fee amount, that it charges consistent with § 1026.52(b).

The final rule also does not adopt the proposed 15-day courtesy period for late fees or other penalty fees so there are no edits to the sample forms or clauses to disclose a courtesy period related to late fees or any other penalty fees. In addition, the final rule does not adopt the \$8.00 safe harbor threshold for penalty fees other than late fees imposed by Larger Card Issuers including over-the-limit fees and return payment fees, so this final rule does not adopt any changes to the sample forms or clauses for penalty fees other than late fees.

This document is intended for informational purposes only. It does not constitute legal advice. If such advice or a legal opinion is required, please consult with competent local counsel.