CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Parts 1005 and 1026

[Docket No. CFPB–2024–0002]

RIN 3170–AA42

Overdraft Lending: Very Large Financial Institutions

AGENCY: Consumer Financial Protection Bureau.

ACTION: Final rule; official interpretation.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) amends Regulations E and Z to update regulatory exceptions for overdraft credit provided by very large financial institutions, thereby ensuring that these extensions of overdraft credit adhere to consumer protections required of similarly situated products, unless the overdraft fee is a small amount that only recovers estimated costs and losses. The rule allows consumers to better comparison shop across credit products and provides substantive protections that apply to other consumer credit.

DATES: *Effective date:* October 1, 2025.

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I. Overview

A. Summary

The CFPB is updating non-statutory exceptions in Regulations Z and E that have allowed very large financial institutions to avoid statutory consumer credit protection requirements when extending certain overdraft credit.[1]

Consumer credit is subject to Regulation Z if the creditor imposes a finance charge, which generally includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit.[2] However, when the Board of Governors of the Federal Reserve System (Board) first adopted Regulation Z in 1969,[3] it excepted from Regulation Z's definition of finance charge any charges for honoring checks that overdraw a checking account unless the payment of the check and imposition of the fee were previously agreed upon in writing. The Board subsequently made ''minor editorial changes'' to this exception, *e.g.,* to reflect ''items that are similar to checks, such as negotiable orders of withdrawal.''[4] This exception is unique to credit extended to pay account overdrafts; other consumer credit products with similar features, such as short term repayment, are subject to Regulation Z.

This exception was evidently intended to allow banks to continue providing limited overdraft services as a courtesy to consumers who inadvertently overdrew their account, without the banks complying with Regulation Z. In the early years of the regulation, decisions to pay an item that overdraws an account instead of returning it unpaid were made as a relatively infrequent part of administering asset accounts. At the time, consumers typically withdrew funds from their bank accounts through in-person withdrawals or by writing checks. If a consumer mistimed when funds from a check deposit would be available for withdrawal[5] and inadvertently overdrew their account and the overdrawing check were returned unpaid, the bank would typically charge the consumer a nonsufficient funds (NSF) fee and the consumer could be subject to additional fees imposed by the payee and other negative consequences from bounced checks. If, instead of returning the check, the financial institution paid it notwithstanding the unavailable or insufficient funds in the account, such courtesy payment could provide a benefit to the consumer, who would avoid the negative consequences of a bounced check without being charged any additional fees beyond an amount that did not exceed the amount charged for nonsufficient funds.

Over the last 30 years, in conjunction with widespread financial institution adoption of information technology systems as well as the expansion of debit card transactions that can overdraw an account, overdraft credit products provided under the exception have morphed from an occasional courtesy provided to consumers into frequently used and promoted products that increase costs to consumers (in certain instances) and generate a substantial portion of the direct fee revenue that financial institutions make from checking accounts (and much of the total revenue that financial

[1] When amending commentary, the Office of the Federal Register requires reprinting of certain subsections being amended in their entirety rather than providing more targeted amendatory instructions. The sections of regulatory text and commentary included in this document show the language of those sections. In addition, the CFPB is releasing an unofficial, informal redline to assist industry and other stakeholders in reviewing the changes to the regulatory text and commentary of Regulation E and Regulation Z. This redline may be found on the CFPB's website. If any conflicts exist between the redline and the text of Regulation E or Regulation Z, its commentary, or this rule, the documents published in the **Federal Register** are the controlling documents.

[2] Consumer credit is also subject to Regulation Z in other circumstances. *See, e.g.,* 12 CFR 1026.1(c).

[3] 34 FR 2002 (Feb. 11, 1969).

[4] 46 FR 20848, 20855 (Apr. 7, 1981).

[5] In 1987, Congress enacted the Expedited Funds Availability Act (12 U.S.C. 4001 *et seq.*) to provide depositors of checks with prompt funds availability and to foster improvements in the check collection and return processes. *See* 82 FR 27552, 27552 (June 15, 2017). Section 229.2(d) of Regulation CC (12 CFR 229), which implements that act, defines ''available for withdrawal.''

institutions make from low-balance accounts). The volume of overdrawing transactions and related revenue rose drastically over the years, including on transactions where the consumer may have otherwise suffered no negative consequences if the transaction were declined. Since the CFPB focused substantial enforcement and supervision attention on overdraft fees in 2021, overdraft fee revenue has contracted somewhat. However, it is still a source of billions of dollars in profits every year, and most very large financial institutions continue to charge $35 per overdraft transaction today. Financial institutions today generally make pay/no-pay decisions in advance—for example, by setting overdraft limits that the consumer may not be aware of and using information technology systems to make automated pay/no-pay decisions. They sometimes calibrate these systems with the goal of generating fee revenue. Because of these market changes, which increase the risk that a consumer will unwittingly incur high overdraft fees, helping consumers make informed decisions about overdraft credit has become a much more serious concern.

Key Changes

Given these changes over the past 30 years and consistent with TILA's purpose of promoting the informed use of credit, the CFPB is updating several non-statutory exceptions in Regulation Z to extend consumer credit protections that generally apply to other forms of consumer credit to certain overdraft credit provided by very large financial institutions. These changes will allow consumers to better compare certain overdraft credit to other types of credit and will provide consumers with several substantive protections that already apply to other consumer credit.

These amendments apply only to very large financial institutions—*i.e.,* insured depository institutions and credit unions with more than $10 billion in assets. The rule does not change the regulatory framework for overdraft services offered by financial institutions with assets of $10 billion or less. The CFPB plans to monitor the market's response to this rule before determining whether to alter the regulatory framework for financial institutions with assets less than or equal to $10 billion.

Under this final rule, Regulation Z will generally apply to overdraft credit provided by very large institutions unless it is provided at or below costs and losses as a true courtesy to consumers. The final rule accomplishes this result by updating two regulatory exceptions from the statutory definition of finance charge. First, the final rule updates an exception that currently provides that a charge for overdraft is not a finance charge if the financial institution has not previously agreed in writing to pay items that overdraw an account.[6] The rule narrows this exception to no longer apply to ''above breakeven overdraft credit'' offered by a very large financial institution, which generally means that profit-generating overdraft fees charged by very large financial institutions would no longer be excepted from TILA. The final rule gives financial institutions the ability to determine whether an overdraft charge is considered above breakeven overdraft credit by either: (1) calculating its own costs and losses using a standard set forth in the rule; or (2) relying on a benchmark fee of $5. Second, the final rule updates a related exception that provides that a charge imposed on an asset account in connection with an overdraft credit feature is not a finance charge if the charge does not exceed the charge for a similar transaction account without a credit feature.[7] The updates clarify what is and is not a comparable charge in light of changes finalized in this rule.

In the proposal, the CFPB presented four alternatives for the benchmark fee described above—$3, $6, $7, and $14—to solicit public comment on what data the CFPB should consider when calculating the fee. In the final rule, the CFPB will apply the same approach used to derive the proposed $3 benchmark fee. However, the final rule increases the $3 benchmark fee to $5 to account for additional costs noted by commenters, such as costs relating to overdraft notices, branch servicing, collection, core providers/vendors, compliance, and technology. As a result of this final rule, above breakeven overdraft credit that is not currently subject to Regulation Z will become subject to Regulation Z, including provisions in subpart B that govern open-end credit (*e.g.,* annual percentage rate disclosures, other account opening disclosures, periodic statements, and advertising rules), on the effective date of this rule. For ease of reference, this final rule generally refers to overdraft credit that is not subject to Regulation Z as non-covered overdraft credit and overdraft credit that is subject to Regulation Z as covered overdraft credit. Above breakeven overdraft credit is currently a type of non-covered overdraft credit, but it will become covered overdraft credit when this final rule becomes effective on October 1, 2025.

The final rule also requires covered overdraft credit offered by very large financial institutions to be put in a credit account separate from the asset account, and it updates exceptions relating to credit cards. Among other changes, it applies the portions of Regulation Z that implement the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act)[8] to covered overdraft credit that can be accessed by a hybrid debit-credit card, such as a debit card or other single credit device (including certain account numbers) that a consumer may use from time to time to obtain covered overdraft credit from a very large financial institution. Provisions of the CARD Act that will apply to such overdraft credit include, but are not limited to, ability to pay underwriting requirements, limitations on penalty fees including certain fees on transactions that are declined due to nonsufficient funds, and various requirements related to rate changes.

The final rule will also prohibit compulsory use of preauthorized electronic fund transfers (EFTs) for repayment of covered overdraft credit provided by very large financial institutions. This change will ensure that consumers using those products have a choice of at least one alternative method of repayment. As a result of this change, covered overdraft credit offered by very large financial institutions cannot be conditioned on consumers agreeing to automatic debits from their checking account. Consumers could still opt into automatic payments on a periodic basis if offered by their financial institution, but they will have the right to repay this overdraft credit manually if they prefer.

The final rule will take effect on October 1, 2025. This effective date is more than six months after the date the rule is published in the **Federal Register**, consistent with 15 U.S.C. 1604(d).

B. Market Background

1. Overview of Overdraft Credit

An overdraft occurs when consumers do not have a sufficient balance in their asset account to pay a transaction, but the financial institution pays the transaction anyway. Typically, the financial institution pays an overdraft transaction by either transferring the consumer's own funds from another asset account held by the financial institution, such as a savings account, or

[6] 12 CFR 1026.4(c)(3).

[7] 12 CFR 1026.4(b)(2).

[8] Public Law 111–24; 123 Stat. 1734 (2009).

by extending overdraft credit (*i.e.,* using the financial institution's own funds and requiring the consumer to repay).

Currently, not all overdraft credit is subject to Regulation Z. For example, when the Board first adopted Regulation Z in 1969,[9] it excepted from Regulation Z's coverage charges for honoring checks that overdraw a checking account unless the payment of the check and imposition of the fee were previously agreed upon in writing. A Board official interpretation stated that this exception for ad hoc credit decisions applies only to ''regular demand deposit accounts which carry no credit features and in which a bank may occasionally, as an accommodation to its customer, honor a check which inadvertently overdraws that account.'' [10] The Board subsequently adopted commentary excluding debit cards with no credit agreement from Regulation Z's definition of ''credit card.'' [11] While the Board did not explain this exception, it appears it was intended to exclude discretionary overdraft services from being subject to Regulation Z when they are accessed by a debit card, consistent with the exclusion for overdraft charges from the definition of finance charge.[12]

Some overdraft credit is previously agreed upon in writing and is currently covered by Regulation Z. Such covered overdraft credit enables consumers to link a checking account to a credit account, like an overdraft line of credit or a credit card, from which funds are transferred automatically to pay transactions when the checking account balance is insufficient to pay them. Some financial institutions charge a fee, often referred to as an overdraft protection transfer fee, for these transfers.[13] Financial institutions may assess such a fee once per day that a transfer is made, once to transfer a round dollar value increment (*e.g.,* a fee for $100 transferred to cover any overdraft(s) less than $100), or, less commonly, once per overdraft transaction; [14] however, since late 2021, in the wake of substantial CFPB enforcement and supervising attention on overdraft fees, a number of financial institutions have voluntarily eliminated such fees.[15] Credit accounts used to cover overdrafts also carry an interest rate applied to the outstanding balance. Repayment of the overdrawn amount and interest is typically made periodically according to a payment schedule. The ability to obtain and use covered overdraft credit is typically limited to consumers whose credit history allows them to qualify for an overdraft line of credit or who have available credit on a credit card.

Financial institutions may also pay overdrafts through currently non-covered overdraft credit, where the financial institution typically pays overdrafts up to certain limits but does not agree in advance to pay the overdrawn transactions, reserving discretion to decline any given overdraft transaction. This type of overdraft credit is currently non-covered overdraft credit because it is currently not subject to Regulation Z. This final rule may also refer to currently non-covered overdraft credit as an overdraft service, overdraft services, or an overdraft program. With certain exceptions provided for by internal policies, the financial institution typically assesses a flat fee for each overdraft transaction the financial institution pays. In addition, some financial institutions charge an additional fee or fees, known as extended or sustained overdraft fees, if the consumer does not bring the account back to a positive balance within a specified period. To collect repayment of the funds advanced to cover overdraft transactions as well as payment of the fees assessed, the financial institution typically deducts those amounts as a lump sum from the consumer's next incoming deposit(s), usually within three days after the account became overdrawn.[16]

Financial institutions typically provide non-covered overdraft credit for certain transaction types—primarily checks, automated clearinghouse (ACH) transactions, and recurring debit card transactions—as a default, up to certain coverage limits. For one-time (non-recurring) debit card and ATM transactions, financial institutions cannot assess overdraft fees for paying such transactions without first obtaining the consumer's opt-in following the process required by Regulation E 12 CFR 1005.17(b).

Financial institutions employ a number of different practices and policies when making pay/return decisions in connection with non-covered overdraft.[17] While, as noted above, overdraft credit must technically be discretionary to be excepted from Regulation Z, in practice, financial institutions typically assign each account an overdraft coverage limit representing the maximum amount of overdraft coverage the financial institution will extend on the account. Once an account reaches its overdraft coverage limit, the financial institution will no longer pay transactions into overdraft and will return those transactions unpaid. Overdraft coverage limits may be static (*i.e.,* the financial institution assigns an unchanging limit to each customer) or dynamic (*i.e.,* the financial institution changes the limit for each account periodically based on account usage patterns, market conditions, or account and accountholder characteristics in an attempt to manage more precisely credit risk, overdraft program revenues, and customer retention).[18] Financial institutions that use static limits sometimes communicate those limits to account holders, while financial institutions that use dynamic limits generally do not communicate those limits to account holders.

Historically, financial institutions have charged an NSF fee when they reject, rather than pay, transactions initiated by check or ACH or other electronic payments; in contrast, financial institutions have rarely if ever charged an NSF fee when declining a one-time debit card purchase or an ATM withdrawal.[19] Financial institutions typically have charged the same amount

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[9] 34 FR 2002 (Feb. 11, 1969).

[10] 42 FR 22360, 22362 (May 3, 1977).

[11] 46 FR 50288, 50293 (Oct. 9, 1981) (providing that a ''credit card'' does not include ''[a] check-guarantee or debit card with no credit feature or agreement, even if the creditor occasionally honors an inadvertent overdraft''); *see also* Regulation Z comment 2(a)(15)–2.ii.A.

[12] Under Regulation Z, an issuer of a credit card can be a creditor regardless of whether the credit is subject to a finance charge. 12 CFR 1026.2(a)(17)(iii); *see also* 12 CFR 1026.2(a)(7) (defining ''card issuer''). Thus, without the 1981 exception, a financial institution that extends overdrafts could be a ''creditor'' for purposes of subpart B of TILA even with an exemption of overdraft fees from the finance charge.

[13] Consumer Fin. Prot. Bureau (CFPB), *CFPB Study of Overdraft Programs: A white paper of initial data findings,* at 55 (June 2013), *https://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf* (CFPB 2013 White Paper) (noting 28 of a sample of 33 large institutions charged a transfer fee in 2012, ranging from $3 to $20 per transfer, with a median of $10, while smaller institutions charged a median of $5).

[14] *Id.*

[15] Between December 2022 and July 2023, CFPB reviewed publicly available information describing the overdraft-related practices of very large financial institutions (CFPB Market Monitoring of Publicly Available Overdraft Practices, Dec. 2022–July 2023).

[16] Trevor Bakker et al., CFPB, *Data Point: Checking account overdraft,* at 5, 22 (July 2014), *https://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf* (CFPB 2014 Data Point).

[17] CFPB 2013 White Paper at 48–52.

[18] Common account and account holder characteristics include account tenure, average balance, overdraft history, and deposit patterns, as well as other relationships the accountholder may have with the institution.

[19] The CFPB is aware that some prepaid card providers charge NSF fees on one-time purchase transactions, based on fees disclosed in the CFPB's publicly-available prepaid account agreement database.

for an NSF fee as for a non-covered overdraft fee.[20] As noted in part I.B.3, many financial institutions have eliminated NSF fees over the past three years.

2. Evolution and Growth of Non-Covered Overdraft

Non-covered overdraft credit started as a courtesy that individuals within financial institutions provided when they would decide on an ad hoc basis to pay particular check transactions into overdraft rather than returning those checks unpaid.[21] This courtesy would help consumers avoid NSF fees, merchant fees, and other negative consequences from bounced checks. Over time, non-covered overdraft credit began to move away from that historical model, as financial institutions shifted to a system involving heavy reliance on automated programs to process transactions and to make overdraft decisions.[22] Financial institutions also began to extend overdraft credit to debit card transactions, even though a declined debit card transaction did not pose the same risk to consumers of an NSF fee, a merchant fee, or certain other consequences associated with a bounced check.[23] Over time, debit card transactions became more numerous than checks, increasing the number of transactions that could generate overdrafts, with typical debit card transactions involving smaller amounts than typical check transactions.[24] Even as transaction processing and overdraft decisioning became more automated and overdraft transactions increased in frequency and decreased in size, financial institutions increased the size of overdraft fees. In 1976, when the process was typically manual and included only checks, one survey of banks in Washington, DC, and the New York metro area found that the median fee was $5, while some banks charged zero.[25] By 1994, concern had risen about the increase in the average fee to over $15 ($5.77 in 1976 dollars);[26] by 2000, the average had surpassed $20 ($6.61 in 1976 dollars) and continued to increase thereafter.[27]

As a result of these market shifts and operational changes, fee revenue from non-covered overdraft credit began to significantly influence the overall business model for many asset accounts. Financial institutions became less likely to charge consumers upfront monthly checking account fees, which consumers could more easily compare across the market, and instead began to rely heavily on overdraft fees.[28] In essence, the provision of non-covered overdraft credit moved away from its original purpose—paying occasional or inadvertent overdrafts as a courtesy—and became the dominant component of a back-end pricing business model. By 2004, marketwide overdraft revenue was estimated at approximately $10 billion and, by 2009, had increased to an estimated $25 billion.[29]

3. Non-Covered Overdraft Credit Today

Marketwide overdraft revenue declined following the 2010 implementation of the Board's ''opt-in'' rule under Regulation E to an estimated $12 billion in 2011, before beginning to increase again.[30] In the several years preceding the COVID–19 pandemic, marketwide overdraft revenue was persistent, climbing from an estimated $11.8 billion in 2015 to $12.6 billion in 2019.[31] With the onset of the pandemic

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[20] *See Consumers Guide to Banking: Staff Report on Commercial Bank Charges in the New York and Washington, DC Metropolitan Area,* S. Comm. on Banking, Hous. and Urban Affairs, 94th Cong. 10–11 tbl.3 (1976) (Senate Staff Report); *see also* 70 FR 8428, 8429 (Feb. 18, 2005) (''Regardless of whether the overdraft is paid, institutions typically charge the NSF fee when an overdraft occurs.''); 74 FR 59033, 59035 (Nov. 17, 2009) (''Second, a consumer will generally be charged the same fee by the financial institution whether or not a check is paid; yet, if the institution covers an overdrawn check, the consumer may avoid other adverse consequences, such as the imposition of additional merchant returned item fees.''); Fed. Deposit Ins. Corp. (FDIC), *2008 FDIC Study of Bank Overdraft Programs,* at 16 n.18 (Nov. 2008), *https://www.fdic.gov/bank/analytical/overdraft/FDIC138_Report_Final_v508.pdf* (FDIC 2008 Study) (''For most of the survey population operating automated programs, the per-item fee charged when items were paid under automated overdraft programs was the same as the fee charged by the bank on NSF items that it did not pay. These two fees were equal to each other for 98.1 percent of 451 institutions reporting the two fee items.'').

[21] *See* 42 FR 22360, 22362 (May 3, 1977) (describing the exception from Regulation Z as applying when overdraft is provided ''as an accommodation . . . honoring a check which inadvertently overdraws that account.''); *see also Federal Reserve Board Staff Opinion Letter No. 948* (Nov. 17, 1975) (explaining that the exception ''relates only to regular demand deposit accounts which carry no credit feature and in which a bank may occasionally, as an accommodation to its customer, honor a check which inadvertently overdraws that account'').

[22] *See* 74 FR 59033, 59033 n.1 (Nov. 17, 2009) (citing *FDIC's Study of Bank Overdraft Programs* (Nov. 2008), which found that nearly 70 percent of banks surveyed implemented their automated overdraft program after 2001).

[23] *See id.* at 59035; *see also id.* at 59034 n.6 (citing *Overdraft Protection: Fair Practices for Consumers: Hearing before the House Subcomm. on Financial Institutions and Consumer Credit, House Comm. on Financial Services,* 110th Cong., at 72 (2007)) (''noting that as recently as 2004, 80 percent of banks still declined ATM and debit card transactions without charging a fee when account holders did not have sufficient funds in their account'').

[24] Federal Reserve Payments Studies from 2004 to 2013 (exhibit 1 in each study) show that from 2000 to 2012, annual debit card transactions increased from 8.3 billion to 47 billion, while annual check transactions decreased from 41.9 billion to billion to 18.3 billion. By 2008, debit card transactions exceeded the number of checks. *See* Bd. of Governors of the Fed. Rsrv. Sys. (FRS), *Federal Reserve Payments Study (FRPS)—Previous Studies, https://www.federalreserve.gov/paymentsystems/frps_previous.htm* (last updated Nov. 13, 2024); *see also* FRS, *The 2013 Federal Reserve Payments Study,* at 9 ex.2 (Dec. 2013), *https://www.frbservices.org/binaries/content/assets/crsocms/news/research/2013-fed-res-paymt-study-summary-rpt.pdf* (showing the average debit card transaction ranged from $37 to $40 from 2003–2012, while the average check transaction ranged from $1,103 to $1,410). The CFPB has found that the median transaction amount that leads to an overdraft fee in the case of debit card transactions is $24, while the median check and ACH transactions that lead to overdraft fees are $100 and $90, respectively. *See* CFPB 2014 Data Point at 5; *see also* Fin. Health Network (FHN), *Responding to Reform: Overdraft in 2023* (Oct. 8, 2024), *https://finhealthnetwork.org/research/responding-to-reform-overdraft-in-2023/* (FHN Brief 2024) (finding almost half (45 percent) of overdrafters reported that their most recent overdraft occurred on a transaction of $50 or less).

[25] Senate Staff Report at 10–11.

[26] *See Bank Fees Associated with Maintaining Depository, Checking, and Credit Card Accounts,* Hearing Before the Subcomm. on Consumer Credit and Ins., Comm. on Banking, Finance and Urban Affairs, 103rd Cong. 73 tbl.3 (1993) (Testimony by Susan M. Phillips, Member, FRS) (showing average overdraft fee of over $15 in 1993); *see also id.* at 95–96, 101–102 (Statement of Chris Lewis, Dir. of Banking and Hous. Pol'y, Consumer Fed'n of Am.) (noting concerns about the rise in the size of ''bounced check fees'', a term the organization used to describe the fee assessed when funds were insufficient, whether the transaction was returned unpaid or paid into overdraft).

[27] Gov't Accountability Off., *Bank Fees: Federal Banking Regulators Could Better Ensure That Consumers Have Required Disclosure Documents Prior to Opening Checking or Savings Accounts,* at 14 (Jan. 2008), *https://www.gao.gov/assets/gao-08-281.pdf; see also* FDIC 2008 Study (by 2007, among primarily financial institutions with less than $5 billion in assets, the average fee was $27); CFPB 2013 White Paper at 52 (by 2012, among the nation's largest financial institutions, the average fee was $34).

[28] CFPB 2013 White Paper at 16–17.

[29] CFPB's estimates of marketwide overdraft revenue, before banks with over $1 billion in assets began reporting overdraft/NSF revenue on call reports in 2015, are based on the estimated share of aggregated fee revenue that banks and credit unions reported on call reports that was attributable to overdraft fees. For more details on methodology, *see* Jacqueline Duby et al., Ctr. for Responsible Lending (CRL), *High Cost & Hidden From View: The $10 Billion Overdraft Loan Market* (May 26, 2005), *https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/ip009-High_Cost_Overdraft-0505.pdf; see also* Leslie Parrish, CRL, *Overdraft Explosion: Bank fees for overdrafts increase 35% in two years,* at 4 (Oct. 6, 2009), *https://www.responsiblelending.org/research-publication/overdraft-explosion-bank-fees-overdrafts-increase-35-two-years.*

[30] *Id.*

[31] CFPB's estimates of marketwide overdraft revenue for 2015 to 2022 extrapolate total overdraft/NSF revenue reported on call reports by banks with over $1 billion in assets to banks with less than $1 billion in assets and to credit unions in order to reach a total marketwide estimate of overdraft/NSF revenue, and then estimate the portion of that combined overdraft/NSF revenue that is attributable to overdraft revenue alone. To extrapolate reported overdraft/NSF revenue to banks with less than $1 billion in assets and to credit unions, the CFPB uses

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in March 2020, overdraft revenue dropped significantly. The drop was likely primarily due to pandemic-related stimulus payments pushing up average checking account balances, as well as temporarily decreased use of debit cards.[32] In addition, Federal regulators encouraged, and some State regulators encouraged or mandated, financial institutions to offer leniency around imposition of overdraft fees in light of the pandemic.[33] Notwithstanding the trend downward during the pandemic, estimated market wide overdraft revenue exceeded $9 billion in 2020 and 2021.[34]

Beginning in late 2021, a number of large banks began announcing and implementing changes to their overdraft policies.[35] Some banks eliminated overdraft fees altogether or reduced them to $10 or $15 per transaction.[36] Some banks made changes to their policies by expanding their fee waiver policies, including establishing a daily limit of one fee per day even if multiple overdrawing transactions are paid; [37] establishing de minimis negative balance thresholds of $50 or more, within which overdrafts do not result in a fee; and implementing grace periods giving consumers time through the next business day to bring their accounts positive before a fee is assessed.[38] Collectively these changes resulted in a sustained reduction in overdraft revenues as compared to pre-pandemic levels.[39] Marketwide overdraft revenue in 2022 was an estimated $9.1 billion ($7.9 billion in 2019 dollars, a 37 percent drop in real terms).[40] Of that, an estimated $6.16 billion, or 68 percent, was earned by financial institutions with above $10 billion in assets.[41] At the same time, most very large financial institutions eliminated NSF fees.[42]

Although there was some overall decline in the charging of overdraft fees, a sizeable majority of banks and credit unions with over $10 billion in assets (*i.e.,* 68 percent) continue to charge between $30 and $37 per transaction incurring an overdraft fee, and more than half charge $35.[43] Most financial institutions' policies allow consumers to incur multiple overdraft fees per day. Financial institutions continue charging these high fees even though the fees far exceed institutions' costs and losses associated with providing non-covered overdraft credit. CFPB data collections and outreach have found that the single largest cost or loss to financial institutions associated with overdraft programs is charged-off account balances, which most frequently occur when a consumer's subsequent deposits do not cover the negative balance created by the overdraft(s) and associated fee(s).[44] The CFPB's study of 2011 bank data found that charge-offs were small relative to the fee revenue banks earned through their overdraft programs.[45] Among those banks, charged-off principal account balances due to overdraft programs represented 14.4 percent of the net overdraft fees (not including NSF fees) at those banks.[46] During the first half of 2023, the CFPB collected additional data from several banks, which again showed that charge-offs associated with negative account balances were the largest cost or loss associated with providing overdraft. As discussed further in part IV.D.3, charge-offs amounted to an average of $2 per overdraft transaction, whether or not such transaction incurred an overdraft fee, and an average of $5 per overdraft transaction that incurred an overdraft fee—representing 6 percent and 15 percent, respectively, of the average fee of $32.50 charged by those banks during the period studied.

4. Consumer Impact of Overdraft Fees

As cumulative overdraft fee revenue for financial institutions increased before recent reductions, so did the cumulative burden of overdraft fees on consumers, particularly more financially vulnerable consumers. CFPB research found that 79 percent of combined overdraft and NSF fees were paid by 9 percent of consumers who paid more than 10 such fees per year, incurring a median of $380 in these fees in a year.[47] Consumers paying more than 20 such fees in a year accounted for about 5 percent of accounts, while paying over 63 percent of the fees.[48]

High overdraft fees can make it more difficult for consumers to return their account to a positive balance, contributing to account charge-offs, involuntary account closures, and consumers blocked out of the banking system. The CFPB found that the banks with the highest share of accounts with frequent overdrafts tended to have the highest rates of involuntary account closure; conversely, those with the

data collected from core processors for the number of accounts by asset size and the overdraft/NSF revenue per account, and from 2014 call report data for distribution of institutions by asset size, and then assumes that overdraft/NSF revenue at small institutions saw the same growth from 2014 to 2019 as at large banks to arrive at the 2019 estimate. These extrapolations result in estimates where banks with over $1 billion in assets comprise 77.4 percent of marketwide overdraft/NSF revenue, banks with less than $1 billion in assets comprise 7.3 percent of such revenue, and credit unions comprise 15.3 percent of such revenue. *See* Éva Nagypál, Ph.D., CFPB, *Data Point: Overdraft/NSF Fee Reliance Since 2015—Evidence from Bank Call Reports,* at 7 (Dec. 2021), *https://files.consumerfinance.gov/f/documents/cfpb_overdraft-call_report_2021-12.pdf* (CFPB 2021 Data Point). For the 2022 estimate, the CFPB assumes that banks with assets over $1 billion, banks with assets below $1 billion, and all credit unions represent the same relative portions of total marketwide overdraft/NSF revenue in 2022 as they did in 2019.

[32] CFPB 2021 Data Point at 22–24.

[33] *See* Press Release, FRS, FDIC & Off. of the Comptroller of the Currency (OCC), *Joint Statement on CRA Consideration for Activities in Response to COVID–19* (Mar. 19, 2020), *https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-19a.pdf;* Press Release, CFPB, *Consumer Financial Protection Bureau Encourages Financial Institutions and Debt Collectors to Allow Stimulus Payments to Reach Consumers* (Mar. 17, 2021), *https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-encourages-financial-institutions-and-debt-collectors-to-allow-stimulus-payments-to-reach-consumers/; see also, e.g.,* State of Cal. Bus., Consumer Servs. & Hous. Agency, *Guidance to Financial Institutions During the COVID–19 Pandemic* (Mar. 22, 2020), *https://www.bcsh.ca.gov/coronavirus19/dbo_banks.pdf;* Press Release, N.Y. State Dep't of Fin. Servs., *DFS Issues New Emergency Regulation Requiring New York Regulated Financial Institutions To Provide Financial Relief To New Yorkers Demonstrating Financial Hardship From COVID–19 Pandemic* (Mar. 24, 2020), *https://www.dfs.ny.gov/reports_and_publications/press_releases/pr202003241.*

[34] *See* discussion of methodology at FN 31.

[35] Rebecca Borné & Amy Zirkle, *Comparing overdraft fees and policies across banks,* CFPB (Feb. 10, 2022), *https://www.consumerfinance.gov/about-us/blog/comparing-overdraft-fees-and-policies-across-banks/.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] CFPB, *Data Spotlight: Overdraft/NSF revenue down nearly 50% versus pre-pandemic levels* (May 24, 2023), *https://www.consumerfinance.gov/data-research/research-reports/data-spotlight-overdraft-nsf-revenue-in-q4-2022-down-nearly-50-versus-pre-pandemic-levels/full-report/* (CFPB May 2023 Data Spotlight); *see also* CFPB, *Trends in overdraft/non-sufficient fund (NSF) fee revenue and practices* (Apr. 24, 2024), *https://content.consumerfinance.gov/data-research/research-reports/trends-in-overdraftnon-sufficient-fund-nsf-fee-revenue-and-practices/* (CFPB April 2024 Data Spotlight) (reflecting data and analysis published periodically from Dec. 1, 2021 to present).

[40] *See* discussion of methodology at FN 31.

[41] Estimated using data from 2022 Federal Financial Institutions Examination Council (FFIEC) Call Reports and methodology discussed at FN 31.

[42] CFPB, *Data spotlight: Vast majority of NSF fees have been eliminated, saving consumers nearly $2 billion annually* (Oct. 11, 2023), *https://www.consumerfinance.gov/data-research/research-reports/vast-majority-of-nsf-fees-have-been-eliminated-saving-consumers-nearly-2-billion-annually/* (CFPB October 2023 Data Spotlight) (finding that nearly two-thirds of banks with over $10 billion in assets have eliminated NSF fees).

[43] CFPB Market Monitoring of Publicly Available Overdraft Practices, Dec. 2022–July 2023.

[44] CFPB 2013 White Paper at 17.

[45] *Id.*

[46] *Id.*

[47] David Low et al., CFPB, *Data Point: Frequent Overdrafters,* at 5 (Aug. 2017), *https://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_frequent-overdrafters.pdf* (CFPB 2017 Data Point); CFPB 2014 Data Point at 12 (both analyzing 2011–2012 data).

[48] CFPB 2017 Data Point at 5.

lowest share of accounts with frequent overdrafts tended to have the lowest rates of involuntary closure.[49] Account closures, in turn, are often reported to account screening consumer reporting agencies, and a negative report from an account screening company may limit a consumer's ability to open an account at a bank or credit union in the future. Negative experiences with overdraft fees likely also discourage many consumers from wanting a bank account at all. The Federal Deposit Insurance Corporation (FDIC) estimates that there were approximately 5.6 million unbanked households in the U.S. in 2023,[50] nearly half of which had a bank account in the past.[51] Of those previously banked households, nearly two-thirds have little or no interest in having a bank account again,[52] with high fees, unpredictable fees, and not enough funds to meet minimum balance requirements among the most cited reasons.[53]

Consumers can face significant uncertainty about whether they will incur overdraft fees. Though financial institutions may provide disclosures related to their transaction processing, deposit availability, and overdraft assessment policies, these policies can be extraordinarily complex.[54] Even consumers who closely monitor their account balances may not know with certainty when transactions will post to their accounts, whether a particular transaction will be paid or returned unpaid, or whether a particular paid transaction will be deemed an overdraft and assessed an overdraft fee.[55]

In response to the CFPB's 2022 request for information regarding fees that are not subject to competitive processes that ensure fair pricing, which received over 80,000 responses,[56] overdraft-related fees were by far the most common issue raised. Common concerns included that the fees were unclear or confusing, disproportionate compared to the incidents resulting in the fees, and difficult or impossible to avoid. These concerns were generally consistent with those reflected in complaints about overdraft fees consumers have submitted to the CFPB since its inception in 2011.

The CFPB has also studied how consumers who are opted-in to overdraft services on one-time debit card and ATM transactions—and thus subject to overdraft fees on those transactions—fare compared to those who are not opted-in. In total, opted-in accounts incurred more than seven times as many overdraft fees as accounts that were not opted-in.[57] At the account level, opted-in accounts were three times as likely to have more than 10 overdrafts per year as accounts that were not opted-in.[58] And among frequent overdrafters, those who were opted-in appeared similar across a number of dimensions to frequent overdrafters who were not opted-in, but incurred significantly more—at the median, 13 more—overdraft/NSF fees per year.[59] In addition, involuntary account closure was about 2.5 times as likely for consumers who were opted-in than for consumers who were not.[60]

Consumers whose accounts are frequently overdrawn are typically more financially insecure than those who do not overdraw or who do so infrequently.[61] Compared to non- or infrequent overdrafters, frequent overdrafters tend to have lower incomes and lower end-of-day balances.[62] They are also less likely to have access to alternative credit options: they have lower credit scores, are less likely to have a general purpose credit card, and, if they do have such a card, they have less credit available on it.[63] Black households and Latino households are more likely to incur overdraft fees than white households.[64]

Further, evidence suggests that millions of accounts with outstanding overdrafts are closed every year, and those former accountholders may have less subsequent access to the formal banking system as a result.[65]

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[49] CFPB 2013 White Paper at 25.

[50] FDIC, *2023 FDIC National Survey of Unbanked and Underbanked Households,* at 1 (Nov. 2024), *https://www.fdic.gov/household-survey/2023-fdic-national-survey-unbanked-and-underbanked-households-report* (FDIC 2023 Unbanked Report).

[51] *Id.* at 27 tbl.1.3 (47.4 percent of unbanked households previously had a bank account).

[52] *Id.* at 28 fig.1.7 (47.5 percent of previously banked households are not at all interested in having a bank account, and 17.8 percent are not very interested).

[53] FDIC, *2023 FDIC National Survey of Unbanked and Underbanked Households—Appendix Tables* (November 2024), at 13 tbl.A.8, *https://www.fdic.gov/household-survey/2023-fdic-national-survey-unbanked-and-underbanked-households-appendix-tables* (among previously banked households, 32.8 percent cited bank account fees are too high, 30.6 percent cited bank account fees are too unpredictable, and 43.3 percent cited that they do not have enough money to meet minimum balance requirements).

[54] *See* Press Release, CFPB, *CFPB Orders Regions Bank to Pay $191 Million for Illegal Surprise Overdraft Fees* (Sept. 28, 2022), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-regions-bank-pay-191-million-for-illegal-surprise-overdraft-fees/; see also* Press Release, CFPB, *CFPB Orders Atlantic Union Bank to Pay $6.2 Million for Illegal Overdraft Fee Harvesting* (Dec. 7, 2023), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-atlantic-union-bank-to-pay-6-2-million-for-illegal-overdraft-fee-harvesting/.*

[55] *Id.; see also* 87 FR 66935, 66935–40 (Nov. 7, 2022).

[56] 87 FR 5801 (Feb. 2, 2022).

[57] CFPB 2014 Data Point at 21.

[58] *Id.* at 13.

[59] CFPB 2017 Data Point at 6, 32–33. This dynamic was likely driven primarily by the scenario where a debit card or ATM transaction is authorized against a sufficient balance but then settles against an insufficient balance. A consumer who was not opted-in would have had this transaction approved and assessed no fee. A consumer who was opted-in may have been charged a fee. For discussion of regulatory guidance and CFPB enforcement actions addressing overdraft fees assessed on these ''authorize positive, settle negative'' transactions, *see* part I.B.5.

[60] CFPB, *A Closer Look: Overdraft and the Impact of Opting-In* (Jan. 19, 2017), *https://files.consumerfinance.gov/f/documents/201701_cfpb_Overdraft-and-Impact-of-Opting-In.pdf* (citing a rate of 6.2 percent in a given year for non-opted-in consumers and 2.5 percent for opted-in consumers, based on calculations using the same large bank data used in CFPB 2014 Data Point).

[61] CFPB has previously used ''frequent overdrafters'' to describe those who incur more than 10 overdraft/NSF fees in one year and ''very frequent overdrafters'' to describe those who incur more than 20 overdraft/NSF fees in one year. *See* CFPB 2017 Data Point at 4–5.

[62] *Id.* at 15–16 (finding that as neighborhood income decreases, overdraft frequency increases); *id.* at 6 (finding that nearly 70 percent of frequent overdrafters had end-of-day balances with medians between $237 and $439, while another 20 percent had median end-of-day balances of $140). *See also* FHN, *Overdraft Trends Amid Historic Policy Shifts* (June 1, 2023), *https://finhealthnetwork.org/research/overdraft-trends-amid-historic-policy-shifts/* (FHN Brief 2023) (finding that households with incomes under $30,000 were twice as likely to report at least one overdraft than those with incomes of $100,000 or more).

[63] CFPB 2017 Data Point at 15–16.

[64] *See* FHN Brief 2023 (finding that 26 percent of Black, 23 percent of Latinx, and 14 percent of White households reported having overdrafted, making Black and Latinx households 1.9 and 1.6 times as likely as White households, respectively, to have overdrafted); *see also* FHN Brief 2024 (finding that 31 percent of Black, 24 percent of Latinx, and 14 percent of White households reported having overdrafted in 2023); Meghan Greene et al., FHN, *FinHealth Spend Report 2022: What U.S. Households Spent on Financial Services During COVID–19,* at 14 (Apr. 2022), *https://finhealthnetwork.org/wp-content/uploads/2022/05/FinHealth_Spend_Report_2022_Final.pdf* (finding in a 2021 survey that Black and Latinx households with a savings or checking account were 1.8 and 1.4 times as likely as White households to report having overdrafted); *see also* CFPB, *Overdraft and Nonsufficient Fund Fees,* at 25 (Dec. 2023), *https://files.consumerfinance.gov/f/documents/cfpb_overdraft-nsf-report_2023-12.pdf* (finding that Black and Hispanic consumers are 69 and 60 percent more likely to reside in a household charged at least one overdraft or NSF fee in the past year).

[65] For example, a 2012 study found that 30 million checking accounts were involuntarily closed from 2001–2005 due to excessive overdrafts, with the former accountholders having limited or no subsequent access to the formal banking system. *See* Dennis Campbell et al., *Bouncing out of the banking system: An empirical analysis of involuntary bank account closures,* 36 J. Banking & Fin. 1224 (2012). The CFPB's supervisory experience suggests that overdraft-related involuntary closures remain prevalent in today's market.

5. Growing Regulatory Concerns About Non-Covered Overdraft Credit

As financial institutions began to evolve the provision of non-covered overdraft away from the historical model and toward increased automation, greater frequency, and higher revenues, Federal regulators expressed increasing consumer protection concerns. In 2001, in declining to issue a requested ''comfort letter'' for a financial institution's overdraft program, the Office of the Comptroller of the Currency (OCC) stated that overdraft services are extensions of credit and that the associated charges may be ''just as burdensome as those imposed on borrowers utilizing other types of high interest rate credit.'' [66] In 2002, the Board noted that some non-covered overdraft credit may not be all that different from overdraft lines of credit,[67] and in 2004 the Board stated that further consideration of the need for Regulation Z coverage of overdraft services would be appropriate if consumer protection concerns were to persist.[68] In 2005, the Federal banking agencies issued joint guidance on non-covered overdraft credit noting that ''the existing regulatory exceptions [*i.e.,* exceptions in Regulation Z such that it does not apply] were created for the occasional payment of overdrafts, and as such could be reevaluated by the Board in the future, if necessary'' and ''[w]ere the Board to address these issues more specifically, it would do so separately under its clear [TILA] authority.'' [69] In 2009, the Board adopted a rule under Regulation E prohibiting institutions from assessing overdraft fees on one-time debit card and ATM transactions unless the institution obtained the consumer's affirmative consent to such fees (''opt-in rule'').[70] Following the adoption of the Board's rule, the FDIC issued additional supervisory guidance,[71] which advises, among other things, that where transactions overdraw an account by a de minimis amount, the overdraft fee should be eliminated or be reasonable and proportional to the amount of the transaction.[72]

More recently, in October 2022, the CFPB issued a policy statement stating that the assessment of overdraft fees that consumers would not reasonably anticipate, including overdraft fees on debit card or ATM transactions that are authorized when the consumer's available balance is sufficient to cover the transaction but that later settle against a negative balance due to intervening transactions or complex processes (''authorize positive, settle negative'' or ''APSN'' transactions), likely violates the Consumer Financial Protection Act of 2010 (CFPA)'s statutory prohibition against unfair practices.[73] In April 2023, the OCC and FDIC issued guidance advising that overdraft fees charged on such transactions raise heightened risk of unfair, deceptive, or abusive acts or practices.[74] The OCC's guidance also describes certain practices that it notes may help to manage risks associated with overdraft programs, including assisting consumers in avoiding ''unduly high costs'' in relation to the face value of the item being presented, the amount of their regular deposits, and their average account balances, and implementing fees and practices that bear a reasonable relationship to the risks and costs of providing overdraft programs.[75]

The CFPB has previously established rules governing overdraft credit on prepaid accounts. In 2016, the CFPB amended Regulation Z to provide that prepaid accounts that offer credit features are generally covered under Regulation Z's credit card rules.[76] The CFPB also amended the compulsory use provision under Regulation E to prohibit prepaid card issuers from requiring consumers to set up preauthorized EFTs to repay credit extended through an overdraft credit feature accessible by a hybrid prepaid-credit card.[77]

In applying Regulation Z to overdraft credit features on prepaid accounts, the CFPB noted that the term ''credit'' in TILA includes ''the right to . . . incur debt and defer its payment'' [78] and explained that that definition ''covers the situation when a consumer makes a transaction that exceeds the funds in the consumer's account and a person elects to cover the transaction by advancing funds to the consumer.'' [79] The CFPB further stated that overdraft fees on prepaid accounts ''generally constitute finance charges, because they are directly payable by the consumer and imposed directly by the creditor as a condition of the extension of credit.'' [80] The CFPB also stated that overdraft services offered in connection with prepaid accounts ''can be regulated by Regulation Z as a 'plan' when the consumer is contractually obligated to repay the debt, even if the creditor retains, by contract, the discretion not to extend credit.'' [81] At that time, the CFPB stated that it was continuing to study overdraft services on checking accounts and would propose any further regulatory consumer protections in that space through a separate rulemaking.[82]

II. The Proposal and Other Procedural Background

A. Outreach and Engagement

The CFPB has engaged in outreach and research related to overdraft fees since soon after the CFPB's inception. In 2012, the CFPB initiated a broad inquiry into overdraft programs for consumer checking accounts.[83] This inquiry included a request for information on

[66] OCC, Interpretive Letter No. 914, at 6 (Sept. 2001), *https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2001/int914.pdf.*

[67] 67 FR 72618, 72620 (Dec. 6, 2002). In 2003, the Board noted that ''[t]he Board's staff is continuing to gather information on these services, which are not addressed in the final rule.'' 68 FR 16185 (Apr. 3, 2003).

[68] 69 FR 31760, 31761 (June 7, 2004).

[69] *See* 70 FR 9127, 9128–29 (Feb. 24, 2005).

[70] 74 FR 5212 (Jan. 28, 2009).

[71] FDIC, *Final Overdraft Payment Supervisory Guidance,* FIL–81–2010 (Nov. 24, 2010), *https://www.fdic.gov/news/news/financial/2010/fil10081.html.*

[72] *Id.*

[73] *CFPB Circular 2022–06: Unanticipated Overdraft Fee Assessment Practices,* 87 FR 66935 (Nov. 7, 2022). The CFPB, the Board, and the FDIC also highlighted risks related to the imposition of overdraft fees from 2015 to 2018. *See* CFPB, *Supervisory Highlights,* at 8–9 (Winter 2015), *https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf* (last visited Dec. 3, 2024) (CFPB Winter 2015 Highlight); FRS, *Interagency Overdraft Services Consumer Compliance Discussion,* Outlook Live presentation slides, at 20–21 (Nov. 9, 2016), *https://www.consumercomplianceoutlook.org/-/media/cco/Outlook-Live/2016/110916.pdf;* FRS, *Consumer Compliance Supervision Bulletin,* at 12 (July 2018), *https://www.federalreserve.gov/publications/files/201807-consumer-compliance-supervision-bulletin.pdf* (FDIC 2018 Highlight); FDIC, *Consumer Compliance Supervisory Highlights,* at 2–3 (June 2019), *https://www.fdic.gov/regulations/examinations/consumercomplsupervisoryhighlights.pdf?source=govdelivery&utm_medium=email&utm_source=govdelivery* (FDIC 2019 Highlight).

[74] OCC, *OCC Bulletin 2023–12, Overdraft Protection Programs: Risk Management Practices* (Apr. 26, 2023), *https://www.occ.treas.gov/news-issuances/bulletins/2023/bulletin-2023-12.html* (OCC Bulletin 2023–12); FDIC, *Supervisory Guidance on Charging Overdraft Fees for Authorize Positive, Settle Negative Transactions,* FIL–19–2023 (Apr. 26, 2023), *https://www.fdic.gov/news/financial-institution-letters/2023/fil23019a.pdf.*

[75] OCC Bulletin 2023–12.

[76] 81 FR 83934, 83934–35 (Nov. 22, 2016). The CFPB amended the 2016 Prepaid Final Rule in 2017 and 2018. *See* 82 FR 18975 (Apr. 25, 2017); 83 FR 6364 (Feb. 13, 2018). The 2016 Prepaid Final Rule and subsequent amendments to that rule are referred to collectively herein as the Prepaid Accounts Rule.

[77] 81 FR 83934, 83935–36 (Nov. 22, 2016).

[78] 15 U.S.C. 1602(f).

[79] 81 FR 83934, 84168 (Nov. 22, 2016).

[80] *Id.* at 84160.

[81] *Id.*

[82] *Id.* at 84162.

[83] Press Release, CFPB, *CFPB Launches Inquiry into Overdraft Practices* (Feb. 22, 2012), *https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-launches-inquiry-into-overdraft-practices/.*

the impacts of overdraft fees on consumers,[84] and collection and analysis of overdraft-related data from several large banks with over $10 billion in assets that provided a significant portion of all U.S. consumer checking accounts.[85] The CFPB published analyses of these data in a series of reports from 2013–2017, which examined institution-level policies and data, as well as account- and transaction-level data.[86] These studies assessed, among other things, overdraft fee size, prevalence, and related account closure; overdraft policies and practices across institutions; the distribution of overdraft fee incurrence across accounts; how overdraft transactions and fees vary across opt-in status; the size of transactions that lead to overdrafts; how long account balances stay negative after overdrafts; and the characteristics of account holders (including end-of-day balance, deposits, credit score, and available credit on a credit card) across distributions of overdraft frequency. The CFPB also collected anonymized institution-level information from several core processors, which provide operations and accounting systems to financial institutions. This data collection informed the CFPB's 2021 report assessing policies and practices among a large sample of financial institutions using core processors.[87]

In 2021, the CFPB examined financial institutions' reliance on overdraft/NSF fees from 2015 to 2019, finding that it was persistent.[88] Since then, the CFPB has continued tracking trends in the marketplace [89] and evaluating some banks' key overdraft-related metrics through the CFPB's supervision work.[90] From December 2022 to July 2023, the CFPB reviewed the publicly available overdraft practices of financial institutions with assets over $10 billion.[91] In addition, the CFPB has recently collected information from several financial institutions under the CFPB's supervision, including data regarding financial institutions' costs associated with offering overdraft credit, which is discussed further in part IV.D as well as in a separate report issued in January 2024 titled ''Overdraft and NSF Practices at Very Large Financial Institutions.'' [92]

Consistent with section 1022(b)(2)(B) of the CFPA, the CFPB has consulted with the appropriate prudential regulators and other Federal agencies, including regarding consistency with any prudential, market, or systemic objectives administered by these agencies. Consistent with the CARD Act, the CFPB consulted with the following agencies regarding rules that implement TILA section 149: (1) the Office of the Comptroller of the Currency; (2) the Board of Directors of the Federal Deposit Insurance Corporation; and (3) the National Credit Union Administration Board. The CFPB also consulted with the Board and several other Federal agencies, as discussed in part II.A.

B. Summary of the Proposed Rule

On January 17, 2024, the CFPB issued a notice of proposed rulemaking containing several proposed amendments to Regulations Z and E to extend consumer credit protections that generally apply to other forms of consumer credit to certain overdraft credit provided by very large financial institutions. This notice of proposed rulemaking was published in the **Federal Register** on February 23, 2024.[93] The CFPB proposed that the final rule, if adopted, would take effect on the October 1 which follows by at least six months the date it is published in the **Federal Register**, consistent with 15 U.S.C. 1604(d). The CFPB expected that would likely fall on October 1, 2025.

As described more fully below, the CFPB proposed to amend Regulations Z and E, and accompanying commentary as they relate to overdraft credit. The amendments would have applied only to very large financial institutions—*i.e.,* insured depository institutions and credit unions with more than $10 billion in assets. The proposal would not change the regulatory framework for overdraft services offered by financial institutions with assets of $10 billion or less.

The CFPB proposed to update two regulatory exceptions from the definition of finance charge so that Regulation Z would apply to overdraft credit provided by very large institutions unless it is provided at or below costs and losses as a true courtesy to consumers, as follows. First, the proposal would have updated an exception that currently provides that a charge for overdraft is not a finance charge if the financial institution has not previously agreed in writing to pay items that overdraw an account [94] so that the exception would not apply to ''above breakeven overdraft credit'' offered by a very large financial institution. The proposal would have given financial institutions the ability to determine whether an overdraft charge is considered above breakeven overdraft credit by either: (1) calculating its own costs and losses using a standard set forth in the proposal; or (2) relying on a benchmark fee set by the CFPB in the proposal. The CFPB asked for comment on four potential benchmark fees: $3, $6, $7, or $14. Second, the proposal would have updated a related exception that provides that a charge imposed on an asset account in connection with an overdraft credit feature is not a finance charge if the charge does not exceed the charge for a similar transaction account without a credit feature.[95]

As a result of these proposed changes, above breakeven overdraft credit that is not currently subject to Regulation Z would have become subject to Regulation Z, including provisions in subpart B that govern open-end credit (*e.g.,* the account opening disclosures, periodic statements, and advertising rules).

The proposal would also have required covered overdraft credit offered by very large financial institutions to be put in a credit account separate from the asset account, and it would have updated exceptions relating to credit cards. Among other changes, it would have applied the portions of Regulation Z that implement the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) [96] to covered overdraft credit that can be accessed by a hybrid debit-credit card, such as a debit card or other single credit device (including certain account numbers) that a consumer may use from time to time to obtain covered overdraft

[84] 77 FR 12031 (Feb. 28, 2012).

[85] *See* CFPB 2013 White Paper at 8; *see also* CFPB 2014 Data Point at 6–7.

[86] *See* CFPB 2013 White Paper; CFPB 2014 Data Point; CFPB 2017 Data Point.

[87] Nicole Kelly & Éva Nagypál, Ph.D., CFPB, *Data Point: Checking Account Overdraft at Financial Institutions Served by Core Processors* (Dec. 2021), *https://files.consumerfinance.gov/f/documents/cfpb_overdraft-core-processors_report_2021-12.pdf.*

[88] CFPB 2021 Data Point.

[89] CFPB April 2024 Data Spotlight.

[90] *See* Patrick Gibson & Lisa Rosenthal, *Measuring the impact of financial institution overdraft programs on consumers,* CFPB (June 16, 2022), *https://www.consumerfinance.gov/about-us/blog/measuring-the-impact-of-financial-institution-overdraft-programs-on-consumers/;* CFPB, *Fall 2023 Supervisory Highlights Junk Fees Update Special Edition,* at 7–9 (Oct. 2023), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory_highlights_junk_fees-update-special-ed_2023-09.pdf* (CFPB Fall 2023 Highlight).

[91] CFPB Market Monitoring of Publicly Available Overdraft Practices, Dec. 2022–July 2023.

[92] *See* CFPB, *Overdraft and NSF Practices at Very Large Financial Institutions* (Jan. 2024), *https://files.consumerfinance.gov/f/documents/cfpb_overdraft-nsf-practices-very-large-financial-institutions_2024-01.pdf* (CFPB Overdraft and NSF Practices Report).

[93] 89 FR 13852 (Feb. 23, 2024).

[94] 12 CFR 1026.4(c)(3).

[95] 12 CFR 1026.4(b)(2).

[96] Public Law 111–24; 123 Stat. 1734 (2009).

credit from a very large financial institution. Provisions of the CARD Act that would have applied to such overdraft credit include, but are not limited to, ability to pay underwriting requirements, limitations on penalty fees including certain fees on transactions that are declined due to nonsufficient funds, and various requirements related to rate changes.

The proposal would also have prohibited compulsory use of preauthorized electronic fund transfers (EFTs) for repayment of covered overdraft credit provided by very large financial institutions, which would have ensured that consumers using those products have a choice of at least one alternative method of repayment. As a result of this change, covered overdraft credit offered by very large financial institutions could not be conditioned on consumers agreeing to automatic debits from their checking account. Consumers could still opt into automatic payments on a periodic basis if offered by their financial institution, but they would have the right to repay this overdraft credit manually if they prefer.

Comments

The CFPB received over 48,000 comments on the proposal.[97] Over 47,000 of those comments were from individual consumers and over 1,000 were from or about institutions with fewer than $10 billion in assets. The CFPB also received many comments from consumer advocate commenters, academic commenters, industry commenters, State regulators, State Attorneys General, and members of Congress. This also includes comments received after the comment period closed via ex parte submissions and meetings.[98] All comments, including ex parte submissions and summaries of ex parte meetings, will be available on the public docket for this rulemaking.[99]

Relevant information received via comment letters, as well as ex parte submissions, is discussed below in subsequent parts of this document, as applicable. The CFPB considered all the comments it received regarding the proposal, made certain modifications, and is adopting the final rule as described in part IV below.

III. Legal Authority

A. Truth in Lending Act

TILA section 105(a). TILA section 105(a) directs the CFPB to prescribe regulations to carry out the purposes of TILA and provides that such regulations may contain additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, that the CFPB judges are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.[100] A purpose of TILA is to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various available credit terms and avoid the uninformed use of credit.[101] This stated purpose is tied to Congress's finding that economic stabilization would be enhanced and competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit.[102] Thus, strengthened competition among financial institutions is a goal of TILA, achieved through the effectuation of TILA's purposes. A purpose of TILA is also to protect the consumer against inaccurate and unfair credit billing and credit card practices.[103]

CARD Act section 2. Section 2 of the CARD Act, which amended TILA to establish fair and transparent practices relating to the extension of credit under an open-end consumer plan, and for other purposes, also specifically grants the CFPB authority to issue rules and model forms it considers necessary to carry out the CARD Act and amendments made by the CARD Act.[104]

For the reasons discussed in this notice, the CFPB is amending Regulation Z with respect to overdraft credit to carry out TILA's purposes. The CFPB is retaining additional requirements, adjustments, and exceptions as, in the CFPB's judgment, are necessary and proper to carry out the purposes of TILA, prevent circumvention or evasion thereof, or to facilitate compliance. In developing these amendments pursuant to its authority under TILA section 105(a), the CFPB has considered the purposes of TILA, including ensuring meaningful disclosures, facilitating consumers' ability to compare credit terms, helping consumers avoid the uninformed use of credit, and protecting consumers against inaccurate and unfair credit billing and credit card practices, and the findings of TILA, including strengthening competition among financial institutions and promoting economic stabilization.

B. Electronic Fund Transfer Act

EFTA section 902 establishes that the purpose of the statute is to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in EFT and remittance transfer systems but that its primary objective is the provision of individual consumer rights.[105] Among other things, EFTA contains provisions regarding compulsory use of EFTs.[106]

EFTA section 904(a) authorizes the CFPB to prescribe regulations to carry out the purposes of EFTA.[107] EFTA section 904(c) provides that regulations prescribed by the CFPB may contain such classifications, differentiations, or other provisions, and may provide for such adjustments or exceptions for any class of EFTs or remittance transfers, that the CFPB deems necessary or proper to effectuate the purposes of EFTA, to prevent circumvention or evasion, or to facilitate compliance.[108] The Senate Report accompanying EFTA noted that regulations are ''essential to the act's effectiveness'' and ''will add flexibility to the act by permitting the [CFPB] to modify the act's requirements to suit the characteristics of individual EFT services. Moreover, since no one can foresee EFT developments in the future, regulations would keep pace with new services and assure that the act's basic protections continue to apply.'' [109]

EFTA section 904(c) also provides that the ''CFPB shall by regulation modify the requirements imposed by this subchapter on small financial institutions if the CFPB determines that such modifications are necessary to alleviate any undue compliance burden on small financial institutions and such modifications are consistent with the purpose and objective of this subchapter.''

As discussed in part IV below, the CFPB is adopting amendments to Regulation E, including with respect to compulsory use of preauthorized repayment and the definition of overdraft services, pursuant to the

[97] *See https://www.regulations.gov/docket/CFPB-2024-0002/comments.*

[98] *See* CFPB, *Policy on Ex Parte Presentations in Rulemaking Proceedings,* 82 FR 18687 (Apr. 21, 2017).

[99] *See https://www.regulations.gov/docket/CFPB-2024-0002/.*

[100] 15 U.S.C. 1604(a).

[101] 15 U.S.C. 1601(a).

[102] *Id.*

[103] *Id.*

[104] Public Law 111–24; sec. 2, 123 Stat. 1734, 1735 (2009).

[105] 15 U.S.C. 1693.

[106] 15 U.S.C. 1693k.

[107] 15 U.S.C. 1693b(a).

[108] 15 U.S.C. 1693b(c).

[109] *See* S. Rept. No. 95–1273, at 26 (1978).

CFPB's authority under, as applicable, EFTA section 904(a) and (c).

C. Consumer Financial Protection Act

CFPA section 1022(b)(1). Section 1022(b)(1) of the CFPA authorizes the CFPB to prescribe rules ''as may be necessary or appropriate to enable the [CFPB] to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.'' [110]

Among other statutes, TILA, EFTA, and the CFPA are Federal consumer financial laws.[111] Accordingly, in issuing this rule, the CFPB is exercising its authority under CFPA section 1022(b) to prescribe rules that carry out the purposes and objectives of TILA, EFTA, and the CFPA and prevent evasion of those laws.

IV. Discussion of the Final Rule

A. Overview of the CFPB's Approach

As discussed above, the CFPB proposed to amend Regulations E and Z to update regulatory exceptions for overdraft credit provided by very large financial institutions, thereby ensuring that extensions of overdraft credit adhere to consumer protections required of similarly situated products, unless the overdraft fee is a small amount that only recovers estimated costs and losses. These consumer protections allow consumers to better comparison shop across credit products and provide substantive protections that apply to other consumer credit.

As a result of the evolution of the overdraft market over the last few decades, the regulatory exceptions for overdraft credit provided by very large financial institutions no longer serve their original purpose. The CFPB proposed preserving a limited exception to encourage the availability of overdraft coverage, which can benefit consumers, especially given that much overdraft credit is incidental in nature, as consumers often do not know with certainty whether a transaction will be presented against sufficient funds. But the proposal stated that a blanket exception for all of today's non-covered overdraft credit—which poses serious risks to consumers as reflected in the discussion of consumer impacts noted above, and resembles other mass-marketed high-cost consumer credit products—cannot be justified as an exception for a courtesy to consumers, nor as consistent with TILA's purposes of promoting the informed use of credit and comparison shopping across credit products, and protecting consumers against inaccurate and unfair credit billing and credit card practices.

The CFPB is adopting the same general approach in the final rule, with some modifications, as discussed herein.

Comments Received on the CFPB's Proposed Approach Generally

Comments received by the CFPB on the proposal, and responses thereto, are discussed in more detail throughout this part IV. The following is a synopsis of comments received on the CFPB's proposed approach generally.

Many of the commenters supported the CFPB's proposal, stating among other things that the rule would reduce fee burdens and associated consequences and support the informed use of credit. These commenters generally focused on negative consumer experiences with overdraft fees, stating that what began as a narrow exception to provide for occasional accommodation now generates billions of dollars in fees from vulnerable populations. A State agency commenter noted that overdraft fees can discourage many consumers from wanting a bank account at all and noted that overdraft fees can deduct funds from a consumer's public benefits, thereby frustrating the purpose of those benefit programs. A consumer advocate commenter noted that some financial institutions are already lowering fees or offering alternative products to meet consumer needs and posited that the CFPB's proposal would continue this progress by supporting market shifts that benefit consumers. Another commenter noted that the proposal continues to offer flexibility to covered entities such that they may offer overdraft as courtesy non-covered overdraft or as a covered overdraft line of credit.

Other commenters, including banks, credit unions, and industry groups, did not support the proposed rule, arguing, for example, that it is unnecessary because overdraft fees are already effectively disclosed consistent with Regulations DD and E, and that consumers find value in overdraft programs and expressly opt into them. Therefore, some argued that the CFPB should further study why consumers sometimes use higher-cost credit options and, in the case of overdraft programs, expressly opt into them, before proposing new regulations to ensure that any changes will achieve their goals. Commenters also emphasized a number of changes to overdraft programs that have already reduced fees in recent years and noted that if the proposal is finalized, financial institutions might pass along costs to consumers by increasing other fees or limiting credit or other services, including the possibility that transactions would not be paid through overdraft credit but would instead be declined or that consumers might migrate to less regulated credit alternatives. Some commenters objected to the CFPB's focus on whether overdraft fees recover more than applicable costs and losses.

B. Entity Coverage

Proposed Rule

The CFPB proposed to expand protections to consumers of overdraft credit at financial institutions with more than $10 billion in assets. Under the proposal, the regulatory framework would not change for overdraft credit offered by financial institutions with $10 billion or less in assets.

To limit the proposed rule to overdraft credit offered by financial institutions with assets of more than $10 billion, the proposed rule would have defined in proposed § 1026.62(b)(8) the term ''very large financial institution'' as an insured depository institution or an insured credit union with total assets of more than $10 billion and any affiliate thereof. The proposed rule then used the term ''very large financial institution'' to limit the scope of overdraft credit that would be subject to the proposed rule.

The CFPB preliminarily determined in the proposal that overdraft services offered by financial institutions with more than $10 billion in assets should be subject to this rule. The proposal noted that, in the supervisory context, Congress adopted in 12 U.S.C. 5515(a) a $10 billion threshold to define the ''very large banks, savings associations, and credit unions'' that would be subject to the CFPB's primary supervision authority. The CFPB preliminarily determined that a $10 billion threshold similarly should be used to define ''very large financial institution'' for limiting the scope of overdraft credit that would be covered by the proposed rule.

The CFPB preliminarily determined in the proposal that consumers would benefit from a rule that would apply to very large financial institutions—*i.e.,* those with assets of $10 billion or more. The proposal noted that such a rule would increase protections for the overwhelming majority of consumers of overdraft credit. The CFPB noted that the proposed rule would have covered

[110] 12 U.S.C. 5512(b)(1).

[111] CFPA section 1002(14), 12 U.S.C. 5481(14) (defining ''Federal consumer financial law'' to include the provisions of the CFPA and enumerated consumer laws; ''enumerated consumer laws'' is defined in CFPA section 1002(12), 12 U.S.C. 5481(12)).

financial institutions holding approximately 80 percent of consumer deposits as of December 2022 [112] and responsible for approximately 68 percent of overdraft charges as of December 2022.[113] The CFPB preliminarily determined that consumers at very large financial institutions would benefit from the expanded protections that would be provided by the proposed rule.

The CFPB noted that in light of the different circumstances smaller financial institutions may face in adapting to the proposed regulatory framework, the CFPB did not propose to extend the proposed rule to those institutions with $10 billion or less in assets. The CFPB noted that while it did not propose any changes to the regulatory requirements for smaller financial institutions, the CFPB will continue to monitor the market in coordination with State and Federal supervisors.

The CFPB requested comment on its preliminary determination to apply the proposed rule only to very large financial institutions and on whether $10 billion is an appropriate threshold for defining very large financial institutions.

For the reasons discussed below, the CFPB is adopting the very large financial institution definition as proposed.

Comments Received

Several commenters, including several consumer advocates, supported the proposal's approach to apply the rule to very large financial institutions. They stated that the rule would benefit a majority of consumers, that very large financial institutions have greater resources to adapt to regulatory changes, and that the CFPB may need additional time to gather relevant cost data for smaller financial institutions. These commenters recommended that the CFPB take steps to conduct a rulemaking as soon as possible to consider expanding the scope of the rule to entities that are not very large financial institutions (non-VLFIs).

A number of industry commenters maintained that the CFPB did not provide a sufficient justification for applying the rule only to very large financial institutions. The industry commenters criticized on several different grounds the proposed rule's approach to apply the revised regulatory framework only to very large financial institutions.

Some industry commenters stated that the CFPB lacks authority to apply the rule only to very large financial institutions. Several industry commenters maintained that the differential treatment of very large financial institutions would be inconsistent with TILA, stating that the proposed rule did not explain why subjecting smaller financial institutions to the rule would not provide a meaningful benefit to consumers while subjecting very large financial institutions to the rule would provide a meaningful benefit. Other industry commenters stated that the proposal did not consider the five factors for an exemption under section 105(f)(2) of TILA and that the CFPB did not explain why it would be appropriate to define overdraft as credit and an overdraft fee as a finance charge only for very large financial institutions.

Several industry commenters stated that the proposal failed to provide a sufficient explanation for covering only very large financial institutions. The commenters stated that the proposal noted the $10 billion supervisory threshold but did not sufficiently explain why that threshold was relevant for exempting very large financial institutions from the proposed overdraft rule. While these commenters acknowledged that the proposal noted that smaller financial institutions may face ''different circumstances,'' they maintained that the proposal did not sufficiently explain what those circumstances are and why they are relevant.

Several industry commenters stated that the proposal provided insufficient data to support applying the rule only to very large financial institutions. The commenters stated that data cited in the proposed rule indicated that smaller financial institutions hold only 20 percent of deposits but receive 32 percent of overdraft fees. Commenters stated the CFPB's own data indicate that smaller financial institutions appear to receive similar or greater overdraft fees per account compared to larger financial institutions.

Several industry commenters also maintained that applying the rule only to very large financial institutions would cause consumer confusion and market disruption. The commenters stated that consumers would receive different disclosures based upon the asset size of their financial institution and may not understand the differences among the overdraft programs at different financial institutions.

Several industry commenters expressed concern that the CFPB's proposal to apply the rule only to very large financial institutions avoided the CFPB's SBREFA obligations. Moreover, some commenters argued that the CFPB did not fulfill its obligations with respect to the SBREFA process.

In addition, many non-VLFI industry commenters stated that, even if the rule would not apply to non-VLFIs, they would nevertheless face competitive pressure to alter their overdraft programs and reduce their overdraft fees. They maintained that, because they lack the resources of larger financial institutions, they would have difficulty altering their overdraft programs and reducing their fees to compete with larger financial institutions and may be forced to decrease availability of or discontinue overdraft programs.

Several commenters, including consumer advocates, academic commenters, and State Attorneys General, recommended that the CFPB apply the rule's framework to all financial institutions. They stated that non-VLFIs engage in the same problematic overdraft practices that harm consumers and that all consumers should receive the protections from the rule's overdraft framework. Some commenters stated that many large institutions already have eliminated or reduced their overdraft and NSF fees, whereas most small institutions have not and that the proposed rule therefore would not apply to many of the institutions that are causing significant harm to their consumers through their overdraft programs.

A couple of commenters recommended adjusting the threshold. One consumer advocate supported reducing the threshold to the SBREFA threshold of $850 million, noting that the rule provides multiple pathways for financial institutions to determine breakeven overdraft fees. A few other commenters recommended raising the threshold to $100 billion or more, arguing that the largest financial institutions have the resources to adapt to regulatory changes.

Some commenters, including a consumer advocate and a bank, raised concerns that nonbanks that partner with banks to offer bank accounts could evade coverage under the rule. They stated that large nonbanks could evade the rule by partnering with multiple smaller banks with assets under $10 billion. The consumer advocate stated that some nonbanks offer accounts that they claim are checking accounts exempt from the prepaid rule and its protections applicable to overdraft fees on prepaid cards. The consumer advocate recommended that the CFPB clarify that any such account, even if tied to a bank account, is a prepaid

[112] Computed from 2022 FFIEC and National Credit Union Administration call report data.

[113] Estimated using data from 2022 FFIEC Call Reports and methodology discussed at FN 29.

account. Alternatively, the consumer advocate recommended that the CFPB expand the rule's definition of ''very large financial institution'' by using the Regulation E definition of ''financial institution,'' which is broader than depository institutions, and including within the scope of the rule nonbanks that offer accounts in partnership with depository institutions. Otherwise, the consumer advocate stated, nonbanks will partner with one or more smaller financial institutions with less than $10 billion in assets to ensure that their accounts would not be subject to this rule. The consumer advocate stated that nonbanks already are using these partnerships to avoid having to comply with the Durbin Amendment's interchange fee limits.

Final Rule

For the reasons stated in the proposal and below, the CFPB is adopting the very large financial institution definition as proposed to expand protections for consumers of overdraft credit at financial institutions with more than $10 billion in assets. The rule does not change the regulatory framework for overdraft credit offered at financial institutions with $10 billion or less in assets. The CFPB plans to monitor market responses to the protections adopted in this rule, analyze additional information, and consider whether to apply expanded protections to overdraft credit offered by financial institutions with $10 billion or less in assets. As in the proposed rule, the final rule defines the term ''very large financial institution'' in § 1026.62(b)(6) as an insured depository institution or an insured credit union with total assets of more than $10 billion and any affiliate thereof. A financial institution may determine whether it has total assets of more than $10 billion using the same determination that is used to determine whether such institutions are subject to the CFPB's supervisory authority under 12 U.S.C. 5515(a). The CFPB currently publishes a list of such institutions at *https://www.consumerfinance.gov/compliance/supervision-examinations/institutions/*. The final rule uses the term very large financial institution to limit the scope of overdraft credit that is subject to the final rule.

The CFPB has determined that it is appropriate to move forward with a rule that expands protections for consumers of overdraft credit at very large financial institutions. The majority of consumers will benefit from such a rule. As noted above, approximately 80 percent of consumer deposits are at very large financial institutions, and more than two-thirds of overdraft fees were imposed by very large financial institutions. Using its supervision and market monitoring capabilities, the CFPB has observed recent market changes for overdraft programs, especially at very large financial institutions. Many very large financial institutions have altered their overdraft programs and reduced or eliminated overdraft fees without imposing additional fees, indicating that very large financial institutions have the capacity to adapt their overdraft programs without impairing their provisions of other products and services.

By contrast, smaller financial institutions may have less flexibility in adapting to changes in the regulatory framework for overdraft credit. To the extent that changes to the regulatory framework would result in a reduction in overdraft revenue, smaller financial institutions may have greater difficulty in absorbing a reduction in overdraft revenue without it having some impact on their operations, and this impact could negatively affect consumers at smaller financial institutions. Although the CFPB has less information about smaller financial institutions, information from the bank call reports and comments on the proposal indicate that smaller financial institutions currently are more reliant on overdraft revenue under the existing regulatory framework than very large financial institutions. For example, based on 2023 call report data, combined revenue from overdraft and NSF charges was 44 percent of deposit service charges and 4.7 percent of noninterest income for banks with assets between $1 billion and $10 billion, as compared to 19 percent and 1.8 percent, respectively, for banks with assets greater than $10 billion. These data suggest that smaller financial institutions are more reliant on overdraft revenue and may be less able to adapt to a regulatory framework that results in reductions in overdraft revenue. A number of non-VLFI industry commenters claimed that if they were subject to the rule, they would face significant challenges that would cause them to alter or eliminate their overdraft programs and impair their ability to offer other products and services. Moreover, as a consumer advocate commenter noted, smaller institutions may have less flexibility to adjust their product offerings.

As noted above, many very large financial institutions have recently adjusted their overdraft credit programs by, among other things, reducing or eliminating fees. This suggests that very large financial institutions, with their diverse product offerings and multiple sources of revenue, would have flexibility to respond to changes in the regulatory framework for overdraft credit and would be able to adapt to a reduction in fee revenue from non-covered overdraft credit. This also suggests that, if very large financial institutions want to continue offering non-covered overdraft credit that is not subject to Regulation Z after the rule goes into effect, they should be able to reduce their fees to continue providing non-covered overdraft credit. The CFPB has not observed a significant number of smaller financial institutions modifying their overdraft credit offerings to reduce or eliminate overdraft fees. On the contrary, the CFPB received feedback from smaller financial institutions stating that they were not capable of making such changes. Given the CFPB's limited information about the potential impact that revising the regulatory framework for overdraft credit could have on smaller financial institutions, and the consumers that rely on those smaller financial institutions, the CFPB has determined that it should proceed at this time with a rulemaking that narrows the exceptions only for very large financial institutions, *i.e.,* those with assets of $10 billion or more.

As noted above, several industry commenters stated that the CFPB lacks authority under TILA to revise the regulatory framework only for very large financial institutions, maintaining that the proposed rule did not consider the standards for TILA exemptions under section 1604(f). As discussed in more detail elsewhere, including in the section discussing changes to the definition of finance charge, the CFPB is partially removing the existing regulatory exceptions created by the Board, not creating new exemptions from TILA or Regulation Z, and therefore need not invoke its statutory exception or exemption authority. Section 1604(f)(2) starts with the phrase ''[i]n determining which classes of transactions to exempt,'' and then provides a list of factors that the CFPB would need to consider to justify creating an exemption under that authority. It is not a list of factors the CFPB must consider to justify partially removing an existing exception, which is what this rule does.[114] And the CFPB

[114] Section 1604(a) provides that the CFPB may prescribe regulations that contain such adjustments and exceptions for all or any class of transactions that the CFPB judges are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. The CFPB likewise does not have to invoke this statutory adjustment or exception authority to narrow the scope of an existing exception.

is not obligated to justify the portion of the Board's exception that the CFPB is not reversing (the portion applicable to non-VLFIs) using those factors) just because the CFPB is declining at this time to remove that portion of the existing exception due to the policy and prudential reasons described herein. As noted above, the CFPB plans to monitor market responses to the protections adopted in this rule and consider whether to remove the exception as to smaller financial institutions.

Nevertheless, these changes are also consistent with TILA § 105(a), which grants the CFPB authority to establish ''additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, as in the judgment of the [CFPB] are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.'' Consistent with the discussion above, the CFPB has determined that covering overdraft credit only from VLFIs in this rule at this time will facilitate compliance with TILA and its purposes by providing the protections of TILA and Regulation Z to the vast majority of consumers of overdraft credit, while the CFPB monitors the market impact of the rule, but not disturbing the status quo for smaller financial institutions that may be less equipped to adapt to such changes without impacting their operations in a manner that could negatively affect their consumers. The CFPB notes that consumers of overdraft credit at smaller institutions will remain covered by the existing regulatory regime.

For similar reasons, the CFPB has determined that the elimination of the regulatory exception to EFTA's compulsory use prohibition only for overdraft credit provided by a VLFI is consistent with EFTA § 904(c), which empowers the CFPB to ''provide for such adjustments and exceptions for any class of electronic fund transfers or remittance transfers as in the judgment of the [CFPB] are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith,'' and also to ''modify the requirements imposed by [EFTA] on small financial institutions if the Bureau determines that such modifications are necessary to alleviate any undue compliance burden on small financial institutions and such modifications are consistent with the purpose and objective of [EFTA].'' The CFPB has determined that, because smaller financial institutions may face difficulty in adapting to these regulatory changes without negatively impacting their consumer base, applying the amendment to the compulsory use exception only to VLFIs in this rule at this time will prevent undue compliance burden on those institutions, facilitate compliance with EFTA, and be consistent with the purpose and objective of EFTA by continuing, for now, the existing regulatory framework establishing the rights, liabilities, and responsibilities of participants in those electronic fund transfer systems while the CFPB monitors the market impact of the rule.

Several industry commenters maintained that the CFPB lacks data for its approach of limiting the applicability of the rule to very large financial institutions, noting that non-VLFIs hold only 20 percent of deposits but receive 32 percent of overdraft fees. As noted above, the CFPB has concluded that it is appropriate to adopt a rule now that covers very large financial institutions because the CFPB has more information about overdraft programs at very large financial institutions and about the capacity for them to adapt to a revised regulatory framework and because such a rule would provide protections to a significant majority of consumers. The CFPB has limited information about the costs for overdraft programs at smaller financial institutions and the cost data that the CFPB relied upon in developing the benchmark fee in § 1026.62(d)(1)(ii) may not be representative of the costs for non-VLFIs. The CFPB is concerned that non-VLFIs would face more significant challenges in adapting to a revised regulatory framework. The CFPB is not basing its decision to apply this rule to VLFIs on material differences in the overdraft programs at very large financial institutions and non-VLFIs.

Several industry commenters also stated that applying the rule only to very large financial institutions would cause consumer confusion and market disruption. They noted that the rule would result in a marketplace in which consumers would receive different disclosures for otherwise similar services based upon the size of the financial institution. The CFPB appreciates that the rule would create some differences in regulatory treatment of overdraft programs in the marketplace. However, the CFPB concludes that the benefits of providing additional protections to most consumers while proceeding cautiously with respect to smaller financial institutions outweighs those concerns. The CFPB plans to monitor market responses to the protections adopted in this rule.

As noted above, a number of industry commenters maintained that the CFPB did not comply with its obligations under the SBREFA process. Several non-VLFI industry commenters maintained that the rule will have a negative impact on their financial condition and their ability to offer overdraft products and other products and services because market pressures will force non-VLFIs to lower their overdraft fees and adjust their overdraft programs even if the rule itself does not require them to do so. Other commenters maintained that the CFPB's decision to remove the existing exception for larger financial institutions but not for smaller financial institutions was designed to circumvent SBREFA. But leaving in place an existing exception for smaller financial institutions is not inconsistent with SBREFA. The CFPB has complied with its obligations under SBREFA. The rule does not require non-VLFIs to comply with the revised regulatory framework, and any competitive pressures to adjust their overdraft programs are indirect and uncertain. It is far from clear that market forces will force non-VLFIs to adjust their overdraft programs. As noted above, many very large financial institutions already have adjusted their overdraft programs, including by reducing or eliminating overdraft fees, but these changes have not forced other non-VLFIs to alter their overdraft programs similarly.

The CFPB has concluded that $10 billion is an appropriate asset threshold for this rulemaking. The CFPB reached the decision to use $10 billion as the threshold by borrowing from Congress's policy judgment to use that threshold to separate very large financial institutions from smaller entities in other contexts in the CFPA. The CFPB also considered the lower threshold of $850 million used by the SBA to define small financial institutions, but decided to take the more prudent and cautious approach of initially finalizing a higher threshold that applies only to ''very large'' entities and not just ''large'' entities. Congress used a relatively high $10 billion threshold to define ''very large banks, credit unions, and savings associations'' for purposes of limiting the CFPB's primary supervision and enforcement authority to very large depository institutions. The CFPB will be able to use its primary supervisory authority to closely monitor the implementation of the rule with respect to these entities, which will aid its understanding of the effects of the rule as the CFPB studies the market to

determine whether and what regulations are appropriate for the rest of the market.

The CFPB has concluded that updating the regulatory framework is appropriate for very large financial institutions for several reasons, including that the CFPB has more information about overdraft credit offered by financial institutions with more than $10 billion in assets and about their ability to adapt to changes in the regulatory framework for their overdraft programs. As noted above, financial institutions with more than $10 billion in assets have greater diversity in product offerings and likely would have greater flexibility in adapting quickly to a revised regulatory framework for overdraft credit. Indeed, as also noted above, many financial institutions with more than $10 billion in assets already have modified their overdraft credit offerings to reduce or eliminate overdraft fees and available evidence indicates that these financial institutions are less reliant on overdraft revenue, indicating that they have the ability to adapt to any reductions in overdraft revenue that may result from these changes to the regulatory framework for overdraft credit.

As noted above, a bank and a consumer advocate raised concerns about nonbanks evading the rule by partnering with smaller banks to offer accounts with overdraft credit. The consumer advocate recommended clarifying that such accounts offered by nonbanks are prepaid accounts subject to the protections of the prepaid rule or, alternatively, revising the definition of ''very large financial institution'' in this rule to cover nonbanks with more than $10 billion in assets. The CFPB declines to address in this rule whether such accounts would be considered prepaid accounts. The CFPB also declines to revise the definition of ''very large financial institution'' to include nonbanks. Nevertheless, the CFPB will continue to monitor the market and will analyze whether any market participants are taking steps to evade coverage under the rule.

C. Transaction and Account Coverage

The CFPB proposed to add § 1026.62(a) and (b) to define the scope of transactions and accounts that would be covered under the proposed rule. As discussed below, to update non-statutory exceptions in Regulation Z, the proposed updates included defined terms (*e.g.,* ''above breakeven overdraft credit,'' ''covered asset account,'' and ''hybrid debit-credit card'') that specifically reference a ''very large financial institution,'' as defined in proposed § 1026.62(b)(8). The proposal would not change the regulatory framework for overdraft services offered by financial institutions with assets of $10 billion or less.

The proposal defined overdraft credit in proposed § 1026.62(a)(2), and also provided an example of overdraft credit in proposed comment 2(a)(14)–4. The CFPB's proposed rule would have added commentary to the definition of open-end credit in § 1026.2(a)(20) to confirm that overdraft credit that is subject to a finance charge is generally open-end credit and is therefore subject to the Regulation Z provisions that apply to open-end credit. The CFPB proposed definitions of covered overdraft credit and non-covered overdraft credit by adding § 1026.62(b) to assist with ease of reference. The proposal provided that covered overdraft credit would be overdraft credit that is subject to a finance charge or is payable by written agreement in more than four installments, and would be subject to Regulation Z. The proposal provided that non-covered overdraft credit would be overdraft credit that is neither subject to a finance charge nor payable by written agreement in more than four installments, and would not be subject to Regulation Z. Additionally, the CFPB proposed to add a definition for covered overdraft credit account to facilitate ease of reference to credit accounts through which the financial institutions extend or can extend covered overdraft credit. Each of these proposed amendments is discussed below.

1. Overdraft Credit (§§ 1026.2(a)(14) and 1026.62(a))

TILA defines ''credit'' to mean the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.[115] Regulation Z similarly defines ''credit'' in existing § 1026.2(a)(14) to mean the right to defer payment of debt or to incur debt and defer its payment.

The CFPB's Proposal

To facilitate compliance, proposed comment 2(a)(14)–4 provided an example of overdraft credit: funds extended by a financial institution to a consumer to pay transactions that overdraw a checking or other transaction account held at the financial institution whenever the consumer has a contractual obligation to repay the funds. The proposal noted, as stated in the 2016 Prepaid Final Rule, that a ''person, in extending overdraft funds, has provided the consumer with 'the right . . . to incur debt and defer its payment.' '' [116]

As part of defining the scope of credit transactions that would be covered under the proposed rule, proposed § 1026.62(a)(2) provided a definition of ''overdraft credit'': any consumer credit extended by a financial institution to pay a transaction from a checking or other transaction account (other than a prepaid account as defined in § 1026.61) held at the financial institution when the consumer has insufficient or unavailable funds in that account. Proposed § 1026.62(a)(2) provided non-exhaustive examples, such as consumer credit extended through a transfer from a credit card account or overdraft line of credit. The definition of ''overdraft credit'' in proposed § 1026.62(a)(2) did not include credit exempt from Regulation Z pursuant to existing § 1026.3.

For the reasons discussed below, the CFPB is adopting comment 2(a)(14)–4 substantially as proposed and is adopting § 1026.62(a) as proposed. The CFPB is also adopting a proposed cross reference to the definition of ''overdraft credit'' at § 1026.62(b)(7) as proposed but with technical changes to conform to Code of Federal Regulations style requirements.

Comments Received

Several commenters, including State Attorneys General, consumer advocates, and nonprofits, agreed that when a financial institution extends funds to pay transactions that overdraw a checking account held at the financial institution, the financial institution is providing credit. A consumer advocate commenter stated that it is common sense that overdraft is credit and that regulators, including the Board, have long acknowledged that overdraft is credit. For example, the commenter noted that in 2005 the Board—along with the OCC, FDIC, and National Credit Union Administration—issued Joint Guidance on Overdraft Protection Programs, which stated that ''[w]hen overdrafts are paid, credit is extended.'' [117] Among other examples, the commenter also pointed to a 2001 OCC interpretive letter stating that an ''overdraft would be 'credit,' as defined by the Truth in Lending Act and Regulation Z.'' [118]

A nonprofit commenter stated that the TILA statute defines ''credit'' broadly and does not exclude overdraft. The commenter further stated that when the Board excepted certain overdraft

[115] 15 U.S.C. 1602(f).

[116] 81 FR 83934, 84168 (Nov. 22, 2016).

[117] 70 FR 9127, 9129 (Feb. 24, 2005).

[118] OCC Interpretive Letter No. 914 (Aug. 3, 2001).

charges from Regulation Z's definition of ''finance charge,'' the Board did not rely on an interpretation of the terms ''finance charge'' or ''credit'' in the statute (rather, the Board used its authority to create a regulatory exception). A consumer advocate commenter stated that it is immaterial to the definition of ''credit'' whether the financial institution has previously committed to pay overdrafts or has an absolute right to use every means to collect repayment; rather, ''credit'' simply means the right to defer payment of debt or to incur debt and defer its payment.

Several industry commenters asserted that overdraft is not credit under TILA and that TILA does not confer authority upon the CFPB to regulate overdraft. A commenter stated that the term ''overdraft'' does not appear in TILA's text and that the legislative history is similarly silent on the issue. Some commenters stated that, if the intent of Congress was for overdraft to be subject to TILA, then Congress would have amended TILA to supersede the Board's regulatory exception for overdraft.

Several commenters asserted that in 1969 when the Board excepted discretionary overdraft charges from Regulation Z's definition of ''finance charge,'' it did so because the Board determined that discretionary overdraft is not ''credit.'' A commenter asserted that the history of Regulation Z and various Board statements show that discretionary overdraft was never considered to be ''credit.'' For example, the commenter pointed to a 1977 interpretive letter where Board staff stated that the regulatory exception for overdraft charges ''relates only to regular demand deposit accounts which carry no credit features and in which a bank may occasionally, as an accommodation to its customer, honor a check which inadvertently overdraws that account.'' [119]

Several commenters stated that overdraft is not credit because the financial institution retains the right to decline transactions that would overdraw the account. Some commenters stated that overdraft is not credit because the consumer is obligated to pay the debt within a very short timeframe; for example, commenters pointed to a State court opinion interpreting the Iowa Consumer Credit Code definition of ''credit'' as not covering overdraft because the consumer ''must pay the bank back immediately upon their next deposit.'' [120] Some commenters also asserted that overdraft does not involve a written obligation, an interest rate, an application, or an underwriting process and otherwise lacks the hallmarks of credit.

The CFPB received few comments regarding the specific language of proposed comment 2(a)(14)–4 and proposed § 1026.62(a). A consumer advocate commenter generally supported the language of these proposed provisions and made some suggestions. First, in addition to the proposed language referencing a contractual ''obligation,'' the commenter suggested referencing a contractual agreement regardless of whether the financial institution has agreed to limit its means of recourse if the consumer does not repay. Second, the commenter suggested revisions to reflect the possibility that overdraft credit could be extended by a different entity than the financial institution that holds the account. Third, the commenter suggested referencing an ''asset account'' rather than a ''checking or other transaction account.'' Fourth, among other non-exhaustive examples of overdraft credit, the commenter suggested adding a reference to ''overdraft services'' as defined in Regulation E § 1005.17(a).

Final Rule

For the reasons discussed below, the CFPB is adopting comment 2(a)(14)–4 substantially as proposed and is adopting § 1026.62(a) as proposed. As proposed, § 1026.62(a)(2) provided the definition of ''overdraft credit'' and the CFPB is finalizing it without change. The definition of ''overdraft credit'' does not include credit exempt from Regulation Z pursuant to existing § 1026.3 (*e.g.,* transactions in securities or commodities accounts in which credit is extended by a broker-dealer registered with the Securities and Exchange Commission or the Commodity Futures Trading Commission). Nor does the definition of ''overdraft credit'' cover prepaid accounts, as the CFPB's Prepaid Accounts Rule already provides comprehensive consumer protections tailored to prepaid accounts.

Arguments that overdraft is not credit under TILA or that TILA does not confer authority upon the CFPB to regulate overdraft are not supported by the statute itself. The final rule is consistent with TILA's definition of ''credit'' [121] and with the CFPB's statutory authority under TILA section 105(a).[122]

TILA defines ''credit'' broadly and does not exclude overdraft. As stated in the 2016 Prepaid Final Rule, ''[b]y authorizing or paying a transaction where the consumer does not have sufficient or available funds . . . to cover the amount of the transaction when the transaction is authorized or paid, the [institution] is allowing the consumer to incur a debt with the [institution] where payment of that debt is not immediate.'' [123] Thus, when a transaction exceeds the funds in the consumer's account and a financial institution elects to cover the transaction by extending overdraft funds, then the financial institution has provided the consumer with the right to defer payment of debt or to incur debt and defer its payment, and therefore has extended ''credit'' under the plain language of TILA's definition.[124]

The fact that Congress did not legislatively supersede the Board's regulatory exception for overdraft does not demonstrate that overdraft is outside the scope of TILA. Rather, Congress provided a broad definition of ''credit'' under the statute and then delegated to the Board (and, later, the CFPB) the authority to prescribe regulations ''to carry out the purposes of'' TILA and which ''may provide for such adjustments and exceptions . . . as in the judgment of the [agency] are necessary or proper to effectuate the purposes of [TILA], to prevent circumvention or evasion thereof, or to facilitate compliance therewith.'' [125] The Board used its delegated authority to create a regulatory exception from the definition of finance charge for certain overdraft fees and the CFPB is using its authority to narrow that exception.[126]

[119] 42 FR 22360, 22362 (May 3, 1977).

[120] *Legg* v. *W. Bank,* 873 NW 2d 763, 770 (Iowa 2016).

[121] 15 U.S.C. 1602(f).

[122] 15 U.S.C. 1604(a).

[123] 81 FR 83934, 84167–68 (Nov. 22, 2016).

[124] 15 U.S.C. 1602(f).

[125] 15 U.S.C. 1604(a).

[126] Commenters disagreed about whether the Board, in issuing the original regulatory exception for certain overdraft fees from TILA's definition of finance charge, was relying on its delegated authority to create adjustments and exceptions or was using its delegated rule-writing authority to implement an interpretation of a statutory provision of TILA. The Board's original 1969 issuance over 50 years ago was not explicit about what authority it used for the overdraft charge exception. 34 FR 2002, 2004 (Feb. 11, 1969). And it neither discussed policy rationales nor interpretation of statutory text. The proposal did, however, invoke the Board's exception authority generally. 33 FR 15506 (Oct. 18, 1968). The inclusion of a specific ''exception'' for overdraft charges that would have met the general definition of finance charge but for the exception, in a rule that did not state it was an interpretation or engage in textual interpretation, suggests the exception was not created as an interpretive exercise. Regardless, the CFPB has put forward its interpretation of the relevant provisions of TILA in

Commenters' assertion that the Board determined that discretionary overdraft is not ''credit'' conflates the definition of ''credit'' with the definition of ''finance charge.'' The history of Regulation Z and the Board's statements show that the Board excepted certain overdraft charges from Regulation Z's definition of ''finance charge,'' which would have been unnecessary if overdraft was not credit. The Board did not except overdraft from the definition of ''credit.'' Existing Regulation Z's definition of ''finance charge'' excepts overdraft charges ''unless the payment of such items and the imposition of the charge were previously agreed upon in writing.'' [127] But the fact that these charges were not considered ''finance charges'' under the regulation does not mean that the underlying overdrafts were not considered credit. For example, existing Regulation Z commentary acknowledges the existence of ''incidental *credit* that is not extended under an agreement between the consumer and the financial institution.'' [128] One example of such incidental ''credit'' in the overdraft context is ''*credit* inadvertently extended incident to an electronic fund transfer using a debit card, . . . if the bank and the consumer do not have an agreement to extend credit when the consumer's account is overdrawn.'' [129] Incidental overdraft credit remains ''credit,'' notwithstanding that the Board excepted the overdraft charges from Regulation Z's definition of ''finance charge.''

Regarding the 1977 interpretive letter cited by a commenter, the CFPB notes that the letter addresses whether certain overdraft charges are finance charges, not whether overdraft is credit.[130] Board staff did not exclude overdraft from the definition of ''credit.'' Rather, the letter states that the Board's regulatory exception for overdraft charges (*i.e.,* excepting them from Regulation Z's definition of ''finance charge'') ''relates only to regular demand deposit accounts which carry no *credit features* and in which a bank may occasionally . . . honor a check which inadvertently overdraws that account.'' [131] Existing Regulation Z commentary similarly distinguishes between an account with incidental overdraft credit and an account with an overdraft ''credit feature.'' [132] On a deposit account with no ''credit feature,'' as explained above, charges for incidental overdraft credit are excepted from existing Regulation Z's definition of ''finance charge''—but nonetheless the incidental overdraft credit remains ''credit.''

Commenters' argument that overdraft is not credit because the financial institution retains the right to decline overdraft transactions is not consistent with the text of TILA and likewise appears to conflate the definition of ''credit'' with the definition of ''finance charge.'' The Board excepted overdraft charges from Regulation Z's definition of ''finance charge'' depending on whether the payment and charge were ''previously agreed upon'' in writing.[133] The TILA definition of ''credit'' requires a ''right'' (*i.e.,* the right to defer payment of debt or to incur debt and defer its payment)—but does not require that such right be previously agreed upon.[134] Notwithstanding that a financial institution had retained discretion and could have declined an overdraft transaction, when the financial institution nonetheless elects to cover the transaction by extending overdraft funds, then the financial institution has provided the consumer with the ''right'' to defer payment of debt or to incur debt and defer its payment, and has therefore extended ''credit'' under the plain language of TILA's definition.[135] Moreover, it is well established that a financial institution's right to decline transactions does not prevent those transactions from constituting credit under TILA: as the CFPB noted in its proposal and previously in the 2016 Prepaid Final Rule, credit card issuers reserve the right to reject individual transactions in their contractual agreements, yet credit card programs are regulated as credit under TILA and Regulation Z.[136]

Regarding commenters' statements that overdraft is not credit because the consumer is obligated to pay the debt within a very short timeframe, such assertion is not supported by TILA. When a financial institution extends overdraft funds that the consumer must pay back upon their next deposit, the institution ''is allowing the consumer to incur a debt with the [institution] where payment of that debt is not immediate.'' [137] And even though the consumer's next deposit to repay the institution is typically soon (*e.g.,* on the consumer's next payday), TILA's definition of ''credit'' does not have an exclusion for short-term repayment periods. TILA similarly does not support commenters' assertions that overdraft is not credit because it lacks certain so-called hallmarks of credit (*e.g.,* a written obligation, an interest rate, an application), or an underwriting process. TILA broadly defines ''credit'' to simply mean the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.[138] TILA does not require a transaction to have any of the so-called hallmarks to be considered credit. Moreover, to the extent that commenters' factual assertions accurately describe current market practices, some such practices might not align with Regulation Z because they pertain to currently non-covered overdraft credit (*e.g.,* overdraft credit with charges excepted from existing Regulation Z's definition of ''finance charge''). Creditors may need to change their practices as a result of the final rule to come into compliance, but that does not mean that such overdraft practices today are not credit under TILA.

In response to a commenter's suggestion that proposed comment 2(a)(14)–4 reference not only a contractual ''obligation'' but also a contractual agreement regardless of the recourse, the CFPB is not adopting this specific suggestion but comment 2(a)(14)–4, as finalized, highlights that it provides but one ''example'' of overdraft credit. Comment 2(a)(14)–4 is not an exhaustive list of examples. As proposed, § 1026.62(a)(2) provided the definition of overdraft credit and the CFPB is finalizing it without change.

Regarding the commenter's suggested revisions to reflect the possibility that overdraft credit could be extended by a different entity than the financial institution that holds the account, the CFPB notes that such revisions are unnecessary because such credit does not fall within the Board's regulatory exception for overdraft and thus such credit is generally covered under existing Regulation Z. Similarly, it is also unnecessary to adopt the commenter's suggestion to reference an ''asset account,'' rather than a ''checking

this rule and explained why the statute covers overdraft fees.

[127] 12 CFR 1026.4(c)(3).

[128] Regulation Z comment 13(i)–2 (emphasis added).

[129] *Id.* (emphasis added).

[130] 42 FR 22360, 22362 (May 3, 1977).

[131] *Id.* (emphasis added).

[132] *Compare* Regulation Z comment 13(i)–2 (providing that credit inadvertently extended incident to an electronic fund transfer using a debit card is governed solely by Regulation E error resolution procedures), *with* Regulation Z comment 13(i)–3 (providing that certain Regulation Z error resolution provisions apply if a consumer uses a debit card to withdraw money at an automated teller machine and activates an overdraft credit feature).

[133] 12 CFR 1026.4(c)(3).

[134] 15 U.S.C. 1602(f); *see also* 12 CFR 1026.2(a)(14).

[135] 15 U.S.C. 1602(f).

[136] 81 FR 83934, 84176 (Nov. 22, 2016).

[137] *Id.* at 84167–68.

[138] 15 U.S.C. 1602(f).

or other transaction account,'' given that the Board referenced a ''checking or other transaction account'' when it excepted certain overdraft charges from Regulation Z's definition of ''finance charge.'' [139]

In response to the commenter's suggestion to revise proposed § 1026.62(a)(2) by adding a reference to ''overdraft service'' as defined in Regulation E § 1005.17(a), the CFPB is not doing so because, consistent with TILA's broad definition of ''credit,'' § 1026.62(a)(2) ''includes, but is not limited to, any . . . overdraft line of credit.'' The commenter's suggested revision is unnecessary and could introduce confusion because the term ''overdraft service'' as defined in Regulation E § 1005.17(a) ''does not include any payment of overdrafts pursuant to . . . [a] line of credit subject to Regulation Z (12 CFR part 1026), including transfers from . . . [an] overdraft line of credit.'' [140]

2. Clarifications to Definition of Open-End Credit (§ 1026.2(a)(20))

The term ''open-end credit'' is defined in § 1026.2(a)(20) as (1) consumer ''credit,'' (2) that is extended under a ''plan,'' (3) where the person extending the credit may impose a ''finance charge'' from time to time on an outstanding unpaid balance, (4) the person extending the credit is a ''creditor,'' (5) the person extending the credit reasonably contemplates repeated transactions, and (6) the amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid. This definition is consistent with TILA's definitions of ''open end credit plan'' and ''open end consumer credit plan,'' which mean a plan under which the creditor reasonably contemplates repeated transactions, which prescribes the terms of such transactions, and which provides for a finance charge which may be computed from time to time on the outstanding unpaid balance.[141]

The CFPB's Proposal

The CFPB proposed to clarify that virtually all overdraft credit that financial institutions provide today, such as through negative balances on checking accounts, would meet the Regulation Z definition of open-end credit, but for Regulation Z excepting overdraft fees from the definition of finance charge. For clarity and to facilitate compliance, the CFPB proposed to add commentary regarding two terms used in the definition of open-end credit: ''plan'' and ''finance charge.''

The CFPB proposed to add comment 2(a)(20)–2.iv to clarify that with respect to covered overdraft credit, a ''plan'' means a program where the consumer is obligated contractually to repay any credit extended by the creditor, even if the creditor retains discretion not to extend credit in individual transactions.

The CFPB also proposed to add comment 2(a)(20)–4.iii to explain that charges for paying a transaction that overdraws a consumer's account generally would be ''finance charges'' unless they are expressly excluded from the definition of finance charge. Proposed comment 2(a)(20)–4.iii also states that these are finance charges ''imposed from time to time on an outstanding unpaid balance'' as long as there is no specific amount financed for the plan for which the finance charge, total of payments, and payment schedule can be calculated.

As discussed below, the CFPB is finalizing these changes substantially as proposed with only minor technical revisions for clarity, including to ensure that the changes to the commentary apply only to very large financial institutions.

Comments Received

Interpretation That Covered Overdraft Credit is Generally Open-End Credit

Consumer advocate commenters supported the proposed rule's analysis concluding that overdraft credit is open-end credit. Specifically, the commenters agreed with the CFPB's analysis of some of the specific elements of ''open-end credit.'' First, one commenter stated that overdraft fees are payable by the consumer and are imposed directly by banks as an incident to and as a condition of the extension of credit, and therefore, meet the definition of a ''finance charge.'' Second, that commenter agreed that a financial institution that imposes an overdraft fee on an unpaid overdraft is imposing a finance charge from time to time on an unpaid balance, regardless of whether the charge is on the deposit account or a separate credit account. Third, the commenter agreed that a very large financial institution that extends covered overdraft credit would be a ''creditor'' under TILA because that financial institution would regularly extend consumer credit subject to a finance charge, and the obligation is payable to that institution by agreement. Finally, the commenter agreed that financial institutions that extend overdraft credit reasonably contemplate that consumers may engage in repeat overdrafts.

Some commenters disagreed with the proposal's determination that overdraft credit is open-end credit. One commenter questioned the CFPB's authority to categorize overdraft fees as ''open-end credit,'' explaining that they believe the Board appropriately excepted from the definition of ''finance charge'' overdraft fees that are not expressly agreed upon in writing because this exception aligned with the statutory intent of TILA to regulate finance charges on ''open end consumer credit'' plans. The commenter did not provide further explanation as to why the exception aligned with TILA's statutory authority. This commenter appears to take issue with the revised exceptions to the definition of ''finance charge'' and not with the definition of ''open-end credit.'' The CFPB addresses the revisions to these exceptions in part IV.D below.

''Plan'' (Comment 2(a)(20)–2.iv)

A consumer advocate commenter generally supported proposed comment 2(a)(20)–2.iv. Specifically, the commenter agreed that a creditor extends credit even if (1) it does not agree in writing to extend the overdraft credit or (2) it retains the discretion to refuse to extend that credit in the future.

However, the commenter recommended that the language regarding what constitutes a ''plan'' under the definition of ''open-end credit'' be changed from ''obligated contractually to pay'' to ''obligated or contractually agrees to pay'' because, the commenter stated, that financial institutions may be able to manipulate whether a consumer is considered ''obligated contractually to pay'' by giving the consumer the right to cancel authorization for repayment or limiting the financial institution's recourse for repayment.

The commenter also suggested that the comment clarify that a program will be considered a ''plan'' when the creditor does not extend credit for transactions once the consumer has exceeded a certain amount, whether or not the limit is disclosed.

Finance Charge Imposed From Time to Time on an Outstanding Balance (Comment 1026.2(a)(20)–4.iii)

A consumer advocate commenter supported comment 1026.2(a)(20)–4.iii, which clarifies that overdraft fees are finance charges imposed from time to time on an outstanding balance if there

[139] 12 CFR 1026.4(b)(2).

[140] 12 CFR 1005.17(a)(1).

[141] 15 U.S.C. 1602(j).

is no specific amount financed for the plan and regardless of whether the fees are imposed on the deposit account or the credit account. The commenter specifically supported two aspects of the statement: (1) that there is a finance charge from time to time on the outstanding balance of a plan regardless of whether the charge is on the deposit account or separate credit account; and (2) there is a finance charge from time to time on the outstanding balance of a plan if there is no specific amount financed for the plan because the amount of any overdraft is never precalculated from inception of the plan.

The commenter suggested that the term ''deposit account'' in the comment be replaced with ''asset account'' because deposit account is undefined and could present problems because there is no established regulatory or caselaw definition for deposit account.

Industry commenters stated that the proposed comment 2(a)(20)–4.iii would introduce ambiguity around finance charges. The commenters stated that the proposed comment would make it difficult for financial institutions to determine their obligations when establishing overdraft credit products. The commenters stated that the uncertain financed amount for a plan would challenge a financial institution's compliance efforts and their ability to transparently disclose terms to consumers.

An individual commenter questioned the CFPB's conclusion that an overdraft fee is ''imposed from time to time on an outstanding unpaid balance. . . .'' The commenter stated that an overdraft fee is imposed because a transaction exceeded the dollar amount in the account, and it is imposed regardless of whether the transaction is paid by the financial institution or the amount of the overdraft credit extended.

Final Rule

For the reasons stated below, the CFPB is finalizing comments 2(a)(20)–2.iv and 2(a)(20)–4.iii substantially as proposed with technical revisions for clarity, including to ensure that the comments address only the subject of the rule, *i.e.,* when a very large financial institution covers a transaction that would otherwise overdraft a consumer's account.

Like the proposal, the final rule does not revise the definition of ''open-end credit.'' Rather, the final rule adds commentary to clarify how overdraft products meet the elements of the definition of ''open-end credit.'' Specifically, and as discussed herein, the final rule adds two comments to clarify (1) the definition of a ''plan'' and (2) that overdraft fees are charges ''imposed from time to time on an outstanding unpaid balance'' as long as there is no specific amount financed for the plan for which the finance charge, total of payments, and payment schedule can be calculated.

The commentary does not change the term ''open-end credit'' in Regulation Z, which implements the statutory term ''open end credit plan'' under TILA. Rather, the commentary provides clarification in light of the revisions made to the regulatory exceptions to the definition of ''finance charge.'' Moreover, the commentary facilitates compliance with TILA by helping participants understand how overdraft products may be subject to TILA's requirements as open-end credit.

In addition, consistent with the proposal and as discussed below, the CFPB concludes that virtually all overdraft credit that financial institutions provide today, such as through negative balances on checking accounts, would meet the Regulation Z definition of open-end credit, but for Regulation Z excepting overdraft fees from the definition of finance charge. Thus, when above breakeven overdraft credit becomes covered overdraft credit on the effective date of this rule, such credit will also likely be considered open-end credit.

(1) Credit. As discussed above, a person extending overdraft funds has provided credit under TILA and Regulation Z.[142]

(2) Plan. An account agreement offered in connection with overdraft credit would—but for the Regulation Z exceptions of overdraft fees from the definition of finance charge—constitute a ''plan'' consistent with the definition of ''open end credit plan'' in TILA.[143] Specifically, but for the Regulation Z exceptions, the account agreement, consistent with the language of comment 2(a)(20)–2.i, would be ''a contractual arrangement between the creditor [the institution offering checking account overdraft credit] and the consumer.''

The CFPB is finalizing proposed comment 2(a)(20)–2.iv generally as proposed (but with technical revisions for clarity) to clarify that the reservation of discretion in connection with covered overdraft does not mean the absence of an open-end credit plan. The CFPB understands that financial institutions offering automated overdraft services include in their agreements' provisions governing how the overdraft service will operate and information about overdraft fees. These terms-and-conditions documents typically stipulate that consumers using overdraft programs must and do agree to repay the debt created by an overdraft and the related fee, indicating that a contractual arrangement between the creditor and the consumer exists. Although these agreements typically state that the financial institution retains discretion to authorize or decline any particular overdraft, as a practical matter, financial institutions operating automated overdraft programs exercise limited, if any, discretion in authorizing particular transactions as long as the overdraft transaction is within the overdraft coverage limit that the institution has internally established. The CFPB notes that credit card issuers similarly reserve the right to reject individual transactions in their contractual agreements, yet credit card programs are open-end credit plans under TILA and Regulation Z. Treating the provision of automated overdraft credit in a comparable way promotes consistency and follows from the text of TILA and Regulation Z. Therefore, the CFPB has determined that an account agreement offered in connection with overdraft credit is a plan notwithstanding that the person offering the agreement reserves the right to not extend credit on individual transactions.

Regarding the commenter's suggestion that comment 2(a)(20)–2.iv be revised to state that a ''plan'' under the definition of open-end credit means a program where the consumer is ''obligated to or contractually agrees to repay any credit extended by the creditor'' instead of stating that the consumer is ''obligated contractually to repay . . . '', the CFPB is not adopting this specific suggestion. However, the CFPB has determined that certain minor changes would help make clear that the comment is an illustrative example. In particular, comment 2(a)(20)–2.iv, as finalized, replaces ''means'' with ''includes'' to state ''a plan includes a program where the consumer is obligated contractually to repay any credit extended by the creditor.'' The comment also highlights that it is providing one ''example'' of overdraft credit and not an exhaustive list of all overdraft credit.

In response to the same commenter's suggestion that comment 2(a)(20)–2.iv be revised to note that a plan under the definition of open-end credit will be a plan regardless of whether the consumer receives disclosure of the overdraft credit limit, the CFPB finds this clarification unnecessary since existing comment 2(a)(20)–5.ii already clarifies

[142] 15 U.S.C. 1602(f); 12 CFR 1026.2(a)(14).

[143] 15 U.S.C. 1602(j).

that a creditor does not need to establish a specific credit limit for a line of credit.

The final rule also replaces ''covered overdraft credit'' with ''covered asset account'' to ensure that changes to the commentary apply only to very large financial institutions.

(3) Imposing a ''finance charge'' from time to time. Overdraft credit is generally subject to fees that would meet the definition of ''finance charges'' but for the exceptions created by Regulation Z to that statutory definition. As discussed elsewhere, this final rule modifies those Regulation Z exceptions so that above breakeven overdraft credit fees will be finance charges when this rule becomes effective. Thus, as explained below, the CFPB has determined that an institution offering covered overdraft credit, including above-breakeven overdraft credit, is generally imposing a finance charge from time to time because there is no specific amount financed for the plan for which the finance charge, total of payments, and payment schedule can be calculated.

The CFPB is finalizing comment 2(a)(20)–4.iii generally as proposed (but with technical revisions for clarity) to clarify that (1) charges imposed by a very large financial institution for paying a transaction that overdraws a consumer's account generally are finance charges unless they are excluded from the definition of finance charge; and (2) these are charges ''imposed from time to time on an outstanding unpaid balance'' as long as there is no specific amount financed for the plan for which the finance charge, total of payments, and payment schedule can be calculated. The CFPB does not anticipate that there will be a specific amount financed for overdraft credit at the time any such credit plan is established because the CFPB anticipates that the credit lines on these credit plans generally will be replenishing (discussed under *(6) Amount of credit replenishes when outstanding balance is repaid,* below). In such cases, an amount financed for the plan cannot be calculated because the creditor will not know at the time the plan is established the amount of credit that will be extended under the plan. Therefore, to the extent that any finance charge may be imposed in connection with such a credit plan, the credit plan will meet this criterion.

Regarding the comment that an overdraft fee is not ''imposed from time to time on an outstanding unpaid balance'' because the fee is charged on the occurrence of there being nonsufficient funds in the consumer's account and not based on the extension of credit, the CFPB disagrees for the reasons explained in more detail in part IV.D addressing the definitions of ''credit'' and ''finance charge.''

With respect to the commenter stating that comment 2(a)(20)–4.iii would introduce ambiguity around finance charges, the commenter explained that this is because a plan with no specific finance amount makes it harder for financial institutions to determine their financial risks and challenges an institution's ability to disclose terms to consumers. The CFPB notes that this characteristic in overdraft credit is no different from any other open-end credit product that similarly does not have a specific amount financed, and which generally must also comply with Regulation Z disclosure and other regulatory requirements.

Regarding the commenter's suggestion that comment 2(a)(20)–4.iii reference an ''asset account,'' rather than a ''deposit account,'' the CFPB is not adopting this specific suggestion. For the same reasons provided in relation to ''overdraft credit'' in part IV.C.1, the CFPB finds it unnecessary to change the term to ''asset account.'' However, the final rule replaces ''deposit account'' with ''covered asset account'' to ensure that regulatory changes are limited to the subject of this rule, *i.e.,* overdraft credit provided by very large financial institutions. The final rule also includes other clarifying edits, including to ensure that comment 2(a)(20)–4.iii properly cross-references § 1026.4.

(4) Person extending credit is a creditor. Assuming that overdraft fees are finance charges, an institution providing covered overdraft credit is a ''creditor'' for purposes of the definition of ''open-end credit.'' A ''creditor'' is generally defined under Regulation Z to mean a person who regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments (not including a down payment), and to whom the obligation is initially payable, either on the face of the note or contract, or by agreement when there is no contract.[144] Thus, to the extent that overdraft credit is subject to a finance charge and is accordingly covered overdraft credit, it is also extended by a creditor if the creditor ''regularly extends'' overdraft credit.

The CFPB anticipates that most persons offering covered overdraft credit regularly extend overdraft credit and therefore would meet the definition of ''creditor.'' Further, if an institution providing open-end covered overdraft credit is considered a ''card issuer,'' then it is also considered a creditor under existing § 1026.2(a)(17)(iii) for purposes of Regulation Z, subpart B.

(5) Reasonably contemplates repeated transactions. Institutions providing overdraft credit typically contemplate repeated overdraft transactions. As noted above, the CFPB understands that financial institutions offering automated overdraft services include in their agreements' provisions governing how the overdraft service will operate and including information about overdraft fees. These agreements contemplate that consumers may overdraw repeatedly. Further, the CFPB found that 93.2 percent of overdraft and NSF fees were assessed on consumers with four or more overdraft or NSF transactions per year.[145]

(6) Amount of credit replenishes when outstanding balance is repaid. Institutions providing overdraft credit generally replenish the amount of overdraft credit available to consumers up to any overdraft coverage limit (*i.e.,* consumers' ''shadow lines'') to the extent that any outstanding overdraft balance is repaid. This replenishable credit distinguishes open-end credit from a series of advances made pursuant to a closed-end credit loan commitment, but it does not mean that the credit plan must always be replenished to the original amount. The creditor may refuse to extend new credit in a particular case due to changes in the creditor's financial condition or the consumer's creditworthiness, if permitted by Regulation Z. While consumers should have a reasonable expectation of obtaining credit as long as they remain current, further extensions of credit need not be an absolute right for the plan to meet the self-replenishing criterion. Because the CFPB anticipates that financial institutions will generally replenish overdraft credit to the extent that any outstanding overdraft balance is repaid, the CFPB concludes that covered overdraft credit plans are generally replenishing.

3. Covered Overdraft Credit (§ 1026.62(b)(3)), Non-Covered Overdraft Credit (§ 1026.62(b)(6)), and Card Issuer (§ 1026.2(a)(7))

The CFPB's Proposal

The CFPB proposed to define ''covered overdraft credit'' as overdraft credit that is subject to a finance charge or is payable by written agreement in more than four installments and ''non-covered overdraft credit'' as overdraft credit that is not subject to a finance

[144] *See* § 1026.2(a)(17)(i).

[145] CFPB 2017 Data Point at 13.

charge and is not payable by written agreement in more than four installments. The purpose of the proposed definitions is to assist with ease of reference to overdraft credit that is subject to, or covered by, Regulation Z. As discussed in more detail in part IV.D, some charges imposed in connection with overdraft credit are not considered finance charges.

The proposed definition of ''overdraft credit'' was limited to consumer credit, but, even with that qualification, not all overdraft credit would be subject to Regulation Z under the proposed rule. Many provisions of Regulation Z apply to a ''creditor,'' which generally is defined at § 1026.2(a)(17)(i) as ''[a] person who regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments.'' Thus, under the proposed rule, a financial institution must offer overdraft credit that is subject to a finance charge or is payable by written agreement in more than four installments (*i.e.,* covered overdraft credit) to be considered a creditor under Regulation Z. (Any financial institution offering overdraft credit will generally satisfy the definition of ''regularly'' under § 1026.2(a)(17)(v)). Because some charges imposed in connection with overdraft credit are not considered finance charges, a financial institution may charge for overdraft credit without being considered a creditor under Regulation Z if certain requirements are met.

Section 1026.2(a)(7) currently defines ''card issuer'' as a person that issues a credit card or that person's agent with respect to the card. Unlike other creditors, card issuers are subject to Regulation Z even if they extend credit that is not subject to a finance charge and is not payable by written agreement in more than four installments. However, this does not apply to overdraft credit that is not subject to a finance charge or repayable by written agreement in more than four installments, even if the financial institution extending such credit would otherwise be considered a card issuer.[146]

Under the proposal, extensions of overdraft credit that are not subject to a finance charge and are not payable by written agreement in more than four installments (non-covered overdraft credit) would continue to not be covered by Regulation Z. Further, under the proposal, institutions providing debit cards that access only non-covered overdraft credit would continue not to be card issuers and would therefore not be creditors under § 1026.2(a)(17)(iii).

Comments Received and Final Rule

A commenter questioned the CFPB's authority to define covered and non-covered overdraft credit because the commenter stated that Congress has not directed the CFPB to differentiate between these two terms. The commenter questioned the CFPB's justification for departing from its prior approach to treating overdraft under Regulation Z because the delineation between covered and non-covered overdraft credit introduces unnecessary complexity.

The CFPB is finalizing the definition of ''covered overdraft credit'' and ''non-covered overdraft credit'' as proposed. With the addition of these two definitions, the CFPB does not create any substantive changes to TILA or Regulation Z. Instead, the additional definitions carry out the purposes of TILA by helping participants understand which forms of overdraft are subject to TILA's requirements. The CFPB did not receive any comments on the definition of ''card issuer'' and is finalizing this definition as proposed because the CFPB has determined that allowing financial institutions to offer debit cards that access only below breakeven overdraft credit without being subject to Regulation Z would further the goals of the final rule.

4. Covered Overdraft Credit Account (§ 1026.62(b)(4))

The CFPB's Proposal

The proposed rule defined ''covered overdraft credit account'' as a credit account through which a financial institution extends or can extend covered overdraft credit. The term would include any line of credit, credit card account, credit feature, credit line, credit plan, or credit subaccount through which the financial institution extends or can extend covered overdraft credit. Proposed § 1026.62(c) would require very large financial institutions to structure covered overdraft credit as a separate credit account. Therefore, the term ''covered overdraft credit account'' would assist in ease of reference to these separate credit accounts and in distinguishing them from linked checking or other transaction accounts.

Comments Received and Final Rule

The comments received on this proposed definition agreed with the CFPB's position, and the CFPB is finalizing the definition of ''covered overdraft credit account'' without change. One consumer advocate commenter supported the definition of ''covered overdraft credit account'' because it believes that any account that can be used to access overdraft credit should be covered by the rule, regardless of the technicalities through which the credit is extended. The commenter stated that a narrower, more specific definition may encourage evasions of the rule.

For the reasons stated above, the CFPB is finalizing the definition of ''covered overdraft credit account'' as proposed.

D. Changes to Definition of ''Finance Charge''

In explaining the meaning of ''finance charge,'' TILA section 106(a) (15 U.S.C. 1605(a)) provides that ''the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit.'' [147] The finance charge does not include charges of a type payable in a comparable cash transaction.[148]

Similarly, under Regulation Z, the term ''finance charge'' generally is defined in § 1026.4(a) to mean ''the cost of consumer credit as a dollar amount.'' It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.

Regulation Z currently excludes certain fees or charges imposed by a financial institution for paying items that overdraw an account from the definition of ''finance charge'' unless ''the payment of such items and the imposition of the charge were previously agreed upon in writing.'' [149] Additionally, where the payment of such items and imposition of the charge were previously agreed upon in writing, when a creditor imposes a service, transaction, activity, or carrying charge for each item that results in an overdraft

[146] Comment 2(a)(15)–2.ii.A. This comment provides that a debit card is not a credit card if there is no credit agreement, even if the creditor occasionally honors an inadvertent overdraft. Because the debit card is not considered a ''credit card'' under Regulation Z, a financial institution offering a debit card that can access non-covered overdraft credit is not considered a card issuer.

[147] 15 U.S.C. 1605(a).

[148] *Id.* The term finance charge also excludes certain fees and amounts imposed by third party closing agents.

[149] 12 CFR 1026.4(c)(3).

on an account, such fees are excluded from the definition of finance charge if they do not exceed the charges imposed for paying or returning overdrafts on a similar transaction account that does not have such a written agreement.[150] Neither of these exclusions appear within the statutory text of TILA.

The CFPB proposed to amend the definition of ''finance charge'' in § 1026.4 in three ways. First, it proposed to modify the partial exception provided in § 1026.4(b)(2) for certain charges imposed on checking and other transaction accounts so that the partial exception would no longer apply to ''covered asset accounts'' as defined in proposed § 1026.62. Second, it proposed to add § 1026.4(b)(12) to provide examples of charges imposed in connection with overdraft credit that are finance charges. Third, it proposed to amend the exception provided in § 1026.4(c)(3) so that the exception would no longer apply to ''above breakeven overdraft credit'' as defined in proposed § 1026.62. These proposed amendments are intended to specify which overdraft transactions include a finance charge and, therefore, may be subject to the requirements of TILA and Regulation Z. Each of these proposed changes are discussed below.

1. Examples of Finance Charges (§ 1026.4(b)(2))

Section 1026.4(b) provides examples of types of charges that are finance charges, except if those charges are specifically excluded under existing § 1026.4(c) through (e). In particular, existing § 1026.4(b)(2) provides that examples of finance charges generally include service, transaction, activity, and carrying charges imposed on a checking or other transaction account (except a prepaid account as defined in § 1026.61). However, the Board added a partial exception to this example such that if a charge for an account with a credit feature does not exceed the charge for a similar account without a credit feature, then the charge is not a finance charge under existing § 1026.4(b)(2) and its commentary.[151] As discussed in the proposal, the Board and the CFPB have amended § 1026.4(b)(2) and its commentary over time.[152]

The CFPB proposed to amend this current example of a finance charge as described in § 1026.4(b)(2) and comment 4(b)(2)–1 to set forth a different rule for when charges imposed on a covered asset account, as that term is defined in § 1026.62(b)(2), would be finance charges. The CFPB also proposed to add § 1026.4(b)(12) to provide examples of finance charges with regard to a covered asset account, as defined in proposed § 1026.62(b)(2). These proposed changes specified which overdraft transactions include a finance charge and, therefore, may be subject to the requirements of TILA and Regulation Z.

Proposed § 1026.4(b)(12)(i) described as an example of a finance charge any service, transaction, activity, or carrying charges imposed on the separate credit account required by § 1026.62(c), which is also a covered overdraft credit account. Proposed § 1026.4(b)(12)(ii) described as an example of a finance charge any service, transaction, activity, or carrying charges imposed on the covered asset account to the extent the charge exceeds a comparable charge imposed on a checking or other transaction account that does not have overdraft credit. Proposed § 1026.4(b)(12)(iii) then described certain charges imposed on a checking or other transaction account that does not have overdraft credit that are not comparable to charges imposed on a covered asset account, which, by definition (see § 1026.62(b)(2)), does have overdraft credit tied to it and is provided by a very large financial institution. As discussed in the proposal, the proposed limitations in § 1026.4(b)(12)(iii)(A) through (E) would prohibit a very large financial institution from comparing charges that are not comparable cash transactions or from using comparisons in a way that may lead to evasion of the requirements of Regulation Z. These proposed changes would broaden the example of a ''finance charge'' for covered asset accounts to apply the applicable rules to such accounts so that the full cost of credit is more accurately disclosed. For the reasons discussed below, the CFPB is finalizing these proposed revisions with certain clarifying changes.

Finance Charges Generally

Several commenters, including industry trade groups, objected to the CFPB's proposed changes to § 1026.4(b)(2) and (b)(12), while other commenters, including consumer advocate and academic commenters, supported the changes. Most commenters did not address the specific language of the proposed changes to § 1026.4(b)(2) and (b)(12), focusing instead on broader concerns. One consumer advocate commenter supported the language of the proposed changes and suggested certain changes, including adding additional commentary, an additional example, and an additional comment related to eliminating the participation fee exception for covered asset accounts.

Commenters opposing the proposed changes argued that the CFPB's proposal misclassifies overdraft as ''credit'' and, because overdraft is not credit, overdraft charges are not a ''finance charge'' under TILA. As discussed above, arguments that overdraft is not credit under TILA are not supported by the statute itself; TILA defines ''credit'' broadly and does not exclude overdraft.

Industry commenters opposing the proposed changes also argued that, even if overdraft is ''credit,'' overdraft charges are not incident to or a condition of the extension of credit and therefore do not meet the definition of a ''finance charge.'' These commenters argued that overdraft charges are service charges applied, for example, for keeping an overdrawn account open or compensating for the failure to timely remedy the overdraft. Commenters pointed to case law that they believe supports this characterization of overdraft charges. At least one industry commenter further argued that the CFPB lacks the authority under TILA to redefine covered overdraft fees as finance charges.

Commenters supporting the proposal argued that the term ''finance charge'' is broadly defined and contains no limitation for overdraft charges in its definition. Members of Congress commented that the proposed rule is consistent with and helps fulfill TILA's purpose by ensuring that consumers have critical protections when offered credit. A consumer advocate commenter stated that overdraft charges imposed on a credit account are clearly incident to credit, and that charges for credit imposed on other asset accounts are part of the cost of the credit and incidental to that credit, even if there are comparable charges in another non-credit context. A consumer advocate commenter provided specific suggestions for amending existing comments 4(b)(2)–1 and 4(b)(2)–1.ii.

With respect to commenters stating that an overdraft charge is not a ''finance charge'' under TILA and that TILA does not confer authority upon the CFPB to regulate overdraft, such assertions are inconsistent with TILA.[153] The definition of ''finance charge'' under TILA section 106(a) and in Regulation Z under § 1026.4(a) is very broad and, unless specifically excluded by the regulation, includes amounts imposed directly or indirectly by the

[150] 12 CFR 1026.4(b)(2).

[151] Regulation Z comment 4(b)(2)–1.

[152] 89 FR 13852, 13864 (Feb. 23, 2024).

[153] See part III.A for a discussion of the CFPB's authority under TILA section 105(a).

creditor as an incident to or condition of the extension of credit.

Moreover, the CFPB discussed the regulatory history of the overdraft exception extensively in the prepaid rule proposal.[154] As summarized in that proposal, although Congress did not exempt overdraft services or similar programs offered in connection with deposit accounts from TILA, the Board in issuing Regulation Z in 1969 carved financial institutions' ''bounce-protection'' programs out of the new regulation.[155] The Board revisited the exception of bounce protection programs from Regulation Z over the years, including signaling concern with overdraft services in a number of rulemaking actions.[156] In particular, the Board revisited the exception of bounce protection programs from Regulation Z in 1981, in a rulemaking in which the Board implemented the Truth in Lending Simplification and Reform Act.[157] In the related proposal, the Board considered adjusting its overdraft exception to apply only to ''inadvertent'' overdrafts because, as the Board stated, ''a charge imposed for honoring an instrument under any agreement between the institution and the consumer is a charge imposed for a credit extension and thus fits the general definition of a finance charge, whether or not the charge and the honoring of the check are reflected in a written agreement. The characterization of the charge will thus depend on whether 'credit' has been extended, within the meaning of the regulation.'' [158] Further, in a 2002 proposal to amend Regulation Z with regard to the status of certain credit card-related fees and other issues, the Board noted that some overdraft services may not be all that different from overdraft lines of credit, which typically include a written agreement, and requested comment on whether and how Regulation Z should be applied to banks' bounce-protection services.[159] That proposal cited to Regulation Z's exclusion of a charge for overdraft unless the payment of such items and the imposition of the charge are previously agreed upon in writing and noted that ''[f]ees imposed in connection with 'bounce protection' services may or may not meet the definition of a finance charge.'' [160] This regulatory history indicates that, but for the exception established under Regulation Z, a charge for overdraft would fall within the definition of a ''finance charge.''

Some comments stated that an overdraft charge is not a finance charge because it is a fee for providing a service related to the account and is imposed regardless of whether credit is extended such that it is not a fee incident to or a condition of the extension of credit. The CFPB notes, however, that this argument appears inconsistent with current market practices, which do often distinguish between overdraft fees and other fees. Financial institutions subject to this rule generally make clear in their account agreements that overdraft coverage is a separate feature with fees that often differ from those charged when an overdrawing transaction is declined. Such financial institutions also often do not assess NSF fees on declined card transactions, and many such financial institutions are no longer charging NSF fees on any types of transactions. These considerations highlight the fact that the overdraft fee is incident to or a condition of the extension of credit, even if the financial institution charges an NSF fee, characterizes the fee as a bank account service fee, or charges the fee for keeping an overdraft account open or because an overdraft is not repaid within a certain period of time.

For these reasons, CFPB is finalizing the proposed change to § 1026.4(b)(2) and corresponding changes to comment 4(b)(2)–1 to set forth a different rule for when charges imposed on a covered asset account, as that term is defined in § 1026.62, are finance charges. As discussed below, the CFPB is also finalizing § 1026.4(b)(12) to provide an example of a finance charge with regard to a covered asset account.

The CFPB declines to incorporate the commenter's suggestions on commentary 4(b)(2)–1 because it believes that finalizing commentary 4(b)(2)–1 as proposed makes clear that charges applied to covered asset accounts are evaluated under § 1026.4(b)(12). The CFPB declines to incorporate the commenter's suggested revisions on commentary 4(b)(2)–1.ii. While the CFPB recognizes that retaining the existing language regarding ''paying or returning'' an item on a similar account without a credit feature could be read to imply that a comparable account with overdraft is nevertheless an account without a credit feature, the discussion of ''overdraft credit'' above in part IV.C.1 notes the distinction between incidental credit and a credit feature.

Example of a Finance Charge for the Separate Credit Account

With regard to a covered asset account, proposed § 1026.4(b)(12)(i) described as an example of a finance charge any service, transaction, activity, or carrying charge imposed on the separate credit account required by § 1026.62(c). Proposed section 1026.62(c) stated that a very large financial institution shall structure covered overdraft credit as a separate credit account and stated that the separate credit account is a covered overdraft credit account.

An industry commenter objected to the lack of language in proposed § 1026.4(b)(12)(i) to account for a comparable cash transaction or to provide for a comparison to a charge imposed on a checking or other transaction account that does not have overdraft credit. This commenter argued that the lack of such language contravenes the specific exclusion in TILA section 1605(a) for charges of a type payable in a comparable cash transaction, and stated that these exclusions from the finance charge definition are mandated by TILA's provisions and tied to TILA's purpose.

A consumer advocate commenter supported § 1026.4(b)(12)(i) because the service, transaction, activity or carrying charges identified in that section are imposed on a credit account and thus are clearly incident to credit. This commenter noted that this is true under the law today and would remain true if banks restructure their overdraft services as lines of credit to comply with the CFPB's rule. This commenter also agreed with the proposal's rationale that it would not make sense to compare fees on a credit account to those on a noncredit account.

Regarding the commenter's argument that the CFPB erred by not providing for a comparison to a charge imposed on a checking or other transaction account that does not have overdraft credit, final § 1026.4(b)(12)(i) does not change existing law. Existing § 1026.4(b)(2) provides that examples of finance charges include service, transaction, activity, and carrying charges imposed on a credit account. Onto this example, the Board added a partial exception in § 1026.4(b)(2) stating that any charge

[154] 79 FR 77102, 77117–20 (Dec. 23, 2014).

[155] 34 FR 2002 (Feb. 11, 1969). *See* § 1026.4(b)(2) and (c)(3).

[156] 79 FR 77102, 77119 (Dec. 23, 2014).

[157] Public Law 96–221, sec. 601, 94 Stat. 132; 45 FR 80648 (Dec. 5, 1980).

[158] 45 FR 80648, 80657 (Dec. 5, 1980). The Board ultimately made only a few minor editorial changes to the exclusion, thus preserving the exemption unless there is an agreement in writing to pay items and impose a charge. 46 FR 20848, 20855 (Apr. 7, 1981).

[159] 67 FR 72618, 72620 (Dec. 6, 2002).

[160] *Id.* The Board did not modify the Regulation Z exemptions when it issued final rules in 2003, instead stating in preamble that ''[t]he Board's staff is continuing to gather information on these services, which are not addressed in the final rule.'' 68 FR 16185 (Apr. 3, 2003).

imposed on a checking or other transaction account (emphasis added), such as a service or transaction account charge, is only a finance charge to the extent that the charge exceeds the charge for a similar asset account without a credit feature.[161] Under existing § 1026.4(b)(2), service, transaction, activity, and carrying charges imposed on an overdraft line of credit account (as opposed to the checking or other transaction account to which the credit line is tied) are generally finance charges. This is true whether or not the charge exceeds the charge for a similar asset account without a credit feature. The CFPB's rule does not change this treatment of fees assessed on overdraft lines of credit or credit card accounts, which many financial institutions currently provide, and which are, in general, currently covered by Regulation Z. Similarly, the separate credit account required by § 1026.62(c) is not a checking or other transaction account that would qualify for the partial exception. The CFPB is also, as described in the proposal, concerned that adding such a comparison might lead to potential evasion of the rule. For these reasons, proposed § 1026.4(b)(12)(i) is consistent with existing § 1026.4(b)(2) and the CFPB is finalizing § 1026.4(b)(12)(i) as proposed.

Example of a Finance Charge for the Covered Asset Account

Proposed § 1026.4(b)(12)(ii) largely echoed existing § 1026.4(b)(2) by providing that any service, transaction, activity, or carrying charge imposed on a covered asset account is a finance charge to the extent that the charge exceeds a comparable charge imposed on a checking or other transaction account that does not have overdraft credit. Commenters, in general, did not focus specifically on proposed § 1026.4(b)(12)(ii), instead focusing their criticism or support on § 1026.4(b)(12)(iii) (discussed below). The CFPB is finalizing § 1026.4(b)(12)(ii) largely as proposed with minor stylistic changes to match existing § 1026.4(b)(2).

Proposed § 1026.4(b)(12)(iii) described five specific types of charges imposed on a checking or other transaction account without overdraft credit that are not comparable to charges imposed on a covered asset account. Industry commenters objected to § 1026.4(b)(12)(iii), focusing most heavily on the inability to use a nonsufficient funds (NSF) fee as a comparable charge to reduce the extent to which an overdraft fee is a finance charge. These commenters argued that eliminating this exception would reduce the availability of covered overdraft credit, and such reduction would disadvantage consumers, who would face the same or higher fees without the benefit of a paid transaction. At least one industry commenter also argued that precluding this comparison contradicts TILA's goal of requiring disclosure of fees that are payable by credit customers but not by cash customers. This same commenter argued that both an overdraft charge and an NSF fee are imposed upon an overdrawn account and serve many of the same functions, citing to court cases and agency publications grouping overdraft and NSF fees in the same category. This commenter argued that nothing in TILA section 1605(a) precludes the ''cash transaction'' description from applying to a payment for services and that the concept of a ''cash transaction'' relates to the method of payment, rather than what is provided in return.

A consumer advocate commenter supported this proposed provision, arguing that the comparable cash transaction exception has been used to hide or exclude amounts even where no comparable transaction actually exists; therefore, the proposed restrictions in § 1026.4(b)(12)(iii) would help to prevent evasions. This commenter also argued that returning an item unpaid is not a comparable cash transaction to paying it as an overdraft as one transaction is credit, with the fee being the cost of that credit, and the other transaction is not credit, with the fee serving a different purpose. This commenter supported the limitations proposed in § 1026.4(b)(12)(iii), arguing that the charges listed in (A) through (D) are not associated with cash transactions. This commenter also supported the limitation on using a charge for transferring funds into the checking or other transaction account from any other asset account (such as a savings account), arguing that a charge for overdraft credit reflects the cost of that credit and that the full amount of that fee should be viewed as a finance charge, noting that this policy is already reflected in existing comment 4(a)–4 and would reflect the reality that the consumers who incur the most overdraft fees are unlikely to have significant linked savings or other asset accounts that can be used to cover overdrafts.

This commenter also recommended adding commentary interpreting § 1026.4(b)(12) for clarity, including a comment stating that transfer fees imposed on any credit account, whether an overdraft line of credit or traditional credit card, are a finance charge and a comment comparing the monthly account fees of two asset accounts that differ in whether they have a tied credit feature or not, such that the difference in the asset accounts' monthly fees is a finance charge.

As to the commenter's request for additional commentary, the purpose of § 1026.4(b)(12)(iii) is to clarify which types of transactions are not comparable to an overdraft charge for purposes of the comparison calculation described in § 1026.4(b)(12)(ii). As discussed further below, specific charges are identified in § 1026.4(b)(12)(iii) for the purpose of prohibiting comparison for purposes of § 1026.4(b)(12)(ii); § 1026.4(b)(12)(iii) does not address whether or not such fees are themselves ''finance charges.'' Thus, the CFPB declines to add additional commentary.

After considering the comments, the CFPB is finalizing § 1026.4(b)(12)(iii) largely as proposed in order to prohibit very large financial institutions from comparing overdraft charges to charges that are not comparable cash transactions, to prevent using such comparisons in a way that may lead to evasion of the requirements of Regulation Z, and to ensure that the full cost of credit is more accurately disclosed. Accordingly, § 1026.4(b)(12)(iii) includes the limitation in proposed § 1026.4(b)(12)(iii)(B) and (C) because fees for declining to authorize or pay a transaction or for returning a transaction unpaid—often referred to as NSF fees—are not comparable to overdraft charges. As discussed in the proposal, an NSF fee is assessed when a transaction is declined while an overdraft charge is assessed when a transaction is paid and the institution lends the consumer money to pay that transaction. As to commenters' concerns that proposed § 1026.4(b)(12)(iii) would have designated NSF fees themselves as examples of ''finance charges,'' final § 1026.4(b)(12)(iii) does not do so. The proposed regulatory text was intended to prohibit the use of an NSF fee to offset an overdraft charge. Final § 1026.4(b)(12)(iii) prohibits that same comparison but adds stylistic changes to clarify that the types of transactions identified in § 1026.4(b)(12)(iii)(A) through (E) are itemized solely for the purpose of clarifying that they cannot be compared to charges imposed when overdraft credit is extended. Nothing in

[161] Existing comment 4(b)(2)–1 similarly provides that a checking or transaction account charge imposed in connection with a credit feature is a finance charge under existing § 1026.4(b)(2) to the extent the charge exceeds the charge for a similar account without a credit feature.

final § 1026.4(b)(12)(iii)(A) through (E) changes or modifies whether or not these five types of transactions are examples of finance charges. Specifically, final § 1026.4(b)(12)(iii) does not comment on whether or not an NSF fee would be a finance charge.

For the reasons discussed above, the CFPB is finalizing § 1026.4(b)(12)(ii) and (iii) largely as proposed. The CFPB makes two additional clarifying changes to the regulatory text of § 1026.4(b)(12)(iii). First, the final rule strikes ''covered'' from ''covered overdraft credit'' in § 1026.4 (b)(12)(iii). Proposed § 1026.4(b)(12)(ii) referred to a checking or other transaction account that does not have overdraft credit; proposed § 1026.4(b)(12)(iii) referred to a checking or other transaction account that does not have covered overdraft credit. Thus, changing ''covered overdraft credit'' to ''overdraft credit'' in final § 1026.4(b)(12)(iii) resolves what could have been read as a conflict between the regulatory text of final § 1026.4(b)(12)(ii) and final § 1026.4(b)(12)(iii) to which this section applies. Second, the final regulatory text of § 1026.4(b)(12)(iii) adds descriptive language to make clear that the comparison at issue is between the charge or combination of charges, including a per transaction fee, imposed on a covered asset account when overdraft credit is extended and the five types of charges itemized in final § 1026.4(b)(12)(iii)(A) through (E). Accordingly, the CFPB finalizes § 1026.4(b)(12)(iii) with these clarifying changes.

2. The § 1026.4(c)(3) Finance Charge Exception

The CFPB's Proposal

Existing § 1026.4(c)(3) provides that charges imposed by a financial institution for paying items that overdraw an account are not finance charges unless the payment of such items and the imposition of the charge were previously agreed upon in writing. The CFPB proposed to change this exception to the finance charge definition by adding a new sentence to the end of § 1026.4(c)(3) that provided that the paragraph does not apply to above breakeven overdraft credit as defined in proposed § 1026.62. In addition to amending § 1026.4(c)(3), the CFPB also proposed to add comment 4(c)(3)–3 to direct readers to see proposed § 1026.4(b)(12) for guidance on when fees imposed on a covered asset account as defined in § 1026.62 are finance charges. For the reasons discussed below, the CFPB is finalizing these changes as proposed and is revising comment 4(c)(3)–1 to clarify that it does not apply to above breakeven overdraft credit as defined in § 1026.62(b)(1).

Comments Received

Many commenters criticized the existing § 1026.4(c)(3) exception, stating that it does not adequately protect consumers. Several of these commenters noted that financial institutions frequently offer overdraft services under the existing § 1026.4(c)(3) exception at a high cost relative to other credit options. Among these commenters, several observed that, in the aggregate, low-income and minority consumers typically pay higher fees for non-covered overdraft credit offered through the existing § 1026.4(c)(3) exception. At least one of these commenters also explained that the existing § 1026.4(c)(3) exception helps financial institutions disguise the true cost of deposit accounts by allowing them to generate substantial fee revenue, which they use to drive profits and to offer free or low-cost banking services to consumers who are relatively more advantaged.

Commenters who criticized the existing § 1026.4(c)(3) exception generally expressed support for the proposed changes to the § 1026.4(c)(3) exception. Many of these commenters indicated that the proposed changes would advance one of TILA's fundamental purposes–promoting the informed use of credit. Specifically, these commenters agreed with the proposal's preliminary determination that the proposed changes would ensure that, when consumers utilized above breakeven overdraft credit, they would receive important Regulation Z protections, such as account-opening disclosures, credit card protections, and ability to repay assessments. These commenters further noted that, by providing consumers with these Regulation Z protections, the proposed changes to the § 1026.4(c)(3) exception not only would help consumers recognize that they are entering into a credit transaction when utilizing above breakeven overdraft credit, but also would help consumers compare the cost of above breakeven overdraft credit with other credit options more effectively. One academic commenter supported requiring TILA disclosures for overdraft products but also emphasized the importance of simplicity and clarity in such disclosures.

Many of the proponents of the proposed changes to the § 1026.4(c)(3) exception also stated that it made sense for the proposed rule to allow very large financial institutions to continue to provide non-covered overdraft credit at or below a very large financial institution's breakeven price. These commenters noted that limiting the application of the § 1026.4(c)(3) exception to non-covered overdraft credit offered at or below a very large financial institution's breakeven price, as proposed, would return the § 1026.4(c)(3) exception to its original courtesy purpose and would reduce fee burdens on consumers, especially low-income and minority consumers. They also explained that returning the § 1026.4(c)(3) exception to its original courtesy purpose would realign the incentives of very large financial institutions so that they would be deterred from adopting practices that push consumers into overdrafting and incurring high fees. Further, they stated that it was unnecessary to eliminate the § 1026.4(c)(3) exception completely because consumers typically would benefit from receiving non-covered overdraft credit provided at or below cost, making TILA protections less critical.

The same commenters also noted that the proposed changes to the § 1026.4(c)(3) exception would require very large financial institutions to better disclose the terms of above breakeven overdraft credit. As a result of these proposed changes, they anticipated that the proposal would help many consumers avoid surprise overdrafts.

Other commenters opposed the proposed changes to the § 1026.4(c)(3) exception. Many of these commenters stated that very large financial institutions should be allowed to earn a profit on non-covered overdraft without abiding by the requirements of TILA and Regulation Z. These commenters also expressed concern that financial institutions could not sustainably offer overdraft credit at or below their breakeven price and would not incur the operational costs or take the compliance and litigation risks necessary to offer above breakeven overdraft in compliance with Regulation Z.

Commenters opposed to the proposed changes to the § 1026.4(c)(3) exception also questioned the need for the proposed changes. Specifically, these commenters contended that existing disclosures and opt-in requirements adequately inform consumers of the terms for non-covered overdraft services. At least one of these commenters further stated that the CFPB inadequately explained why consumers are currently unable to compare the cost and terms of overdraft credit with other kinds of credit. Another commenter questioned why the CFPB would not consider the existing disclosures for

overdraft services provided under Regulations DD and E effective in helping consumers understand above breakeven overdraft credit. This commenter further questioned why the CFPB finds that Regulation Z disclosures would provide consumers a better understanding of these services and would help them make more informed decisions when using such services.

Commenters opposed to the proposed changes to the § 1026.4(c)(3) exception also stated that the CFPB's proposal to change the § 1026.4(c)(3) exception was arbitrary and capricious. At least one of these commenters stated that the CFPB's proposal to change the § 1026.4(c)(3) exception was arbitrary and capricious because the changes it proposed would apply only to above breakeven overdraft credit even though the proposal's stated consumer protection goals would apply equally to non-covered overdraft credit. At least one other commenter argued that the CFPB arbitrarily and capriciously relied upon the promotion of the informed use of credit to apply TILA and Regulation Z to overdraft fees. This commenter stated that the CFPB provided inadequate evidence to support its statement that applying consumer credit protections to above breakeven overdraft credit would help consumers make informed decisions about such credit. In particular, the commenter questioned the volume of evidence marshalled by CFPB. The commenter also stated that the CFPB should consider other reasons consumers may utilize non-covered overdraft credit rather than alternative credit products, including timeliness, ease of use, lack of access to alternatives, or cost.

A few commenters asked the CFPB to amend its proposal to change the § 1026.4(c)(3) exception. One commenter recommended that the CFPB amend comment 4(c)(3)–1 to specify that the comment does not apply to above breakeven overdraft credit offered in connection with a covered asset account as defined in § 1026.62(b)(2). Another commenter stated that the CFPB should eliminate the § 1026.4(c)(3) exception rather than attempt to amend it. This commenter provided several justifications for this viewpoint, including that the exception originally applied to checks, but that checks are used less frequently today, and that overdraft fees put a significant strain on low-income households while providing outsized profits to financial institutions.

Final Rule

For the reasons stated in the proposal and below, the CFPB finalizes § 1026.4(c)(3) and comment 4(c)(3)–3 as proposed. Additionally, as discussed below, the CFPB revises comment 4(c)(3)–1 to clarify that it does not apply to above breakeven overdraft credit as defined in § 1026.62(b)(1).

As further discussed below, the CFPB is finalizing § 1026.4(c)(3) for several independent reasons, consistent with the proposal. First, amending the § 1026.4(c)(3) exception so that it no longer applies to above breakeven overdraft credit (the § 1026.4(c)(3) amendment) returns the exception to its original conception—excepting overdraft services from Regulation Z when offered as a courtesy or accommodation to customers—while adapting it to fit within the modern payments system. Additionally, the § 1026.4(c)(3) amendment furthers TILA's purpose of promoting the informed use of credit by ensuring that above breakeven overdraft credit is disclosed as a credit product and facilitating comparison shopping across credit products. Moreover, applying the Regulation Z regulatory framework to above breakeven overdraft credit products will benefit consumers by applying the regulation's existing substantive protections to such credit products, consistent with TILA's purpose of protecting consumers against inaccurate and unfair credit billing and credit card practices. The § 1026.4(c)(3) amendment also reflects, in part, an effort to balance the reliance interests of very large financial institutions and consumers against these other considerations.

Adapting the Courtesy Exception To Fit Within the Modern Payments System

Commenters opposed to the revision to the § 1026.4(c)(3) exception stated that the rationales for the amendment provided in the proposed rule—protecting consumers against inaccurate and unfair credit practices and promoting the informed use of credit—were arbitrary and capricious. They stated that this was because the consumer protection goals justifying the amendment apply equally to both above breakeven overdraft credit and non-covered overdraft credit provided at or below breakeven pricing, and the amendment applies only to at or below breakeven overdraft credit. The CFPB acknowledges that Regulation Z disclosures and protections would be helpful to consumers both in circumstances where overdraft fees are profit-generating and in circumstances where they are not. However, consistent with the Board's original reasoning, the CFPB's revision to the exception is based on the countervailing considerations discussed herein, including that consumers receive a benefit from the availability of this service if it is offered as a courtesy and that very large financial institutions are more likely to offer courtesy overdraft when they are able to recover the costs of providing that service. In light of these considerations, the revision to the § 1026.4(c)(3) exception allows very large financial institutions to provide non-covered overdraft without being subject to Regulation Z requirements.

As explained in the proposal, the existing § 1026.4(c)(3) exception no longer reflects its original courtesy purpose. Historically, whenever a consumer bounced a check written against a deposit account that lacked a credit feature, the consumer's financial institution typically returned the check unpaid and assessed the consumer an NSF fee. In addition, the payee on the check might have taken various actions against the consumer, such as assessing the consumer a late fee or returned item fee, reporting the consumer's payment as late to a credit bureau, or bringing legal action against the consumer for writing a bad check.[162] However, instead of returning the check unpaid, a financial institution, in its discretion, might have paid the check into overdraft as a courtesy.[163]

When it issued Regulation Z in 1969, the Board created a limited exception for this longstanding practice.[164] Specifically, the Board added § 226.4(d), which provided that ''[a] charge imposed by a bank for paying checks which overdraw or increase an overdraft in a checking account is not a finance charge unless the payment of such checks and the imposition of such finance charge were previously agreed

[162] 74 FR 5212, 5214 (Jan. 29, 2009); 74 FR 59033, 59035 (Nov. 17, 2009); Steve Cocheo, *Follow the Bouncing Check,* 95 ABA Banking J. 32, at 34 (2003) (Cocheo 2003).

[163] *See* Peter G. Weinstock & Stephanie E. Dreyer, *Overdraft Protection Programs: The Emerging Battleground for Bankers and Consumer Advocates,* 121 Banking L. J. 791, at 795 (2004) (''Banks have been paying NSF items as a service to customers on a case-by-case basis for decades.''); *see also* Cocheo 2003 at 34 (''Our overdraft program formalizes the traditional courtesy of paying insufficient checks. . . .'') (quoting Gaynell Lawson, Executive Vice President and Chief Financial Officer of Citizens Bank of Blount County).

[164] 34 FR 2002, 2004 (Feb. 11, 1969); 73 FR 28904, 28927 (May 19, 2008) (''Historically, if a consumer engaged in a transaction that overdrew his or her account, depository institutions used their discretion on an ad hoc basis to pay the overdraft, usually imposing a fee. The Board recognized this longstanding practice when it initially adopted Regulation Z in 1969 to implement TILA.'').

upon in writing.'' [165] A bank providing discretionary, check-centric overdraft (also known as ''bounce-check protection'' or ''courtesy overdraft protection'' services, as noted in later **Federal Register** publications) [166] was not a creditor subject to Regulation Z because, pursuant to this exception, it did not impose a finance charge (and otherwise did not structure the repayment of credit by written agreement in more than four installments).[167] As Board commentary on Regulation Z noted, this exception enabled a bank to ''occasionally, as an accommodation to its customer, honor a check which inadvertently overdraws that account'' without having to comply with the requirements of Regulation Z.[168]

In 1981, the Board amended Regulation Z to, among other things, make ''a few minor editorial changes'' to the § 226.4(d) exception.[169] Specifically, the Board changed the term ''bank'' to ''financial institution'' and the term ''checks'' to ''items.'' [170] The Board made these changes ''to reflect the ability of financial institutions other than banks, such as savings and loan associations, to pay items that are similar to checks, such as negotiable orders of withdrawal, into overdraft.'' [171] Additionally, the Board renumbered § 226.4(d) to § 226.4(c)(3).[172] By making these ''minor editorial changes,'' the Board stated that ''[n]o substantive change is intended . . . .'' [173] In other words, the Board did not change the purpose of the § 226.4(d) exception, which was to allow financial institutions to provide consumers with ad hoc, fee-based, check-centric, courtesy overdraft services without having to comply with the requirements of TILA and Regulation Z.[174]

Despite the fact that neither the Board nor the CFPB has changed the purpose of the § 1026.4(c)(3) exception, the market for non-covered overdraft credit has changed in important ways—many financial institutions have automated their non-covered overdraft programs and expanded them to cover non-check transactions, while also adjusting their account pricing structure to more heavily emphasize overdraft fees.[175] These changes have caused the market for non-covered overdraft credit to move away from the historical courtesy model to the point that, for a significant number of consumers, non-covered overdraft credit is no longer an occasional accommodation for inadvertent overdrafts.

Unlike in 1969, when checks made up the lion's share of overdraft transactions,[176] recent CFPB analysis of account data from a number of large banks showed that on average overall only 10.36 percent of monthly debit transactions occurred by check, while 62.14 percent occurred by debit card (both one-time and recurring), 12.14 percent occurred by ACH, 6.43 percent occurred by ATM, 0.71 percent occurred by bank teller, and the remainder occurred by other means.[177] This shift away from check transactions is significant because, as financial institutions have automated their non-covered overdraft programs and expanded them to cover non-check transactions, the sheer volume of overdraft transactions and associated fees has increased.[178] This trend especially is pronounced with respect to debit cards, where CFPB research shows that incidence of overdraft increases for consumers who use debit cards. For example, CFPB research shows that 92.3 percent of accounts that do not use debit cards have no overdrafts in a year of account use and only 0.6 percent of such accounts incur more than 10 overdrafts per year.[179] In contrast, accounts that use their debit cards more than 30 times per month have the lowest percentage of accounts with no overdraft (51.2 percent) and the highest percentage of accounts that overdraft more than 10 times per year (18.0 percent).[180] In other words, for many consumers who use debit cards frequently, non-covered overdraft credit services are no longer provided as an occasional accommodation.[181] Moreover, financial institutions today routinely extend overdraft credit in circumstances where they stand to generate more direct revenue from extending overdraft credit to cover a transaction than they would from declining it (because, for example, consumers are rarely charged NSF fees for declined debit card transactions,[182] and nearly two-thirds of banks with over $10 billion in assets have eliminated NSF fees [183]).[184] As a result of these changes, non-covered overdraft programs now generate a substantial portion of the direct fee revenue that many financial institutions make from checking accounts (and much of the total revenue that financial institutions make from low-balance accounts), which has encouraged some financial institutions to promote consumers' use of non-covered overdraft credit and/or to calibrate their systems to increase overdraft fee revenue.[185] This shift represents a significant departure from the historical courtesy model, which provided an accommodation to consumers for the occasional, inadvertent overdraft.

The CFPB's amendment to the § 1026.4(c)(3) exception reestablishes the original courtesy purpose of the § 1026.4(c)(3) exception by providing the exception only for overdraft credit priced at or below a very large financial institution's breakeven point.

Promoting the Informed Use of Credit

Commenters opposed to the CFPB's amendment to the § 1026.4(c)(3) exception contended that existing disclosures and opt-in requirements adequately inform consumers of the terms for non-covered overdraft services.

As an initial matter, the CFPB is amending the § 1026.4(c)(3) exception to return the regulatory requirements closer to TILA's original effect. The CFPB is following Congress's judgment that standardized disclosures across

[165] 34 FR 2002, 2004 (Feb. 11, 1969).

[166] 70 FR 29582, 29582 n.1 (May 24, 2005).

[167] *See* 12 CFR 1026.2(a)(17)(i).

[168] 42 FR 22360, 22362 (May 3, 1977).

[169] 46 FR 20848, 20855 (Apr. 7, 1981).

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] The language from the Board's 1981 version of § 226.4(c)(3) remains in effect unchanged at § 1026.4(c)(3) in the CFPB's existing version of Regulation Z. In 2016, the CFPB added an additional sentence to the end of § 1026.4(c)(3) to clarify that the paragraph does not apply to credit offered in connection with a prepaid account as defined in § 1026.61. *See* 81 FR 83934, 84179 (Nov. 22, 2016). However, this amendment did not impact the text of the portion of § 1026.4(c)(3) adopted in 1981.

[175] 74 FR 5212 (Jan. 29, 2009); 81 FR 83934, 83950–51 (Nov. 22, 2016).

[176] Stephen Quinn & William Roberds, *The Evolution of the Check as a Means of Payment: A Historical Survey,* 93 Fed. Rsrv. Bank Atlanta Econ. Rev. 1, at 21 (2008).

[177] CFPB 2014 Data Point at 17.

[178] 81 FR 83934, 83950–51 (Nov. 22, 2016).

[179] CFPB 2014 Data Point at 15 tbl.4c.

[180] *Id.*

[181] 42 FR 22360, 22362 (May 3, 1977) (''[Section 226.4(d) (now section 1026.4(c)(3)] relates only to regular demand deposit accounts which carry no credit features and in which a bank may occasionally, as an accommodation to its customer, honor a check which inadvertently overdraws that account.'').

[182] 74 FR 5212, 5217 (Jan. 29, 2009).

[183] See CFPB October 2023 Data Spotlight.

[184] This was not always the case. Historically, financial institutions charged no more for honoring an overdrawing check through non-covered overdraft credit than they did for returning the check unpaid. For example, a 1976 report on bank fees presented the results of a survey of banks in New York and Washington, DC. Of the 41 banks surveyed, 39 charged overdraft fees that were equal to or less than the amount of their NSF fees. *See* Senate Staff Report at 10–11.

[185] *See* 81 FR 83934, 83950–51 (Nov. 22, 2016); 70 FR 29582, 29583 (May 24, 2005); CFPB 2013 White Paper at 16–17; CFPB Winter 2015 Highlight at 8–9; FDIC 2018 Highlight at 12; FDIC 2019 Highlight at 2–3.

different types of credit help consumers better comparison shop.

As the CFPB explained in the proposed rule, most non-covered overdraft credit is subject to Regulations DD and E. Although Regulations DD and E require certain disclosures for non-covered overdraft credit, neither regulation requires that such non-covered overdraft credit be disclosed as a credit product. Instead, both regulations use terms like overdraft fees, overdraft practices or overdraft services that tend to obscure the fact that financial institutions are providing consumers a credit product. Unlike the disclosures required under Regulations DD and E, the disclosures required by Regulation Z are designed to set forth contractual terms for credit products clearly. Regulation Z would also apply additional requirements under subparts B and G, including periodic statement requirements and advertising rules meant to help consumers better understand credit terms, monitor their use of the product, and trace how their funds are being used.

Applying the Regulation Z regulatory framework to above breakeven overdraft credit benefits consumers by ensuring that above breakeven overdraft credit is disclosed as a credit product and treated like other credit products. Treating above breakeven overdraft credit like other credit benefits consumers by helping them understand that they are entering into a contract for a credit product provided by a creditor.

Additionally, disclosing above breakeven overdraft credit services under the Regulation Z regulatory framework also promotes the informed use of credit because requiring very large financial institutions to present the credit terms for above breakeven overdraft credit in the same form that creditors present the credit terms of other credit products will allow consumers to compare the cost of such credit with the cost of alternative credit products. For example, the cost of non-covered overdraft credit is typically disclosed as a fee, and no annual percentage rate disclosure is required. In contrast, Regulation Z requires disclosure of periodic rates as annual percentage rates, which will aid consumers in comparing the cost of covered overdraft credit to other credit products.

At least one commenter also contended that the CFPB did not adequately explain how its proposed amendment would allow consumers to compare the cost and terms of overdraft credit with other kinds of credit better than existing requirements. In particular, this commenter stated that the CFPB did not cite sufficient evidence to support its finding that consumers have difficulty comparing non-covered overdraft credit services with available alternatives. The commenter also asserted that the CFPB failed to consider other reasons why consumers may utilize non-covered overdraft credit over alternative sources of liquidity, such as timeliness, ease of use, lack of access to alternatives, and cost.

As an initial matter, the reports cited in the proposed rule to support the finding that many consumers have difficulty comparing non-covered overdraft credit services with available alternatives are bolstered by other research.[186] For example, a survey conducted by the Pew Charitable Trust found that 42 percent of the overdrafters they polled had sufficient credit available on a credit card to cover an emergency expense of $400.[187] This finding is significant because, according to a CFPB 2014 report, the median amount of overdraft credit extended per non-covered overdraft transaction was $50 across all transaction types [188] and was only $25.50 for debit card transactions,[189] well within the amount of credit card credit available to many overdrafters polled by Pew. Therefore, as explained in the proposal, a significant number of consumers continue to use non-covered overdraft credit services despite the availability of alternative credit that is generally much cheaper than overdraft credit.[190]

As the commenter noted, consumers who have access to cheaper, alternative sources of liquidity still may opt to use non-covered overdraft credit services despite the higher cost if, for example, they believe these services are more timely and easier to use. (The commenter's other two theories for why consumers might use non-covered overdraft—lack of access to alternatives and cost—do not apply to consumers who have access to lower cost liquidity.) However, other evidence cited in the proposal indicates that many consumers often do not understand the cost and terms of non-covered overdraft. For example, the proposed rule noted that a significant number of commenters responding to the CFPB's 2022 request for information (2022 RFI) stated that overdraft fees were unclear or confusing. The proposed rule further noted that the concerns raised by commenters responding to the 2022 RFI were generally consistent with the concerns reflected in consumer complaints about overdraft fees submitted to the CFPB.

Applying Substantive Protections

Applying the Regulation Z regulatory framework to above breakeven overdraft credit services also benefits consumers by applying the regulation's existing substantive protections to such credit services. For example, the rule applies the due date requirement in § 1026.7(b)(11)(i)(A), the offset prohibitions in § 1026.12(d)(1), and the ability to pay provisions in § 1026.51 to covered overdraft credit accounts (including credit that currently is non-covered above breakeven overdraft credit) that can be accessed by a hybrid debit-credit card. Therefore, applying Regulation Z to above breakeven overdraft credit accessible via a hybrid debit-credit card prohibits very large financial institutions from immediately taking funds from any incoming deposit in repayment of the consumer's overdraft balance, requires very large financial institutions to establish due dates on the same day of each billing cycle, and requires very large financial institutions to assess the consumer's ability to pay for such credit—all protections that the current Regulations DD and E regulatory frameworks do not provide.

Balancing Reliance Interests Against Other Considerations

The rule does not entirely eliminate the § 1026.4(c)(3) exception in part because both very large financial institutions and consumers have reliance interests in the existence of non-covered overdraft. Very large financial institutions have undertaken efforts to ensure that their non-covered overdraft credit programs comply with Regulations DD and E, and some consumers have come to rely on the availability of non-covered overdraft credit.

The rule's amendment to the § 1026.4(c)(3) exception addresses the CFPB's consumer protection concerns while recognizing these reliance interests. Under the rule's approach, consumers who use above breakeven overdraft credit will receive Regulation Z's credit disclosures as well as Regulation Z's substantive protections.

[186] 89 FR 13852, 13868 n.165 (Feb. 23, 2024); CFPB 2013 White Paper at 52; CFPB 2014 Data Point at 5.

[187] Pew Charitable Tr., *Overdraft Does Not Meet the Needs of Most Consumers,* at 9 (Dec. 2017), *https://www.pewtrusts.org/-/media/assets/2017/12/cb_overdraft_does_not_meet_the_needs_of_most_consumers.pdf* (Pew 2017 Chartbook). The proposed rule referenced this study as evidence that consumer understanding of the Regulation E opt-in right is low. *See* 89 FR 13852, 13892 n.255 (Feb. 23, 2024).

[188] CFPB 2014 Data Point at 5.

[189] 89 FR 13852, 13869 n.166 (Feb. 23, 2024).

[190] *Id.* at 13868.

Consumers who use non-covered overdraft credit will receive courtesy overdraft credit priced at or below a very large financial institution's breakeven point. In addition, very large financial institutions that have invested in compliance with Regulations DD and E can maintain their current processes for providing consumers with non-covered overdraft credit so long as they price such credit at or below breakeven pricing.

Commenters opposed to the CFPB's amendment to the § 1026.4(c)(3) exception objected to the amendment's impact on the pricing of non-covered overdraft credit. These commenters stated that, as a matter of principle, very large financial institutions should be allowed to earn a profit on non-covered overdraft without abiding by the requirements of TILA and Regulation Z. The CFPB takes a different view. When Congress created TILA, it did not exempt any category of overdraft credit from TILA. Rather, the Board created a limited exception for the longstanding practice of courtesy overdraft. The concept of a courtesy or an accommodation is the provision of a service primarily for the convenience of a customer. A credit product that produces large amounts of revenue and profit is inconsistent with the concept of providing an additional service as a courtesy because it encourages financial institutions to promote consumers' use of non-covered overdraft credit and/or to calibrate their systems to increase overdraft fee revenue.[191] In contrast, providing overdraft credit at or below its breakeven point incentivizes a very large financial institution to provide overdraft credit simply for the convenience of the customer so as to foster customer goodwill and to improve customer retention.

These commenters also expressed concern that financial institutions could not sustainably offer overdraft credit at or below their breakeven price and would not incur the operational costs or take the compliance and litigation risks necessary to offer above breakeven overdraft in compliance with Regulation Z. However, even before the CFPB issued the proposed rule, several very large financial institutions had reduced or eliminated their overdraft fees,[192] and most financial institutions currently waive overdraft fees for at least some overdrafts. Since some very large financial institutions can provide consumers with overdraft credit without assessing any overdraft fees, it stands to reason that other very large financial institutions could continue to provide non-covered overdraft credit for a fee that is at or near their breakeven price. Similarly, many very large financial institutions currently offer overdraft lines of credit that comply with Regulation Z. Commenters have not explained why they think that applying Regulation Z to above breakeven overdraft credit would create compliance and litigation risks that are materially different from the compliance and litigation risks that very large financial institutions already face when offering overdraft lines of credit. The CFPB acknowledges that certain above breakeven overdraft credit also must comply with certain CARD Act provisions and the compulsory use prohibition; but again, commenters have not explained how these provisions create materially different compliance and litigation risks from the risks faced by very large financial institutions with respect to their existing credit card offerings. And lastly, the breakeven standard is designed to allow very large financial institutions to break even regardless of the financial institution's cost level. If a financial institution has unique circumstances that cause it to have higher compliance or other costs or losses, those can be incorporated into the financial institution's fee amount to ensure that the courtesy overdraft product is offered without overall losses to the financial institution. The CFPB does not find it credible that a financial institution would choose to incur the reputational and competitive harms associated with eliminating overdraft altogether if the financial institution does not lose money on the service; however, if a financial institution chose to do so, consumers who want non-covered overdraft could avoid any ensuing harms by switching to a financial institution that does offer non-covered overdraft credit.

Requested Changes to the CFPB's Amendment to the § 1026.4(c)(3) Exception

One commenter recommended that the CFPB amend comment 4(c)(3)–1 to specify that the comment does not apply to above breakeven overdraft credit offered in connection with a covered asset account as defined in § 1026.62(b)(2).

Comment 4(c)(3)–1 currently provides that, except with respect to credit offered in connection with a prepaid account as defined in § 1026.61, a charge on an overdraft balance computed by applying a rate of interest to the amount of the overdraft is not a finance charge, even though the consumer agrees to the charge in the account agreement, unless the financial institution agrees in writing that it will pay such items. The purpose of the comment is to clarify whether interest charged on overdraft credit is exempt from the Regulation Z definition of a finance charge. In the proposed rule, the CFPB proposed to amend the regulatory text of § 1026.4(c)(3) to establish that the paragraph does not apply to above breakeven overdraft credit. Accordingly, the paragraph's commentary also would not have applied to above breakeven overdraft credit. Therefore, interest charges imposed on above breakeven overdraft credit would have been finance charges under the proposed rule regardless of whether a very large financial institution agreed in writing to pay an item into overdraft. Nonetheless, for clarity, the final rule amends comment 4(c)(3)–1 to provide that the comment, like the regulatory text in § 1026.4(c)(3), does not apply to above breakeven overdraft credit as defined in § 1026.62(b)(1).

Another commenter stated that the CFPB should eliminate the § 1026.4(c)(3) exception rather than attempt to amend it. They noted that the exception originally applied to checks, but that checks are used less frequently today, and contended that overdraft fees put a significant strain on low-income households while providing outsized profits to financial institutions.

The CFPB has determined that amending the § 1026.4(c)(3) exception better serves the market and consumers than eliminating the exception completely because the amendment addresses the CFPB's consumer protection concerns while acknowledging the long-standing reliance interests of both very large financial institutions and consumers and ensuring availability of courtesy overdraft credit. As explained above, the rule's amendment to the § 1026.4(c)(3) exception adequately addresses the CFPB's consumer protection concerns because consumers who use above breakeven overdraft credit will receive Regulation Z's credit disclosures as well as Regulation Z's substantive protections while consumers who use non-covered overdraft credit will receive courtesy overdraft credit priced at or below a very large financial institution's breakeven point. This approach mitigates certain risks associated with current non-covered overdraft credit, like high cumulative fee burdens, account charge-offs, involuntary account closures, and loss of access to the banking system, while

[191] *See* 81 FR 83934, 83950–51 (Nov. 22, 2016); 70 FR 29582, 29583 (May 24, 2005); CFPB 2013 White Paper at 16–17; CFPB Winter 2015 Highlight at 8–9; FDIC 2018 Highlight at 12; FDIC 2019 Highlight at 2–3.

[192] *See* CFPB May 2023 Data Spotlight.

allowing very large financial institutions to continue offering and consumers to continue accessing non-covered below breakeven overdraft credit as a courtesy.

Comment 4(c)(3)–3

Proposed comment 4(c)(3)–3 would have directed readers to see § 1026.4(b)(12) for guidance on when fees imposed on a covered asset account as defined in § 1026.62 are finance charges. The CFPB received no comments specifically addressing this proposed comment. Accordingly, the CFPB finalizes comment 4(c)(3)–3 as proposed.

3. Defining and Determining ''Above Breakeven Overdraft Credit''

The CFPB's Proposal

The proposed rule added ''above breakeven overdraft credit'' as a new defined term at proposed § 1026.62(b)(1). Proposed § 1026.62(b)(1) defined above breakeven overdraft credit to mean overdraft credit extended by a very large financial institution to pay a transaction on which, as an incident to or a condition of the overdraft credit, the very large financial institution imposed a charge or combination of charges exceeding the average of its costs and charge-off losses for providing non-covered overdraft credit as described in proposed § 1026.62(d).

Proposed § 1026.62(d)(1) clarified that overdraft credit offered by a very large financial institution was ''above breakeven overdraft credit'' for purposes of proposed § 1026.62(b)(1) if the charge or combination of charges for such credit exceeded the greater of (1) the pro rata share of the very large financial institution's annual total direct costs and charge-off losses for providing non-covered overdraft credit calculated in accordance with § 1026.62(d)(2); or (2) an estimate published by the CFPB.

For purposes of proposed § 1026.62(d)(1), a ''combination of charges'' included all revenue received in connection with an overdraft transaction, including any extended or sustained overdraft fees, any interest charges on outstanding overdraft balances, and any other payments the very large financial institution received in connection with an overdraft transaction or transactions.

Proposed § 1026.62(d)(1) provided two methods for determining whether an overdraft charge exceeded the average of a very large financial institution's costs and charge-off losses for providing non-covered overdraft credit–the breakeven standard and the benchmark fee. To the extent that a very large financial institution preferred not to calculate its average costs and charge-off losses for providing non-covered overdraft credit using the breakeven standard, the proposal permitted the very large financial institution to determine whether it was offering above breakeven overdraft credit based solely on the benchmark fee.

Proposed Breakeven Standard

Under the proposed breakeven standard, a very large financial institution used a two-step process to determine whether an overdraft charge exceeded the average of the institution's costs and charge-off losses for providing non-covered overdraft credit. First, the very large financial institution determined its total direct costs and charge-off losses for providing non-covered overdraft credit to all accounts open at any point in the previous year (Step 1). For Step 1, proposed § 1026.62(d)(2) clarified that only costs and charge-off losses that were specifically traceable to a very large financial institution's provision of non-covered overdraft credit in the previous year could be considered total direct costs and charge-off losses for purposes of the breakeven standard. The proposed rule instructed a very large financial institution to exclude general overhead costs and charge-off losses resulting from unauthorized use, EFT errors, billing errors, returned deposit items, and rescinded provisional credit from the breakeven calculation because those costs and charge-off losses were not specifically traceable to a very large financial institution's provision of non-covered overdraft credit.

Next, the very large financial institution divided the total direct costs and charge-off losses figure from Step 1 by the total number of non-covered overdraft transactions attributable to those accounts occurring in the previous year (Step 2). For purposes of calculating Step 2, the proposed rule allowed the very large financial institution to exclude non-covered overdraft transactions that did not incur fees from the total number of non-covered overdraft transactions. Additionally, the proposed rule clarified that, when a very large financial institution applied the breakeven standard either for the first time or after transitioning from the benchmark fee described at proposed § 1026.62(d)(1)(ii), the very large financial institution could include direct costs and charge-off losses from any non-covered overdraft transaction occurring in the previous year regardless of whether the transaction would be considered above breakeven overdraft credit during that period.

Proposed Benchmark Fee

Under the benchmark fee approach outlined at proposed § 1026.62(d)(1)(ii), a very large financial institution could presume that any charge or combination of charges it imposed for paying a transaction that overdraws an account did not exceed its costs and charge-off losses for providing non-covered overdraft credit if the charge or combination of charges was less than or equal to any benchmark fee established by the CFPB. The CFPB proposal suggested four potential options for this benchmark fee—$3, $6, $7, and $14—and sought comment on whether to finalize one of these numbers or some other number.

The CFPB used the same general formula to calculate all four of the proposed alternative benchmark fees—charge-off losses divided by non-covered overdraft transactions, plus costs of $1 per non-covered overdraft transaction—but referred to different datapoints from data collected from five very large financial institutions (the sample) to derive each fee amount. The CFPB proposed four benchmark fee amounts in order to get feedback on two issues: (1) whether the CFPB should calculate charge-off losses based on the average across all institutions in its sample or across just the outlier in its sample with the highest costs (the outlier); and (2) whether the CFPB should include all non-covered overdraft transactions in its calculation or only non-covered overdraft transactions for which the institutions in its sample assessed a fee (fee-assessed transactions).

The proposed $3 benchmark fee is the fee that results from calculating the benchmark fee using all non-covered overdraft transactions from all institutions in the CFPB's sample; the proposed $6 benchmark fee is the fee that results from calculating the benchmark fee using only fee-assessed non-covered overdraft transactions from all institutions in the CFPB's sample; the proposed $7 benchmark fee is the fee that results from calculating the benchmark fee using all non-covered overdraft transactions from the outlier in the CFPB's sample; and the proposed $14 benchmark fee is the fee that results from calculating the benchmark fee using only fee-assessed non-covered overdraft transactions from the outlier in the CFPB's sample.

Comments Received

Comments Relating to Above Breakeven Overdraft Credit

Several commenters responded to the proposed rule's requests for comment soliciting alternative approaches for determining whether credit is above breakeven overdraft credit. Some of these commenters recommended that the final rule allow the threshold for above breakeven overdraft credit to vary based on a range of factors, such as the amount of the overdraft, the amount of overdraft fees, the duration of the overdraft, the cost to the very large financial institution of providing the overdraft, the size of the very large financial institution, and the frequency with which the consumer overdraws their account. At least one of these commenters recommended that the charge to the consumer for non-covered overdraft should decline with each successive overdraft so that the consumer would not fall into a debt trap. Another of these commenters recommended that the charge to the consumer for the first overdraft should be lower than the charge for subsequent overdrafts in order to deter the consumer from frequently overdrawing their account. Other commenters recommended that the final rule define the threshold for above breakeven overdraft credit as an annual percentage rate rather than a flat fee.

At least one commenter recommended that the final rule allow above breakeven overdraft credit to continue to qualify as non-covered overdraft credit if such credit included consumer-friendly features, such as cure periods, de minimis limits, transaction limits, and real-time notifications.

Comments Relating to the Breakeven Standard

Specifically Traceable Costs and Charge-Offs

Various commenters asked the CFPB to provide greater clarity regarding the breakeven standard. Most of these commenters asked the CFPB to provide additional guidance regarding the types of costs and charge-off losses that would have been considered specifically traceable costs and charge-off losses under the breakeven standard. One of these commenters asked the CFPB to amend the Official Interpretations of Regulation Z to clarify whether the final rule would permit a very large financial institution to allocate a portion of its call center expenses to overdraft transactions if it did not have a method to track the calls it received relating to non-covered overdraft credit.

A significant number of commenters requesting additional guidance regarding the breakeven standard also expressed concern that, as proposed, it was unclear whether the breakeven standard allowed very large financial institutions to recover certain costs, such as communication costs, branch servicing costs, collection costs, core provider/vendor costs, compliance costs, and technology costs. These commenters stated that a lack of clarity regarding these costs would create too much compliance and litigation risk for very large financial institutions to adopt the breakeven standard. Industry commenters stated that the formula for calculating costs and charge-off losses under the breakeven standard should include general overhead costs and charge-off losses resulting from unauthorized use, EFT errors, billing errors, returned deposit items, or rescinded provisional credit. These commenters also stated that the CFPB did not sufficiently explain its rationale for excluding such costs and losses from the breakeven standard's cost and loss calculation formula. In contrast, consumer advocate commenters stated that it was appropriate to exclude general overhead costs and charge-off losses resulting from unauthorized use, EFT errors, billing errors, returned deposit items, and rescinded provisional credit from the breakeven standard's cost and loss calculation formula because those costs and charge-off losses did not have a direct relationship to the provision of non-covered overdraft services. These commenters further explained that including such costs in the breakeven standard's cost and loss calculation formula would allow very large financial institutions to earn profits from their non-covered overdraft programs.

Using Less Than 12 Months of Cost and Charge-Off Loss Data

At least one commenter asked the CFPB to clarify how a very large financial institution would implement the breakeven standard if the institution lacked 12 months of cost and charge-off loss data. This commenter suggested that the CFPB should amend the breakeven standard so that it provides very large financial institutions with the flexibility to use less than 12 months of cost and charge-off loss data to calculate the breakeven fee.

Accounting for Fee Waiver Policies

Various commenters addressed whether the final rule's breakeven standard should allow very large financial institutions to adjust their non-covered overdraft transaction totals to account for non-covered overdraft transactions that do not incur fees. Many commenters opposed allowing such adjustments because they believed that very large financial institutions would be less likely to grant discretionary waivers to frequent overdrafters than to infrequent overdrafters. These commenters also expressed concern that frequent overdrafters, who are disproportionately made up of lower-income and minority consumers, would pay higher fees than they would if very large financial institutions could not adjust their non-covered overdraft transaction totals to account for their fee waiver policies. Other commenters supported a rule that would allow very large financial institutions to adjust their non-covered overdraft transaction totals to account for non-covered overdraft transactions that do not incur fees. These commenters noted that, if transaction totals included waived and refunded transactions, it would discourage very large financial institutions from continuing consumer friendly policies, such as offering grace periods before assessing overdraft fees, capping the number of overdraft fees per day, and establishing de minimis thresholds for assessing overdraft fees. Additionally, these commenters noted that very large financial institutions legally cannot charge overdraft fees for certain transactions, such as certain APSN transactions, and, therefore, those institutions likely would reduce access to overdraft credit if the rule required them to include such transactions in their transaction totals. One of these commenters further stated that the final rule should only allow very large financial institutions to adjust their non-covered overdraft transaction totals to account for their fee waiver policies if the rule also mandated additional consumer protections, such as grace periods, caps on the number of overdraft fees per day, and de minimis thresholds.

Extended or Sustained Overdraft Fees, Interest Charges on Outstanding Overdraft Balances, and Other Fees

At least one commenter asked the CFPB to amend the Official Interpretations of Regulation Z to clarify whether extended or sustained overdraft fees, interest on outstanding overdraft balances, and transfer fees assessed to move funds from a credit account to the consumer's depository account would count as overdraft charges for purposes of determining whether overdraft credit was above breakeven overdraft credit.

Calculating Average Costs and Charge-Off Losses Within Subsets of Account Portfolios When Applying the Breakeven Standard

At least one commenter provided their views on whether the final rule should allow very large financial institutions applying the breakeven standard to make separate calculations of their average costs and charge-off losses for non-covered overdraft within subsets of their depository account portfolios, such as account relationship tiers or average account balance ranges. This commenter stated that the final rule should not allow this practice because it would allow very large financial institutions to charge vulnerable consumers higher fees for non-covered overdraft credit while also raising the bar for such consumers to receive Regulation Z protections.

Comments Relating to the Benchmark Fee

The Benchmark Fee Formula

At least one commenter stated that the formula used to calculate the benchmark fee should match the formula used to calculate the breakeven standard.

Support for a Specific Benchmark Amount

Numerous commenters responded to the proposed rule's requests for comment soliciting feedback on the proposed benchmark fee figures. Commenters consisting of consumer advocates, government organizations, plaintiffs' attorneys, and members of the public generally supported adoption of a $3 benchmark fee while financial institution and industry trade group commenters generally supported adoption of a high benchmark fee ($14 or more). Some commenters supported benchmark fees falling between $3 and $14.

Proponents of the $3 benchmark fee noted that it would provide greater benefits to consumers. These benefits included access to cheaper credit, decreased risk of falling into debt cycles, and decreased risk of becoming unbanked. Proponents of the $3 benchmark were generally skeptical that adopting a low benchmark fee would limit consumers' access to overdraft credit. They presented three points in support of this view. First, they noted that many very large financial institutions either currently do not charge a fee for overdraft services or have significantly reduced their fees. Second, they noted that very large financial institutions with costs exceeding the $3 benchmark fee could calculate their own costs under the breakeven standard and charge a higher fee, or offer overdraft credit that complies with Regulation Z. Third, they noted that very large financial institutions could make changes to their overdraft programs to lower their costs in response to the rule.

Proponents of a $3 benchmark fee further stated that the proposed rule's cost and loss estimates were generous. Specifically, they explained that, when estimating the cost of funds for financial institutions, the proposed rule assumed that financial institutions would lend an average of $120 to consumers per transaction for a period of one month. However, they noted that the median overdraft is only $50 and is repaid in three days. Similarly, they explained that, when estimating financial institutions' operational costs for providing overdraft credit, the proposed rule assumed that 10 percent of non-covered overdraft transactions would require 10 minutes of a customer service representative's time and that 20 percent of these customer service contacts also would require 10 minutes of a supervisor's time. They believed that those estimates overstated the amount of call center expense associated with operational costs.

Proponents of a $3 benchmark fee further stated that the CFPB should not base the final rule's benchmark fee on the charge-off costs of the one very large financial institution in its data with the highest costs because that institution appeared to be an outlier and, as a policy matter, the CFPB should incentivize very large financial institutions to reduce charge-offs because they often lead to consumers becoming unbanked.

Proponents of a higher benchmark fee generally indicated that the CFPB should adopt a benchmark of $14 or more or stated only that $14 was too low. Several industry commenters stated that the proposed ranges for the benchmark fee would not allow them to recoup their costs. Some of these commenters stated that the $1 per transaction estimate for costs of funds and operational costs in the proposed rule was too low. Other industry commenters offered thoughts on what benchmark fee might be more appropriate for them. Two of these commenters, representing the interests of credit unions, including credit unions with assets exceeding the very large financial institution threshold, stated that average costs for the credit unions they represent ranged from $20–22 per overdraft transaction. Another commenter representing a state-chartered bank with $1.6 billion in assets stated that the known operational costs (including charge-off losses) for non-covered overdraft at their institution were roughly 39 percent of overdraft fees, but that the institution incurs other costs, and that its total costs exceed $14 per overdraft transaction. Several other industry commenters stated that the CFPB should adopt the proposed $14 benchmark fee. Two of these commenters representing credit unions with assets below the very large financial institution threshold indicated that the institutions they represent recently lowered their overdraft fees from the $25–$35 range to the $10–$15 range (implying that their costs fall within or below the $10–$15 range). Another commenter expressed concern that the sample used to calculate the benchmark fee was too small and that the CFPB should set the benchmark at $14 until the agency had an opportunity to review a larger sample. They further noted that a $14 fee benchmark fee would represent a significant fee reduction from the current average fee of $34 and would save low-balance account holders, on average, just over $90 per year and frequent overdrafters at least $220 per year. They also noted that several very large financial institutions recently reduced their fees to between $10 and $15, so setting the benchmark fee at $14 would make it easier for those institutions to comply with the rule. At least one industry commenter stated that the CFPB should set the benchmark fee at the current average fee in the market and adjust it for inflation going forward.

At least one industry commenter representing a credit union with assets of approximately $4.8 billion supported a $5 fee per overdraft, limited to one fee per day. This commenter further explained that their institution conducted a review of costs for overdraft credit and determined that a $5 fee would be sustainable. A consumer advocate commenter stated that the CFPB should set the benchmark fee at $6 (*i.e.,* the proposed benchmark fee that results from calculating the benchmark fee using only fee-assessed non-covered overdraft transactions from all institutions in the CFPB's sample), but only if the rule also mandated additional consumer protections, such as grace periods, caps on the number of overdraft fees per day, and de minimis thresholds.

Data Used for the Benchmark Fee

Industry commenters criticized the analysis used to establish the proposed benchmark fee amounts. First, they stated that the sample used for the

analysis was inadequate. Specifically, they noted that the sample consisted of only five very large financial institutions (or approximately three percent of the very large financial institutions that the proposed rule would have covered). They further observed that, by attempting to incorporate a diverse set of geographic footprints, asset sizes, and business models into the sample, entire categories of financial institution types were represented by only a single institution's data. They expressed concern that estimating the breakeven cost of overdraft credit based on five institutions would not be representative of the breakeven cost of overdraft credit for most very large financial institutions. They further criticized the sample because it did not include data from financial institutions that fell under the threshold for very large financial institutions. They explained that, even though the proposed rule would not have covered such institutions, it would have impacted such institutions indirectly because they would have had to adjust their overdraft fees to remain competitive with very large financial institutions. As a result, they believed that the analysis should have considered the impact of the proposed rule on those institutions.

Consideration of Effects to Consumer Behavior

Industry commenters stated that the analysis used to establish the proposed benchmark fee amounts failed to consider changes in consumer behavior. Specifically, these commenters explained that in the current market fees for non-covered overdraft credit have a deterrent effect. These commenters anticipated that, if the CFPB finalized any of the proposed benchmark fees, consumers would increase their use of overdraft credit. These commenters expressed concern that, as consumers increased their use of overdraft credit, more consumers would default on such credit, increasing charge-off costs as well as increasing the frequency of involuntary account closures and negative credit reporting. The commenters further anticipated that, as more consumers defaulted on non-covered overdraft credit, very large financial institutions would increase restrictions on such credit. In contrast, consumer advocate commenters expressed skepticism that overdraft fees were an effective way to deter consumers from overdrawing their deposit accounts.

Consideration of Market Conditions

Various commenters stated that the analysis used to establish the proposed benchmark fee amounts failed to consider changes in market conditions, in particular how charge-off costs would increase during an economic downturn. At least one of these commenters also expressed concern that neither the benchmark fee nor the breakeven fee would be sufficient for very large financial institutions to recover losses incurred during an economic downturn. Additionally, several industry commenters noted that the proposed benchmark fee amounts failed to adjust for inflation.

Final Rule

For the reasons stated in the proposal and below, the CFPB:

- Finalizes as proposed (but with technical edits to conform to Code of Federal Regulations style requirements) the definition of above breakeven overdraft credit at § 1026.62(b)(1), the methodology described at § 1026.62(d)(1) for determining whether credit is above breakeven overdraft credit, the description of the breakeven standard at § 1026.62(d)(1)(i), and the formula at § 1026.62(d)(2) for calculating the breakeven standard;
- Amends § 1026.62(d)(1)(ii) to set the benchmark fee at $5;
- Adds § 1026.62(d)(3) to provide additional guidance regarding the circumstances under which a cost or charge-off loss is specifically traceable;
- Adds § 1026.62(d)(4) to provide additional guidance regarding the meaning of the phrase ''charge or combination of charges'' for purposes of § 1026.62(d)(1);
- Adds § 1026.62(d)(5) to provide additional guidance on how a very large financial institution determines the pro rata share of its total direct costs and charge-off losses under § 1026.62(d)(1)(i); and
- Adds § 1026.62(d)(6) to define ''previous year'' for purposes of § 1026.62(d)(1)(i).

These sections are discussed more fully below.

Definition of Above Breakeven Overdraft Credit (§ 1026.62(b)(1))

Section 1026.62(b)(1) defines above breakeven overdraft credit as overdraft credit extended by a very large financial institution to pay a transaction on which, as an incident to or a condition of the overdraft credit, the very large financial institution imposes a charge or combination of charges exceeding the average of its costs and charge-off losses for providing non-covered overdraft credit as described in § 1026.62(d).

As discussed above, several commenters asked the CFPB to consider a threshold for above breakeven overdraft credit that varies based on a range of factors, such as the amount of the overdraft, the amount of overdraft fees, the duration of the overdraft, the cost to the very large financial institution of providing the overdraft, the size of the very large financial institution, the frequency with which the consumer overdraws their account, or a periodic rate. Other commenters asked the CFPB to allow above breakeven overdraft credit to continue to qualify as non-covered overdraft credit if such credit included consumer-friendly features, such as cure periods, de minimis limits, transaction limits, and real-time notifications.

The CFPB adopts the approach outlined in the proposed rule over the approaches proposed by commenters because it is easier for financial institutions to implement, easier for regulators to enforce, and more protective of consumers. Under the approach adopted in this rule, overdraft credit is above breakeven overdraft if the charge exceeds the higher of the fee calculated using the breakeven standard or the benchmark fee. As a result, both very large financial institutions and regulators can readily determine whether an overdraft transaction is above breakeven overdraft credit by reviewing the fee charged to verify whether it exceeds either the benchmark fee or the fee permitted under the breakeven standard. If the threshold for above breakeven overdraft varied by factors such as the amount, duration, and cost of each overdraft, both very large financial institutions and regulators would need to make case-by-case determinations regarding whether individual transactions fell above or below the relevant threshold for above breakeven overdraft credit.

As noted, the approach adopted in the rule is also more protective of consumers. For example, many non-covered overdraft programs operating under the existing 1026.4(c)(3) exception already include consumer-friendly features, such as cure periods, de minimis limits, and transaction limits. Unfortunately, despite having these consumer-friendly features, many non-covered overdraft programs still operate as high-cost consumer credit products that put consumers at risk of harms such as high cumulative fee burdens, account charge-offs, involuntary account closures, and loss of access to the banking system. Allowing above breakeven overdraft credit to continue to qualify as non-covered overdraft credit when it

includes consumer-friendly features would allow those potential harms to persist in their present form. In contrast, the approach adopted in the rule significantly mitigates these risks by ensuring that very large financial institutions provide the non-covered overdraft credit as a courtesy. Therefore, the CFPB adopts § 1026.62(b)(1) as proposed.

General Calculations for Above Breakeven Overdraft Credit (§ 1026.62(d)(1))

Proposed § 1026.62(d)(1) clarified that overdraft credit offered by a very large financial institution is above breakeven overdraft credit for purposes of proposed § 1026.62(b)(1) if the charge or combination of charges for such credit exceeds the greater of (1) the pro rata share of the very large financial institution's annual total direct costs and charge-off losses for providing non-covered overdraft credit calculated in accordance with the breakeven standard outlined in § 1026.62(d)(2); or (2) the benchmark fee published by the CFPB.

The CFPB adopts § 1026.62(d)(1) as proposed. As explained in the proposed rule, the § 1026.62(d)(1) provides very large financial institutions with two methods for determining whether its current charge for an overdraft transaction exceeds the average of its costs and charge-off losses for providing non-covered overdraft credit—the breakeven standard and the benchmark fee. This approach decreases compliance costs for some very large financial institutions by providing them with a simple bright-line method for determining whether the overdraft credit they extend is above breakeven overdraft credit, while providing other very large financial institutions the flexibility to make the above breakeven calculation on their own.

In response to commenters' request for guidance clarifying whether extended or sustained overdraft fees, interest on outstanding overdraft balances, and transfer fees would count as overdraft charges for purposes of determining whether overdraft credit was above breakeven overdraft credit, the CFPB amends its proposal by adding § 1026.62(d)(4), which incorporates guidance that appeared in the preamble of the proposed rule into the final regulation text.[193] Specifically, § 1026.62(d)(4) provides that, for purposes of § 1026.62(d)(1), a charge or combination of charges includes all revenue received in connection with an overdraft transaction, including, but not limited to, any extended or sustained overdraft fees, any interest charges on outstanding overdraft balances, and any other payments the very large financial institution receives in connection with an overdraft transaction.

Breakeven Standard (§§ 1026.62(d)(1)(i), 1026.62(d)(5), and 1026.62(d)(6))

Proposed § 1026.62(d)(1)(i) outlined the breakeven standard used to determine whether overdraft credit was above breakeven overdraft credit for purposes of proposed § 1026.62(b)(1). To employ the breakeven standard described at proposed § 1026.62(d)(1)(i), a very large financial institution determines its total direct costs and charge-off losses for providing non-covered overdraft credit to all accounts open at any point during the prior year and then divides that figure by the total number of non-covered overdraft transactions attributable to those accounts occurring in the prior year. The CFPB adopts § 1026.62(d)(1)(i) as proposed.

The CFPB sought comment regarding whether the breakeven standard should allow very large financial institutions to make separate calculations of their average costs and charge-off losses for non-covered overdraft within subsets of their depository account portfolio, such as account relationship tiers or average account balance ranges. At least one commenter stated that the final rule should not allow very large financial institutions to make separate calculations of their average costs and charge-off losses for non-covered overdraft within subsets of their depository account portfolios. As explained above, the CFPB favors an approach for determining whether a transaction is above breakeven overdraft that is straightforward for very large financial institutions to implement and simple for regulators to validate. Requiring very large financial institutions to calculate their average costs and charge-off losses for non-covered overdraft across their entire depository account portfolio advances these goals in at least two ways. First, it simplifies the breakeven calculation because financial institutions would not need to determine how they would apportion costs within subsets of their depository account portfolios. Second, it allows regulators to confirm a very large financial institution's compliance with the above breakeven overdraft requirement more easily because they would only need to review a single calculation. Therefore, the final rule requires very large financial institutions to calculate their average costs and charge-off losses for non-covered overdraft across their entire depository account portfolio.

The CFPB also sought comment regarding whether the rule should allow a very large financial institution to exclude non-covered overdraft transactions from the transaction totals used to calculate the threshold for the breakeven standard in instances where the very large financial institution waived, refunded, or otherwise did not assess fees for those transactions (''uncharged transactions''). As discussed above, several commenters addressed this issue. The CFPB has considered these comments and determined that a very large financial institution should include all non-covered overdraft transactions, including uncharged transactions, in the transaction totals used to calculate the breakeven threshold.

The CFPB takes this position because including all non-covered overdraft transactions in the transaction totals used to calculate the breakeven threshold will keep the breakeven standard tailored to ensuring financial institutions can break even on just the non-covered overdraft transaction products and is not used to cross-subsidize other deposit account-related expenses like losses associated with uncharged transactions. The rule is not designed to allow a financial institution to turn a profit on non-covered overdraft transactions in order to cover other expenses related to the depository account. And the CFPB concludes that it would not need to provide an incentive to ensure uncharged transactions continue because the fact that financial institutions are providing them now at a loss suggests there is already sufficient logistical, competitive, or reputational incentive for them to exist.

This approach will also result in fairer treatment of consumers who pay fees for non-covered overdraft. As explained above, a very large financial institution employs the breakeven standard by dividing its total direct costs and charge-off losses for providing non-covered overdraft credit to all accounts open at any point during the prior year (the numerator) by the total number of non-covered overdraft transactions attributable to those accounts occurring in the prior year (the denominator). If the final rule permitted very large financial institutions to exclude transactions that do not incur fees from the denominator, the share of costs and losses attributable to the transactions remaining in the denominator increases. As a result, consumers who paid fees for non-covered overdraft transactions would pay higher fees for those

[193] 89 FR 13852, 13869 (Feb. 23, 2024).

transactions than they otherwise would under a rule requiring very large financial institutions to include all non-covered overdraft transactions in the transaction totals used to calculate the breakeven threshold. To avoid such cost shifting, the CFPB has determined that a very large financial institution should include all non-covered overdraft transactions, including uncharged transactions, in the transaction totals used to calculate the breakeven threshold.

The CFPB notes that another method for ensuring that the breakeven fees only covered losses on non-covered overdraft transactions would be to take out losses associated with uncharged transactions. The CFPB has determined that it would be practically difficult for financial institutions to isolate losses from charge-offs that resulted from overdrafts that incurred fees from losses from charge-offs resulting from uncharged transactions. Therefore, the CFPB has determined the best approach is to allow financial institutions to include all losses in the breakeven calculation, and account for that by including all overdraft transactions, whether they involved a fee or not. The result is to reach a fee amount that more accurately reflects a financial institution's marginal costs and losses per transaction.

To clarify that very large financial institutions must include uncharged transactions in the transaction totals used to calculate the threshold for the breakeven standard, the CFPB amends its proposal by adding § 1026.62(d)(5). Section 1026.62(d)(5) will provide that, when calculating the pro rata share of its total direct costs and charge-off losses for providing non-covered overdraft credit in the previous year, a very large financial institution must include all non-covered overdraft transactions from the previous year in its calculation.

At least one other commenter asked the CFPB to clarify how a very large financial institution can implement the breakeven standard if the institution lacks cost and charge-off loss data from the previous year. This commenter suggested that the CFPB amend the breakeven standard so that it provides very large financial institutions with the flexibility to use less than 12 months of cost and charge-off loss data to calculate the breakeven fee.

As explained in the proposed rule, very large financial institutions must use annualized cost and charge-off loss figures because those figures even out seasonal variations that could occur with a shorter review period.[194] As a result, if a very large financial institution lacks cost and charge-off loss data covering a full year, it cannot implement the breakeven standard. Instead, a very large financial institution wishing to offer non-covered overdraft credit should utilize the benchmark fee until it has sufficient data to implement the breakeven standard.

The proposal did not define the term ''previous year'' for purposes of § 1026.62(d)(1)(i), but the CFPB intended to provide very large financial institutions with flexibility to use cost and charge-off loss data from a recent 12-month period, such as the prior calendar year, any 365-day period that begins within the prior calendar year, the prior four financial quarters, or the prior accounting year. To provide additional guidance regarding the meaning of ''previous year,'' the CFPB amends its proposal by adding § 1026.62(d)(6). Section 1026.62(d)(6) provides that, for purposes of § 1026.62(d)(1)(i), the term ''previous year'' means a period that encompasses, at the very large financial institution's option, any of the following periods—the prior calendar year, any 365-day period that begins within the prior calendar year, the prior four financial quarters, or the very large financial institution's prior accounting year.

When implementing the breakeven standard either for the first time or after transitioning from the benchmark fee, a very large financial institution can include direct costs and charge-off losses from any transaction that was a non-covered overdraft transaction during the previous year. For example, to comply with the final rule's effective date of October 1, 2025, a very large financial institution using the breakeven standard could calculate direct costs and charge-off losses based on all non-covered overdraft transactions occurring from January 1, 2024 through December 31, 2024 (the previous calendar year).

Cost and Loss Calculation for the Breakeven Standard (§§ 1026.62(d)(2) and 1026.62(d)(3))

To provide additional guidance regarding the types of costs and charge-off losses a very large financial institution could consider when calculating the breakeven standard, the CFPB proposed to add § 1026.62(d)(2). Proposed § 1026.62(d)(2) provided that, when calculating the breakeven standard, a very large financial institution could consider costs and charge-off losses that are specifically traceable to its provision of non-covered overdraft credit in the previous year.

As discussed above, various commenters asked the CFPB to provide greater clarity regarding the breakeven standard. Most of these commenters asked the CFPB to provide additional guidance regarding the types of costs and charge-off losses that are considered specifically traceable costs and charge-off losses under the breakeven standard.

As the CFPB explained in its proposal, when calculating its costs and charge-off losses under the breakeven standard, a very large financial institution can consider costs and charge-off losses that are specifically traceable to its provision of non-covered overdraft credit. The CFPB proposed this specifically traceable standard in order to prevent very large financial institutions from employing the breakeven standard in a manner that would have circumvented § 1026.62(b)(1). Without such a restriction, very large financial institutions might have included costs and charge-off losses in their average cost and loss calculations that are more appropriately attributable either to other segments of their deposits business or to their deposits business overhead.

The proposed rule also provided an example of how the specifically traceable test would work in practice. In that example, if a very large financial institution had used issue tagging in its call center to reasonably and accurately gauge the number of customer service calls it received relating to non-covered overdraft credit, direct costs relating to those customer service calls would be specifically traceable and the very large financial institution could include the direct costs relating to those calls in its calculation of costs under the breakeven standard. This example demonstrates that the specifically traceable test consists of two questions. First, does the cost or charge-off loss have a direct relationship to the provision of non-covered overdraft services? Second, can the very large financial institution provide evidence to demonstrate that direct relationship? If a very large financial institution can answer both questions in the affirmative, then the cost or charge-off loss is specifically traceable, and the very large financial institution may consider the cost or charge-off loss for purposes of the breakeven standard.

As discussed above, some commenters stated that the formula for calculating costs and charge-off losses under the breakeven standard should include general overhead costs and charge-off losses resulting from unauthorized use, EFT errors, billing errors, returned deposit items, or rescinded provisional credit. However, as other commenters noted, such costs and losses do not have a direct

[194] 89 FR 13852, 13870 (Feb. 23, 2024).

relationship to the provision of non-covered overdraft services. This is true because very large financial institutions incur those costs and losses even if they do not extend non-covered overdraft credit to the consumer. As a result, such costs and charge-off losses fail the first part of the specifically traceable test and cannot be included in the breakeven standard's cost and charge-off calculation formula.

Very large financial institutions should employ a similar analysis when considering whether costs such as communication costs, branch servicing costs, collection costs, core provider/vendor costs, compliance costs, and technology costs are specifically traceable to the provision of non-covered overdraft credit. For example, a commenter asked whether the final rule would permit a very large financial institution to allocate a portion of its call center expenses to overdraft transactions if it did not have a method to track the calls it received relating to non-covered overdraft credit. As demonstrated by the example above, because the institution could not satisfy the second part of the specifically traceable test by producing evidence to substantiate the cost, the cost would not be specifically traceable and the very large financial institution could not include the cost under the breakeven standard.

After considering the comments received, and for the reasons stated above, the CFPB adopts § 1026.62(d)(2) as proposed. For clarity, the CFPB is amending its proposal by adding § 1026.62(d)(3) to describe the two-part test discussed above. Specifically, § 1026.62(d)(3) provides that, for purposes of § 1026.62(d)(2), a cost or charge-off loss is specifically traceable if it has a direct relationship to the provision of non-covered overdraft services and the very large financial institution can provide evidence to demonstrate that direct relationship.

Benchmark Fee (§ 1026.62(d)(1)(ii))

Section 1026.62(d)(1)(ii) establishes the benchmark fee. In its proposal, the CFPB suggested four potential benchmark fee amounts—$3, $6, $7, and $14—based on data collected from five very large financial institutions (the sample) and sought comment on whether to finalize one of these or some other fee amount. The CFPB used the same formula (the benchmark formula) to calculate all four of these proposed alternative benchmark fees but relied on different datapoints from the sample to derive each fee amount.

The proposed benchmark formula used a methodology that was similar to the methodology that a very large financial institution would use to calculate its costs and losses under the breakeven standard provided in § 1026.62(d)(2) (the breakeven formula). The CFPB sought comment on this approach. At least one commenter stated that the methodology used to calculate the benchmark fee should track the breakeven formula. The commenter further underscored that both methodologies should treat the issue of uncharged transactions consistently.

Consistent with its proposal, the CFPB uses a calculation methodology for the benchmark fee that is similar to the calculation methodology that a very large financial institution uses to calculate its cost and losses under the final rule's breakeven standard. The CFPB considers this approach appropriate because the benchmark fee is meant to serve as a proxy for a financial institution's own breakeven calculation. The CFPB finds that providing such a proxy will facilitate compliance by decreasing compliance costs for very large financial institutions and by accommodating those institutions that lack the ability to determine their average costs and charge-off losses for providing non-covered overdraft credit under the breakeven standard. To advance these goals, the CFPB conducted its own calculation under the breakeven standard using cost and loss data from a sample of very large financial institutions. The results of this calculation reflect the average costs and charge-off losses for providing non-covered overdraft credit under the breakeven standard for the financial institutions in its sample. The CFPB anticipates that many very large financial institutions will be able to rely on the benchmark fee in lieu of performing their own calculation under the breakeven standard. Furthermore, as discussed above, the final rule requires a very large financial institution to include all non-covered overdraft transactions in the transaction totals used to calculate the breakeven threshold. For the same reasons, the CFPB uses the same approach to calculate the benchmark fee.

In the proposal, the CFPB also considered whether it should calculate the benchmark fee based on data from all five institutions in its sample or just the financial institution in its sample with the highest charge-off losses. Commenters in favor of using data from all five institutions generally stated that the CFPB should not calculate the benchmark fee using the data of a single outlier financial institution and that the average from the entire sample provides a more accurate benchmark fee estimate. These commenters also expressed concern that relying on data from the outlier institution might discourage very large financial institutions from adopting practices that reduce charge-offs, which could result in greater consumer harm in the form of account closures and negative reporting than otherwise would occur if the CFPB calculated the benchmark fee based on the average charge-off losses from all five institutions in its sample.

Commenters in favor of using data from the outlier institution stated that the CFPB's sample was small and that the average may not be probative of the appropriate benchmark fee amount. They further noted that, even if the CFPB adopted its highest proposed benchmark fee of $14, the benchmark fee would reflect a significant reduction in the average market price for non-covered overdraft. As a result, these commenters thought that basing the benchmark fee on data from the outlier institution was the sounder approach.

The CFPB has considered these comments and determined that it should calculate the benchmark fee based on data from all five institutions in its sample. The CFPB shares the concerns expressed by commenters who noted that relying on data from the outlier institution might result in greater consumer harm than otherwise would occur if the CFPB calculated the benchmark fee based on the average charge-off losses from all five institutions in its sample. In addition, the outlier institution's losses were significantly higher than losses for other institutions in the sample and for institutions that provided loss information in their comments, which suggests that using the outlier institution's losses to set the benchmark would overestimate the losses incurred by many institutions. Moreover, to the extent the benchmark fee amount is insufficient for a given institution to recoup its costs and losses, it may calculate its own costs and losses using the breakeven standard.

By applying a calculation methodology similar to the breakeven formula to all transaction data taken from all five of the very large financial institutions, the CFPB is using the same approach it used to derive the proposed $3 benchmark fee. As discussed above, the CFPB received numerous comments regarding the amount of the benchmark fee. These comments fell into three general categories—support for the $3 benchmark fee, support for a benchmark fee falling in between the $3 and $14 range, and support for a benchmark fee

of $14 or more. Proponents of the $3 benchmark fee stated that a $3 benchmark fee would benefit consumers. They also viewed a $3 benchmark fee as generous because they believed that the CFPB overestimated the cost of funds and operational costs faced by very large financial institutions. At least two commenters supported a benchmark fee falling between the $3 and $14 range. One of these commenters explained that their financial institution conducted a review of its costs for overdraft credit and determined that a $5 fee would be sustainable for their institution. The other commenter stated that the CFPB should set the benchmark fee at $6, but only if the rule also mandated additional consumer protections, such as grace periods, caps on the number of overdraft fees per day, and de minimis thresholds. This commenter explained that it wanted the CFPB to adopt the approach it used to derive the proposed $6 benchmark fee, but with additional consumer protections in order to prevent very large financial institutions from changing waiver policies in order to increase revenues. Proponents of a benchmark fee of $14 or more stated either that their costs were closer to $14 or that the CFPB's estimates of very large financial institutions' costs were too low. These commenters also criticized the analysis used to establish the proposed benchmark fee amounts. First, they stated that the sample used for the analysis was too small and was unrepresentative of the broader market. Additionally, they criticized the sample because it did not include data from financial institutions that fell under the threshold for very large financial institutions.

No commenters representing very large financial institutions provided the CFPB with additional data that would impact the findings of its original analysis establishing the proposed benchmark fee amounts. One commenter representing a bank with $1.6 billion in assets provided a breakdown of known costs and losses associated with the operation of their bank's overdraft program. This commenter determined that the known costs and losses associated with their bank's overdraft program represented roughly 39 percent of its overdraft fee of $25, which equates to $9.75. However, this estimate likely overstates the costs and losses attributable to a very large financial institution's overdraft program for several reasons. First, the commenter's cost estimates included costs for manual review of overdraft payment decisions by bank employees. These review costs represented $1 of the $9.75, or approximately ten percent of its costs. The CFPB expects that many very large financial institutions have automated such reviews, making them significantly less costly. Second, the commenter's cost estimates included costs associated with mailing overdraft notices. These mail-related costs represented $1.75 of the $9.75, or approximately 18 percent of its costs. The CFPB expects that many very large financial institutions provide such notices electronically, significantly lowering the cost of providing such notices. Accounting for these and other efficiencies gained by scale at very large financial institutions, the CFPB expects the costs and losses of many very large financial institutions to be lower than this bank's estimated costs and losses. An additional commenter representing a credit union with $4.8 billion in assets stated that based on a recent review of costs conducted by the credit union, a $5 fee would be sustainable for their institution.

Both commenters referenced in the preceding paragraph represented financial institutions with less than $10 billion in assets. It stands to reason that many very large financial institutions, which have the advantage of scale, could continue to operate overdraft programs at the proposed $3 benchmark fee. As noted above, the benchmark fee is not a regulatory obligation; it is a proxy for a financial institution's own breakeven calculation and is being adopted to ease the compliance burden of implementing the breakeven standard. To the extent the benchmark fee amount is insufficient for a given institution to recoup its costs and losses, that institution may calculate its own costs and losses using the breakeven standard. However, to help ensure that the benchmark fee covers additional costs noted by commenters, such as costs relating to branch servicing, collections, core provider/vendor services, compliance, technology, and the provision of overdraft notices, the CFPB will increase its cost estimates for its proposed $3 benchmark fee by $2 per transaction. Therefore, the CFPB finalizes § 1026.62(d)(1)(ii) to set the benchmark fee at $5.

Industry commenters also expressed concern that, if the CFPB finalized any of the proposed benchmark fees, consumers would increase their use of overdraft credit. These commenters contended that, as consumers increased their use of overdraft credit, more consumers would default on such credit, increasing charge-off costs as well as increasing the frequency of involuntary account closures and negative credit reporting. The commenters further anticipated that, as more consumers defaulted on non-covered overdraft credit, very large financial institutions would increase restrictions on such credit.

Both the proposed rule's 1022(b) analysis and the final rule's 1022(b) analysis have considered how lower prices might impact consumer behavior.[195] For consumers who overdraft by mistake, both 1022(b) analyses determined that a lower price for non-covered overdraft credit would be unlikely to change consumer behavior because those consumers did not intend to overdraft in the first place. This view is consistent with the views expressed by consumer advocates who commented that overdraft fees are not an effective deterrent and that lowering the amount of overdraft fees likely will not significantly impact whether or not a consumer overdraws their account. For consumers who use non-covered overdraft credit deliberately, both 1022(b) analyses determined that a lower price for non-covered overdraft credit would lead some consumers to use such credit more frequently on the margin. Nonetheless, very large financial institutions could take proactive measures to reduce such use, should they prefer that—such as by managing overdraft credit limits.

Commenters also stated that the analysis used to establish the proposed benchmark fee amounts failed to consider changes in market conditions. Specifically, these commenters noted that the analysis failed to consider how charge-off costs could increase during an economic downturn. At least one of these commenters also expressed concern that neither the benchmark fee nor the breakeven fee would be sufficient for very large financial institutions to recover losses incurred during an economic downturn. Additionally, several commenters noted that the proposed benchmark fee amounts failed to adjust for inflation.

To the extent that a very large financial institution determines that changes in market conditions, such as an economic downturn or inflation, make the benchmark fee too low, the final rule provides very large financial institutions with the flexibility to calculate their own breakeven pricing or to offer covered overdraft credit in compliance with the requirements of Regulation Z. The CFPB expects that very large financial institutions employing the breakeven standard during an economic downturn should

[195] *See* 89 FR 13852, 13893 (Feb. 22, 2024); part VII.E.1.iii of this rule.

be able to effectively manage their credit risk through traditional credit risk management practices, such as adjusting underwriting standards. Nevertheless, the CFPB will continue to monitor the market to determine whether adjustments to the benchmark fee or the breakeven standard are warranted.

E. Changes To Covered Overdraft Credit Offered by Very Large Financial Institutions

As discussed below, the CFPB is updating requirements that apply to covered overdraft credit offered by a very large financial institution by: (1) requiring covered overdraft credit to be structured as a separate account; (2) applying additional credit card provisions to covered overdraft credit that can be accessed by a hybrid debit-credit card; and (3) applying Regulation E's compulsory use prohibition to covered overdraft credit. For existing open-end covered overdraft credit products, the proposed new designation as covered overdraft credit accounts would not impose duplicative or additional account opening requirements.

1. Structure of Covered Overdraft Credit (§ 1026.62(c))

The CFPB proposed in § 1026.62(c) to prohibit a very large financial institution from structuring covered overdraft credit as a negative balance on a checking or other transaction account and to require the institution to structure covered overdraft credit as a separate credit account. The CFPB preliminarily determined that this structural requirement would make it easier for creditors and consumers to implement and understand, respectively, covered overdraft credit. For the reasons discussed below, the CFPB is finalizing § 1026.62(c) as proposed.

Comments Received

Several industry commenters opposed the CFPB's proposal. They argued that the requirement to structure overdraft as a separate account would substantially increase the cost of providing overdraft credit relative to the current cost of providing non-covered overdraft as a negative balance on the asset account. Some argued that the requirement was unreasonable or impractical in connection with most overdrafts, which are of small duration and amount.

Several consumer advocate commenters supported the CFPB's proposal. They argued that important TILA consumer protections, including the offset prohibition and the periodic statement disclosure and billing error resolution requirements, would be difficult or impossible for creditors to implement without separating a consumer's asset account from the consumer's linked covered overdraft credit. They also argued that the separate account structure would improve consumers' ability to know when they are accessing, and to decide whether they want to access, covered overdraft credit, as well as their ability to know when they are repaying, and to decide whether they want to repay, the overdraft credit. They argued that the current high cost of overdraft credit makes such consumer understanding and control particularly important. One nonprofit commenter observed that structuring covered overdraft as a credit account separate from the asset account is the way that overdraft lines of credit have worked since TILA's enactment in 1968 and is the way that checking accounts with linked credit card accounts work. This commenter agreed with the CFPB's proposal because, this commenter stated, the separation of the credit account from the asset account is a core element of TILA.

Final Rule

For the reasons discussed below, the CFPB is finalizing § 1026.62(c) as proposed. Final § 1026.62(c) prohibits a very large financial institution from structuring covered overdraft credit as a negative balance on a checking or other transaction account and requires the institution to structure covered overdraft credit as a separate credit account. The CFPB has determined that requiring the separation of a consumer's asset balance, such as a checking or other transaction account that is a ''covered asset account'' as defined in proposed § 1026.62(b)(2), from the consumer's credit balance, such as a credit account that is a ''covered overdraft credit account'' as defined in proposed § 1026.62(b)(4), is an appropriate addition to Regulation Z under its TILA section 105(a) authority, as it is necessary or proper to facilitate creditor compliance and to effectuate the purposes of TILA by helping to avoid the uninformed use of credit and protecting consumers against inaccurate and unfair credit billing and credit card practices.

The separate account structure requirement will enable institutions to comply with the requirements of TILA and Regulation Z, including, for example, the offset prohibition. It is not possible for an institution to maintain both a credit balance and an asset balance at the same time for a consumer within a single asset account that has no tied credit account or subaccount. It is therefore also not possible for the institution to provide overdraft credit to the consumer in a manner that complies with the Regulation Z offset prohibition without providing the consumer with a credit account or subaccount that is separate from the tied asset account.

Further, Regulation Z's open-end rules are generally drafted with the assumption that the product in question is a pure credit product, without substantial positive funds. For example, existing § 1026.11(a) generally provides that creditors must refund any positive balances on the credit account to the consumer within six months. As another example, the rules for defining finance charges in the credit card context generally treat all transaction charges as finance charges, which makes sense when all transactions are generally assumed to involve use of credit.

The separate account structure requirement will also avoid the uninformed use of credit by enabling consumers to better understand and monitor their asset and credit balances and trace how their funds are being used through more informative periodic statement disclosures, both for the asset account as required by Regulations E and DD and for the linked separate covered overdraft credit account as required by Regulation Z. The separate account structure will protect consumers from unfair credit billing and credit card practices by enabling them to control their funds. Specifically, the requirement will empower consumers to use funds from incoming deposits to their accounts for purposes other than immediately repaying an overdraft balance, as the offset prohibition requires institutions to permit consumers to do.

The CFPB has determined that the separate credit account structure by itself will not materially increase the cost of providing non-covered overdraft credit that will become covered overdraft credit under this final rule. This structure is demonstrably feasible today because very large financial institutions already have it in place for their overdraft lines of credit and for their credit cards linked to checking accounts. Indeed, creditors have structured their overdraft lines of credit in this manner since TILA's enactment. If a very large financial institution that today does not offer such lines of credit or linked credit cards seeks to provide above breakeven overdraft credit, the institution will be required to implement the separate account structure as part of doing so, when they will already be incurring costs for implementing other operational changes

to offer covered overdraft credit. The expected costs and benefits of these changes are discussed in part VII below. The CFPB has also determined that it will not be impractical for institutions to comply with the separate account requirement in connection with overdrafts of small duration and amount because these characteristics have nothing to do with the cost of the separate account structure requirement. For example, many credit card purchases are of small dollar amounts. These small purchases simply get incremented to the credit card account balance at virtually zero marginal cost. At some later time, funds are transferred from the consumer's asset account to repay the credit balance, again at virtually zero marginal cost.

2. Credit Card Changes

Credit cards and card issuers are generally subject to additional requirements in Regulation Z. The requirements that apply generally depend on whether the credit account (1) is a ''credit card account under an open-end (not home-secured) consumer credit plan'' under Regulation Z; or (2) can be accessed by a ''credit card'' or ''charge card,'' as those terms are defined under Regulation Z. Currently, a covered overdraft credit account that can be accessed by a debit card or other device that qualifies as a credit card (including certain account numbers) is subject to some Regulation Z requirements that apply to ''credit cards.'' Such covered overdraft credit, however, is not subject to requirements that apply to a ''credit card account under an open-end (not home-secured) consumer credit plan.'' It is also specifically excepted from some of the requirements that apply to ''credit cards.'' The CFPB proposed applying all credit card provisions generally to covered overdraft credit accounts if the credit account can be accessed by a hybrid debit-credit card, as defined in the proposal, namely a debit card offered by a very large financial institution. As discussed further below, the CFPB is finalizing these changes as proposed, such that the final rule applies all the credit card provisions to covered overdraft credit accounts if the credit account can be accessed by a hybrid debit-credit card.

i. Applying CARD Act Provisions of Regulation Z To Covered Overdraft Credit

The CFPB proposed subjecting all covered overdraft credit to the CARD Act provisions of Regulation Z in subparts B and G (the CARD Act provisions) if that credit is (1) open-end credit; (2) accessible by a credit card; and (3) offered by a very large financial institution. Currently, a debit card that can access covered overdraft credit is considered a credit card under Regulation Z and generally is subject to the Regulation Z provisions that apply to credit cards, but, because of two non-statutory exceptions, the overdraft credit is not subject to the CARD Act provisions.[196] The final rule subjects such credit to the CARD Act provisions when it is offered by very large financial institutions. To implement these changes, the rule adds a new definition of ''hybrid debit-credit card,'' amends the definitions of ''credit card'' and ''credit card account under an open-end (not home-secured) consumer credit plan,'' and makes other clarifying changes to the rule text and associated commentary.

Background on the CARD Act and Overdraft

As discussed in the proposed rule, the CARD Act amended TILA to institute new substantive and disclosure requirements to establish fair and transparent practices for open-end consumer credit card plans.[197] The statutory language of the CARD Act applies the protections broadly to credit card products that can access open-end consumer credit. The CARD Act generally applies to any ''credit card account under an open-end consumer credit plan.'' Absent two non-statutory exceptions, this broad language generally applies to open-end covered overdraft credit that is accessed by a credit card, including a debit card.

The Board implemented this statutory language in Regulation Z in 2010 through the term ''credit card account under an open-end (not home-secured) consumer credit plan.''[198] That term is defined in existing § 1026.2(a)(15)(ii) to generally mean an open-end credit account that is accessed by a credit card. The Board then used the term ''credit card account under an open-end (not home-secured) consumer credit plan'' in provisions of Regulation Z in subpart B and subpart G that were promulgated or amended to implement the CARD Act. Like the statutory definition, this regulatory definition would be broad enough so that the CARD Act provisions generally would apply to covered overdraft credit that is accessed by a credit card, including a debit card.

However, overdraft lines of credit are not subject to the CARD Act provisions in subpart B and subpart G that apply to a ''credit card account under an open-end (not home-secured) consumer credit plan'' because the Board adopted two non-statutory exceptions that exclude overdraft lines of credit from that definition. The exceptions in existing § 1026.2(a)(15)(ii)(B) and (C), respectively, are (1) an overdraft line of credit that is accessed by a debit card; and (2) an overdraft line of credit that is accessed by an account number other than an account number that is a hybrid prepaid-credit card that can access a covered separate credit feature as defined in § 1026.61. Although Regulation Z does not explicitly define ''overdraft line of credit,'' the term is generally understood to refer to an open-end credit product tied to an asset account. Funds are advanced from the credit product to pay for a withdrawal when the consumer withdraws more money than they have available in the asset account.

Aside from the CARD Act provisions in subpart B and subpart G, currently these overdraft line of credit products are generally subject to Regulation Z's open-end credit rules when the fees and other charges imposed on this product are finance charges. The existing

[196] 12 CFR 1026.2(a)(15)(i), (iv) and comment 2(a)(15)–2.i.B. Non-covered overdraft credit is not subject to Regulation Z, which includes the provisions applicable generally to credit cards and the provisions implementing the CARD Act, because (1) it is not subject to a finance charge or repayable by a written agreement in more than four installments and (2) a debit card that can access non-covered overdraft credit is not considered a credit card because, as existing comment 2(a)(15)–2.ii.A explains, a debit card with no credit feature or agreement is not a credit card even if the creditor occasionally honors an inadvertent overdraft. As discussed in the changes to the definition of finance charge section above, the final rule amends the definition of ''finance charge'' to expand the scope of covered overdraft credit, such that certain overdraft credit that is currently non-covered overdraft credit will be considered covered overdraft credit when this rule becomes effective. Like other covered overdraft credit, this newly covered overdraft credit will be generally subject to the Regulation Z provisions applicable to credit cards if the covered overdraft credit can be accessed by a credit card. However, without further changes, the non-statutory exceptions that exclude covered overdraft from being subject to the CARD Act provisions would prevent covered overdraft credit, including newly covered overdraft credit, from being subject to the CARD Act provisions. As discussed in this section, the final rule updates these non-statutory exceptions, which subjects certain covered overdraft credit, including certain newly covered overdraft credit, to the CARD Act provisions.

[197] Section 2 of the CARD Act expressly granted authority to the Federal Reserve Board to issue such rules as it considers necessary to the carry out the Act, and the CFPB now has that authority pursuant to the CFPA.

[198] *See* 75 FR 7658, 7663–65 (Feb. 22, 2010). The Board first implemented the statutory term ''credit card account under an open-end consumer credit plan'' in its July 2009 interim final rule, which, in relevant part, exempted home equity lines of credit from certain requirements of the CARD Act. 74 FR 36077, 36083 (July 22, 2009). The Board added the term ''credit card account under an open-end (not home-secured) consumer credit plan'' in its 2010 final rule.

overdraft-related exclusion in 12 CFR 1026.4(c)(3), which the CFPB is narrowing in this rulemaking, does *not* exclude overdraft products where ''the payment of [overdrawing] items and the imposition of the charge were previously agreed upon in writing.'' To the extent these overdraft line of credit products can be accessed by a debit card or other single credit device, the debit card or other single credit device is a ''credit card'' and is generally subject to provisions in Regulation Z that apply to a ''credit card.'' [199]

The Board acknowledged in its February 2010 rule that it believed that, as a general matter, Congress intended the CARD Act to apply broadly to products that meet the definition of a credit card.[200] The Board also acknowledged that a debit card that accesses an overdraft line of credit is a ''credit card.'' [201]

Nevertheless, the Board relied on its authority under TILA section 105(a) and section 2 of the CARD Act to create two exceptions for overdraft lines of credit, including one for debit cards that can access an overdraft line of credit. As a result of the exceptions, such accounts are not subject to the various CARD Act provisions in subpart B and subpart G that apply to a ''credit card account under an open-end (not home-secured) consumer credit plan.'' In creating the exceptions, the Board stated that, at the time, Regulation Z-covered overdraft lines of credit were not in wide use and that, as a general matter, creditors who offered overdraft lines of credit did not engage in some of the practices regulated by the CARD Act provisions with respect to those products.[202] The Board cited three examples of practices regulated by the CARD Act that were not currently present in the market: (1) increasing annual percentage rates, (2) applying different rates to different balances, and (3) allowing grace periods before charging interest. The Board did not specifically address other provisions, such as limitations on penalty fees, over-the-limit fees, and the requirement to assess ability to pay, which may have had an impact on practices involving overdraft lines of credit. Because of its assessment that the small market for overdraft lines of credit did not present substantial consumer protection concerns similar to those addressed by the CARD Act, the Board concluded that ''alternative forms of regulation'' such as Regulation E were ''better suited'' to protect consumers from harm with respect to those products.[203]

Hybrid Debit-Credit Card (§ 1026.62(b)(5)), Credit Card (§ 1026.2(a)(15)(i)), and Credit Card Account Under an Open-End (Not Home-Secured) Consumer Credit Plan (§ 1026.2(a)(15)(ii))

In § 1026.62(b)(5), the CFPB proposed defining the new term ''hybrid debit-credit card'' for clarity and ease of reference. It also proposed amending the definition of ''credit card'' in § 1026.2(a)(15)(i) and related commentary in 2(a)(15) to clarify what is and is not a credit card when certain credit devices can access covered overdraft credit. Under current Regulation Z, a debit card that can access an overdraft line of credit is a credit card.[204] The CFPB also proposed amending the definition of ''credit card account under an open-end (not home-secured) consumer credit plan'' in § 1026.2(a)(15)(ii) by narrowing the two overdraft-related exceptions so that open-end covered overdraft credit offered by a very large financial institution would no longer be excepted from the definition of a ''credit card account under an open-end (not home-secured) consumer credit plan.'' Such credit offered by a very large financial institution would be subject to the CARD Act provisions in subpart B and subpart G. This would include existing covered overdraft credit (currently commonly referred to as ''overdraft lines of credit'') and overdraft credit that would become covered overdraft credit because it is above breakeven overdraft credit.

Comments Received

Various commenters provided general feedback on the application of the credit card provisions. With regard to adding a new definition of ''hybrid debit-credit card,'' and amending the definitions of ''credit card,'' and ''credit card account under an open-end (not home-secured) consumer credit plan,'' several commenters, including consumer advocates as well as a trade group, wrote in support of these changes, with the consumer advocate commenters noting that the CFPB has authority under TILA and the CARD Act to make these changes, these changes are consistent with Regulation Z, and finance charges or four installments are not necessary for there to be a credit card. Some commenters, including a consumer advocate, a think tank, and a member of Congress, noted that debit cards that can access overdraft credit are credit cards under TILA and the CARD Act. At least one consumer advocate commenter also noted that the CFPB has the authority to bring all overdraft credit accessed through a device within the definition of credit card, regardless of the size of the fee or even the presence of any fee at all. These and other consumer advocate commenters support the CFPB eliminating the regulatory exceptions to bring the regulatory scheme closer to the plain meaning of the CARD Act, and to fulfill the consumer protection purposes of the CARD Act.

Many industry commenters opposed the application of the credit card rules to overdrafts, stating that there would be additional costs, complexity, and risk involved for very large financial institutions offering above breakeven overdraft credit. Industry commenters said consumers would also be harmed because they would be denied overdraft credit because of the CARD Act requirements, would see the cost of their asset accounts go up due to the cost of the credit card provisions, and would be confused by receiving periodic disclosures under both Regulation Z and Regulation E. One noted that while stronger regulations for overdraft lines of credit are needed, regulatory flexibility in the application of the credit card rules also was needed so as not to stifle innovation. This commenter and consumer advocate commenters questioned whether certain credit card provisions should not apply to or should be more flexible for overdrafts.

With regard to comments about using CFPB's statutory authority to expand Regulation Z credit card coverage to overdrafts that would be non-covered overdrafts under the final rule, for the reasons discussed further above, the CFPB declines to do so. The CFPB recognizes that the credit card provisions may result in additional costs, complexity and risk to very large financial institutions depending on how a very large financial institution chooses to price and structure its overdraft credit in response to this rule. However, the CFPB has determined that the regulatory exceptions from the statutory credit card provisions are no longer appropriate. While the Board created those exceptions based on the understanding that overdraft lines of credit were not in ''wide use'' at the time and did not include features common to other credit cards, the CFPB has determined that the prevalence or nature of a particular type of credit card should not render it

[199] *See* Regulation Z comment 2(a)(15)–2.i.B.

[200] *See* 75 FR 7658, 7664 (Feb. 22, 2010).

[201] *Id.*

[202] *Id.* at 7665.

[203] *Id.*

[204] *See* existing Regulation Z comment 2(a)(15)–2.i.B (stating that examples of credit cards include a debit card that also accesses a credit account).

beyond the scope of the CARD Act. By its plain terms, the CARD Act applies to all ''credit card account[s] under an open-end consumer credit plan,'' which, as noted above, includes open-end overdraft credit accessible by a credit card. In any event, the CFPB anticipates that the market for covered overdraft credit could react to the changes in this rule in several ways, including by offering covered overdraft lines of credit to many consumers who currently receive non-covered overdraft credit, including subprime consumers.

Very large financial institutions could also react to this rule by offering covered overdraft credit on different terms than those that have historically been offered. Similarly, other protections, such as the requirement to assess ability to pay, the fee limitations provision, and the limits on penalty fees, may become even more important if covered overdraft credit is offered to more subprime consumers.

The CFPB also has determined that the CARD Act provisions would provide important consumer protections to those consumers most likely to use covered overdraft credit accounts. Today, a small subset of consumers, whom the CFPB has in the past referred to as ''frequent overdrafters,'' incur most overdraft fees. In light of the final rule's treatment of the overdraft fee that a very large financial institution may charge for non-covered overdraft, the CFPB expects that some very large financial institutions may have reduced incentive to provide non-covered overdraft credit to the frequent overdraft consumers who typically have lower credit scores [205] and today incur the preponderance of overdraft fees. Instead of providing these consumers with non-covered overdraft credit, some very large financial institutions may provide these consumers with covered overdraft credit accounts—the accounts to which the rule would apply the CARD Act provisions—which would allow them the flexibility to charge more than the threshold that cannot be exceeded to remain non-covered overdraft credit.

The CFPB also has determined that applying the CARD Act provisions could provide important benefits to economically vulnerable consumers such as ''subprime'' consumers. Many of the provisions of the CARD Act target credit card practices affecting these consumers.[206] To the extent that some financial institutions would offer covered overdraft credit to more economically vulnerable consumers in response to the final rule, these CARD Act provisions would offer additional protections to consumers with a debit card that accesses overdraft credit. This will result in a consumer who uses a debit card to access overdraft credit—who often is a vulnerable consumer—receiving the same protections that a subprime credit card consumer receives today, consistent with the broad statutory language in the CARD Act.

With respect to comments about possible consumer confusion due to consumers receiving both monthly credit account disclosures and monthly asset account disclosures, Regulations Z, E and DD permit the required disclosures to be combined in one communication as long as the disclosures comply with the regulatory requirements.[207] As discussed further above, the addition of credit disclosures will further facilitate consumers' understanding of the cost of overdraft credit.

Final Rule

To prevent the market for Regulation Z-covered overdraft from posing consumer risks after the rule goes into effect, carry out the purposes of TILA by promoting the informed use of credit and protecting consumers against unfair credit card practices pursuant to TILA section 105(a), and carry out the CARD Act pursuant to section 2 of the CARD Act, the final rule subjects all covered overdraft credit to the CARD Act provisions in subpart B and subpart G if that credit is (1) open-end credit; (2) accessible by a credit card; and (3) offered by a very large financial institution.

The final rule defines ''hybrid debit-credit card'' in § 1026.62 to mean any card, plate, or other single credit device that a consumer may use from time to time to obtain covered overdraft credit from a very large financial institution. This definition describes a type of credit card that has two defining characteristics: (1) the credit card must be able to access covered overdraft credit; and (2) the covered overdraft credit must be offered by a very large financial institution. This definition would include, for example, a debit card that a consumer can use to complete transactions using funds drawn from an asset account held at a very large financial institution when that device can also be used to access covered overdraft credit.

TILA defines ''credit card'' as ''any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.'' [208] Section 1026.2(a)(15)(i) defines credit card as ''any card, plate, or other single credit device that may be used from time to time to obtain credit,'' which includes ''a hybrid prepaid-credit card as defined in § 1026.61.'' The final rule revises § 1026.2(a)(15)(i) to clarify that a debit card that can access a covered overdraft credit account is a credit card. Thus, under the rule, a debit card that can access a covered overdraft credit account is a hybrid debit-credit card, a hybrid debit-credit card is a credit card, and a debit card that can access a covered overdraft credit account is a credit card. As noted, under the extant regulation a debit card that can access an overdraft line of credit is a credit card. Consistent with these changes and to clarify what is not a credit card, the final rule amends comments 2(a)(15)–2.i.B, 2(a)(15)–2.i.A, 2(a)(15)–2.ii.C, and 2(a)(15)–2.ii.A and adds comment 2(a)(15)–2.ii.E. As proposed, and under current law, the final rule clarifies in comment 2(a)(15)–2.ii.C that an account number is a credit card when it can access covered overdraft credit if the account number can use the credit accessed to purchase goods and services. For example, if an institution permits a consumer to use the account number to initiate ACH transactions that can access credit to purchase goods and services, the account number is a credit card. This is so even if the institution declines the consumer's debit card transactions that would access credit if authorized.

The final rule also amends the definition of a ''card account under an open-end (not home-secured) consumer credit plan'' in § 1026.2(a)(15)(ii) by narrowing the two overdraft-related exceptions so that card-accessible open-end covered overdraft credit offered by a very large financial institution would no longer be excepted from the definition of a ''credit card account under an open-end (not home-secured) consumer credit plan.'' Such credit offered by a very large financial institution would be subject to the CARD Act provisions in subpart B and subpart G.

[205] *See* CFPB 2017 Data Point at 16 tbl.2; *see also* CFPB 2014 Data Point at 12 (showing non-overdrafters had a median credit score of 747, infrequent overdrafters had a median credit score of 654, occasional overdrafters had a median credit score of 610, moderately frequent overdrafters had a median credit score of 585, and very frequent overdrafters had a median credit score of 563.)

[206] *See, e.g.,* CARD Act section 105, entitled ''Standards applicable to initial issuance of subprime or 'fee harvester' cards.''

[207] *See* Regulation Z comment 5(a)(1)–2, Regulation E § 1005.4(b), and Regulation DD § 1030.3(a).

[208] 15 U.S.C. 1602(l).

Discussion of the Effect of Applying Regulation Z's CARD Act Provisions To Covered Overdraft Credit Accounts Accessed by a Hybrid Debit-Credit Card

The changes discussed above subject covered overdraft credit to the CARD Act provisions in subpart B and subpart G if that credit is accessible by a debit card and offered by a very large financial institution. In addition to the changes discussed above, the CFPB also proposed conforming and clarifying changes to the commentary for §§ 1026.55 and 1026.57 to reflect the changes discussed in this section. In particular, the CFPB proposed to add comment 55(a)–5 to clarify that the limitations on increasing annual percentage rates, fees, and charges apply to fees imposed in connection with covered overdraft credit whether those fees are imposed on the covered overdraft credit account or the associated covered asset account. Finally, the CFPB proposed to amend comment 57(a)(1)–1 so that it would continue to accurately reflect the exceptions from the definition of credit card issued under a credit card account under an open-end (not home-secured) consumer credit plan if changes to that definition are finalized as proposed. The CFPB is finalizing those changes as proposed.

As mentioned, various commenters provided general feedback on the application of the credit card provisions. A consumer advocate commenter noted its support and reasoning for applying each of the credit card provisions to hybrid debit-credit cards, including (but not limited to) provisions related to limitations on penalty fees (§ 1026.52(b)(1) and (b)(2)), the prohibition on increases in any APR, fee, or finance charge applicable to any outstanding balance on a credit card account (§ 1026.55), the requirement that card issuers reevaluate rate increases (§ 1026.59), and the requirement that institutions of higher education publicly disclose agreements with card issuers and limit the marketing of credit cards on or near college campuses (§ 1026.57). This commenter noted that other credit card provisions may not be applicable to debit cards that access overdraft credit as they are currently structured but that the provisions should apply as these cards or overdraft practices change. The commenter mentioned provisions including those regarding how a card issuer must allocate payments in excess of the minimum periodic payment (§ 1026.53), the limitation on card issuers imposing a finance charge as a result of the loss of a grace period (§ 1026.54), and the restriction on fees for over-the-limit transactions to one per billing cycle and the requirement that the consumer opt-in to payment of such transactions in order for the fee to be charged (§ 1026.56).

To the extent that commenters provided substantive comments on specific credit card provisions, they are discussed below.

Ability To Pay (§ 1026.51)

The ability to pay requirement in § 1026.51 requires assessment of the consumer's ability to pay the credit extended, such as covered overdraft credit, based on the consumer's income or assets and the consumer's current obligations.[209] It requires reasonable written policies and procedures to consider the consumer's ability to make the required minimum payments under the terms of the account based on a consumer's income or assets and a consumer's current obligations.[210] Reasonable policies and procedures also include consideration of at least one of the following: The ratio of debt obligations to income; the ratio of debt obligations to assets; or the income the consumer will have after paying debt obligations.[211] It would be unreasonable for a card issuer not to review any information about a consumer's income or assets and current obligations.[212] With regards to sources of information about a consumer's income or assets, the commentary states that the financial institution may consider information provided by the consumer in connection with the account, provided by the consumer in connection with any other financial relationship the card issuer or its affiliates have with the consumer, obtained through third parties, or obtained through any empirically derived, demonstrably and statistically sound model that reasonably estimates a consumer's income or assets.[213] The commentary also states that current or reasonably expected income also includes income that is deposited regularly into an account on which the consumer is an accountholder (*e.g.,* an individual deposit account or joint account).[214] With regard to sources of information about a consumer's obligations, the commentary states that the financial institution may consider the consumer's current obligations based on information provided by the consumer or in a consumer report.[215]

Some industry commenters, and an academic commenter, argued that applying the ability to pay provision to hybrid debit-credit cards would result in a pullback of overdraft credit for those consumers who need it the most. On the other hand, a consumer advocate commenter noted that the ability to pay requirement may be too weak and this minimal requirement would not result in consumers being denied overdraft credit.

While the ability to pay requirement provides important protections, this requirement is flexible. It requires the ability to repay the required minimum periodic payments, and does not set mandatory minimum ratios, such as a minimum debt to income ratio.[216] Furthermore, application of this provision will provide an incentive for financial institutions to structure and price covered overdraft credit such that consumers are better able to repay it, relative to current non-covered overdraft credit. To the extent that a consumer does not have the ability to repay covered overdraft credit, not extending overdraft credit to such a consumer is an important consumer protection because a consumer defaulting on the overdraft credit may mean losing their asset account.

One industry commenter noted that it was impractical to comply with the ability to pay provision for an overdraft credit extension of short duration and small amount. Another industry commenter stated that conducting the ability to pay analysis before each pay/no pay decision is unworkable. These comments appear to misunderstand the ability to pay requirement. This provision does not require an ability to pay analysis at the time of each transaction that may result in an extension of overdraft funds, just as it does not require an ability to pay analysis with each credit card transaction. Nor is the analysis based on the amount of time it actually takes the consumer to repay the transaction. In the credit card context, the ability to pay provision requires the ability to pay analysis to be conducted before the credit card account is opened, and the analysis be based on whether the consumer can make required minimum periodic payments.[217] As such, the same

[209] *See* 12 CFR 1026.51(a)(1)(i).

[210] 12 CFR 1026.51(a)(1)(ii).

[211] *Id.*

[212] *Id.*

[213] *See* Regulation Z comment 51(a)(1)(i)–5; *see also* comments –4 and –6.

[214] *See* Regulation Z comment 51(a)(1)(i)–4(ii).

[215] Regulation Z comment 51(a)(1)(i)–7.

[216] *See* 12 CFR 1026.51.

[217] *See* 12 CFR 1026.51(a)(i) (stating that "[a] card issuer must not *open* a credit card account for a consumer under an open-end (not home-secured) consumer credit plan . . . unless the card issuer considers the consumer's ability to make the

ability to pay analysis is conducted in the context of the opening of a hybrid debit-credit card, which is in advance of any transaction requiring an extension of overdraft funds.[218]

Several industry commenters noted that it would cost time and money to perform an ability to pay analysis, which may include obtaining a credit report, asking a consumer for information about their income/assets and obligations, and obtaining other information on income and expenses for each customer account. Commenters also stated that there would be a reduction in the consumer's credit score resulting from pulling the consumer's credit report, and that consumers would be confused about being asked for debt and income information by an institution seeking to provide a consumer with covered overdraft credit when the consumer is opening a deposit account. An industry commenter and a consumer advocate commenter stated that a source of income/asset or obligation information may include transaction data from asset or others accounts that a financial institution may already have for the particular consumer. In addition, a nonprofit commenter asked that the CFPB clarify that underwriting based on transactions in asset accounts connected to overdraft lines of credit would satisfy the ability to pay requirement even if the creditor does not specifically identify obligations from the account.

The ability to pay analysis is currently conducted for traditional credit cards. As such, consumers have familiarity with, and very large financial institutions that issue credit cards have policies and procedures to handle, the ability to pay process. The fact that asset account consumers may now go through the ability to pay process may underline for consumers that covered overdraft credit is a credit product and encourage comparison with other credit products and an intentional upfront decision whether to obtain overdraft credit. While there are costs associated with conducting an ability to pay analysis where a very large financial institution has not had to conduct such analysis, as some commenters noted, the ability to pay provision does not require the use of a credit report or the consumer as sources of information regarding income, assets, or obligations. The commentary lists sources of information that the financial institution may use but does not indicate that permissible sources are limited to those listed.[219] For example, for income or asset information, comment 51(a)(1)(i)–4(ii) contemplates consideration of income that is being deposited regularly into an account on which the consumer is an accountholder (*e.g.,* an individual deposit account or joint account). However, with any source of income, asset, or obligation information, Regulation Z requires that the financial institution have reasonable written policies and procedures in place to consider the consumer's ability to pay.[220] As such, the source of information must be reasonable.

If the consumer's asset account reflects the consumer's income and expenses, such an asset account, alone, may be a reasonable source of information about the consumer's income, assets, and obligations for the purpose of analyzing the consumer's ability to make the required minimum payments under the terms of the hybrid debit-credit card. In this circumstance, a financial institution would not have to obtain a credit report or ask the consumer for this information. To comply with the ability to pay requirements, a financial institution could use this kind of transaction data from the accounts it maintains on behalf of the consumer, and/or it could use transaction data provided by a different financial institution if the consumer authorized its transmittal using the rights recently finalized in the Personal Financial Data Rights Rule.[221] The ability to pay provision requires that the financial institution use this transaction data to consider the ratio of debt obligations to income, the ratio of debt obligations to assets, or the income the consumer will have after paying debt obligations.[222]

Limitation on Fees During First Year After Account Opening (§ 1026.52(a))

Section 1026.52(a) limits the amount of certain fees, such as overdraft fees, that an issuer can charge during the first year after opening of a credit account, such as a covered overdraft credit account, to 25 percent of the credit limit. This restriction does not apply to charges assessed as periodic rates. An account is considered open no earlier than the date on which the account may first be used by the consumer to engage in transactions.

One industry commenter opposed application of this provision, stating that this provision was meant for low-limit high-fee credit cards and not for overdraft credit. This commenter along with an academic commenter stated that application to overdraft credit would make it difficult for financial institutions to offer overdraft credit to consumers who would not qualify for a high credit limit. A consumer advocate commenter wrote in support of applying this provision, noting that application of this provision would prevent high fees from consuming a large portion of the credit line and would likely result in financial institutions moving costs into the interest rate and hence the disclosed APR. This commenter asked for clarification that this provision applies to asset accounts that are more than one year old at the time of the effective date. It also asked that the CFPB extend the limitation to beyond one year for hybrid debit-credit cards.

Regulation Z applies the first-year-fee limitation to all credit cards out of a concern that the practice of charging fees that are more than 25 percent of the credit limit would spread beyond subprime cards.[223] To be consistent with other credit cards, the final rule also applies this limitation to hybrid debit-credit cards.

With respect to concerns about credit availability for consumers who do not qualify for a high credit limit, the first-year-fee limitation may provide an incentive for financial institutions to reduce or eliminate flat fees for overdraft and to instead apply periodic rates that must be disclosed as APRs. Doing so may improve consumers' ability to understand the price of the overdraft credit, and to compare it to the pricing of other forms of credit that the consumers might wish to consider.

With regard to when to start measuring the one year, the fee limitation applies starting no earlier than the date on which a *credit* card

required minimum periodic payments . . . .'' (emphasis added)).

[218] The ability to pay analysis is also required prior to a credit line increase. *See* 12 CFR 1026.51(a)(i).

[219] *See* Regulation Z comments 51(a)(1)(i)–5 and –7.

[220] *See* 12 CFR 1026.51(a)(1)(ii).

[221] *See* 89 FR 90838 (Nov. 18, 2024).

[222] *Id.*

[223] *See* Board's Regulation Z final rule implementing the CARD Act, 75 FR 7658, 7724–25 (Feb. 22, 2010) discussing this particular provision, stating ''However, while new TILA Section 127(n) is titled 'Standards Applicable to Initial Issuance of Subprime or 'Fee Harvester' Cards,' nothing in the statutory text limits its application to a particular type of credit card. Instead . . . it appears that Congress intended Section 127(n) to apply to a broad range of fees regardless of the type of credit card account. Although the practice of charging fees that represent a high percentage of the credit limit is generally limited to subprime cards at present, it appears that Congress intended Section 127(n) to prevent this practice from spreading to other types of credit card products. Accordingly, although the Board understands that complying with Section 127(n) may impose a significant burden on card issuers, the Board does not believe that this burden warrants a different interpretation of Section 127(n).''

account may first be used by a consumer to engage in transactions.[224] The date on which an *asset* account is opened is not relevant to the determination of when a tied credit account may first be used by the consumer to engage in transactions. For asset accounts with debit cards in existence prior to the effective date of this final rule that include non-covered overdraft credit (but not covered overdraft credit), the one year period starts no earlier than when that debit card becomes a hybrid debit-credit card for the consumer. The debit card becomes a hybrid debit-credit card when the consumer may first engage in a transaction that accesses a tied covered overdraft credit account.

For example, assume that prior to the effective date of the CFPB's rule, a very large financial institution provides non-covered overdraft credit that is considered above breakeven debit card overdraft credit. Assume further that the institution seeks to continue to provide the consumer above breakeven overdraft credit via the card subsequent to the effective date. Because such debit card will legally be a hybrid debit-credit card on the effective date of this rule, to charge above breakeven overdraft fees beyond that date, the institution must comply with the Regulation Z credit card requirements, including the fee limitation requirement for one year from the date of credit card account opening. However, if prior to the effective date of the CFPB's rule a very large financial institution is providing a covered overdraft credit account—*i.e.,* an overdraft line of credit—accessible by a credit card, such institution would not be required to comply with the credit account opening requirements (*e.g.,* account opening disclosures, the ability to pay requirement, and the limitation on fees during the first year after account opening) solely because this rule goes into effect, as discussed in the Effective Date section below. Nonetheless, the institution must comply with ongoing credit account requirements (*e.g.,* the requirements that the ability to pay analysis be conducted prior to a credit line increase, that the payment due date be the same each month, that disclosures be delivered 21 days before due date, and that card agreements be submitted to the CFPB on a quarterly basis).

The CFPB does not currently see a reason to introduce inconsistency into the credit card provisions by applying this limitation on fees beyond one year from credit card account opening for hybrid debit-credit cards.

[224] *See* 12 CFR 1026.52(a)(1).

Limitations on Penalty Fees (§ 1026.52(b))

Section 1026.52(b) regulates the imposition of penalty fees on a credit card account under an open-end (not home-secured) consumer credit plan. TILA refers to a ''penalty fee'' as a fee imposed ''in connection with any omission with respect to, or violation of, the cardholder agreement,'' and it permits only a penalty fee that is ''reasonable and proportional to the amount of such omission or violation.'' [225] Consistent with this statutory language, Regulation Z defines a ''penalty fee'' as ''any charge imposed by a card issuer based on an act or omission that violates the terms of the account or any other requirements imposed by the card issuer with respect to the account, other than charges attributable to periodic interest rates.'' [226] Section 1026.52(b)(1) permits a card issuer to impose a penalty fee as long as that fee represents a ''reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation'' or complies with dollar amounts specified in a safe harbor provision.[227] Section 1026.52(b)(2), meanwhile, prohibits a penalty fee that exceeds the dollar amount associated with the violation or where there is no dollar amount associated with the violation.[228] In particular, § 1026.52(b)(2)(i)(B)(1) prohibits any fee charged in connection with a credit card account for a ''transaction that a card issuer declines to authorize.'' As a result of this overdraft rule, the CARD Act's penalty fee provision will prohibit fees for declined transactions when a very large financial institution provides a covered overdraft credit account that is accessible by a hybrid debit-credit card or other credit card—*i.e.,* a credit card account.

When applied to a covered overdraft credit account accessed by a hybrid debit-credit card, § 1026.52(b)(2)(B)(1) would prohibit most declined transaction fees imposed with respect to a declined transaction that, if paid, would have overdrawn a particular consumer's asset account. When covered overdraft credit is accessible by a hybrid debit-credit card, the CFPB has determined that a fee imposed when a potentially overdrafting transaction is declined, such as a nonsufficient funds (NSF) fee, is a penalty fee.

[225] CARD Act section 102, TILA section 149, 15 U.S.C. 1665d(a).

[226] Regulation Z comment 52(b)–1.

[227] 12 CFR 1026.52(b)(1)(i)–(ii).

[228] Section 1026.52(b)(2) also bans the imposition of multiple fees for the same violation. 12 CFR 1026.52(b)(2)(ii).

Thus, for a covered overdraft account accessed by a hybrid debit-credit card, 15 U.S.C. 1665d(a) and § 1026.52(b) would prohibit any fee for a potentially overdrawing transaction that the card issuer declines to authorize. This would include declined debit card transactions as well as declined ACH or other transactions. However, as explained in comment 52(b)(2)(i)–4, the prohibition on fees for transactions that a card issuer declines to authorize does not extend to fees imposed for declining a ''check that can access a credit card account.'' [229] The CFPB has determined that applying § 1026.52(b) to a covered overdraft account accessed by a hybrid debit-credit card similarly would permit fees imposed when a card issuer declines a check on an asset account with an attached covered overdraft credit account as long as those fees satisfy the restrictions in § 1026.52(b)(1).

With respect to declined transactions other than declined check transactions, the CFPB has determined that the Board's rationale in adopting § 1026.52(b)(2) continues to apply. That is, it appears that there is no dollar amount associated with a declined transaction and the imposition of the fee does not appear to be related to costs incurred by the card issuer. The CFPB recognizes that it may be possible that such fees could have a deterrent effect or could affect that consumer's conduct in certain limited situations. However, there does not appear to be any need for the financial institution to attempt to deter or influence the consumer's conduct in this situation, particularly in light of minimal costs and risks to the card issuer. With respect to costs, because the mechanism for authorizing or declining a transaction is generally automated, the CFPB understands that declining transactions imposes very minimal or no costs, which would not support imposing a penalty fee. The CFPB understands this to be the case across several payment channels, including for payments initiated via debit card, payments occurring on an ACH network, and other online payments. To the extent there are certain minimal costs associated with automated authorization and declination of transactions generally, card issuers can consider whether other sources of revenue might allow them to recoup those costs.

The CFPB notes that these considerations may apply equally to declined checks. Nonetheless, the CFPB is not at this time reconsidering the Board's prior decision to permit some amount of a fee in connection with

[229] Regulation Z comment 52(b)(2)(i)–4.

declining to pay a check that accesses a credit card account. This rule applies the same approach to checks issued in connection with a covered asset account tied to a covered overdraft credit account accessible by a hybrid debit-credit card.

Only one commenter provided comment on this provision, and did so in support of its application to a covered overdraft credit account accessed by a hybrid debit-credit card. After considering the comments and the factors in 15 U.S.C. 1665d(c), the CFPB is not amending § 1026.52(b) and is finalizing the rule to apply § 1026.52(b) to covered overdraft credit accounts accessed by hybrid debit-credit cards.

Submission of Card Agreements (§ 1026.58)

Section 1026.58 requires financial institutions to submit credit card agreements to the CFPB on a quarterly basis. An industry commenter questioned whether including covered overdraft credit account agreements in a credit card account agreement database would create more confusion than value. On the other hand, a consumer advocate commenter stated that collecting the agreements and making them public would promote transparency and a better understanding of the hybrid debit-credit card market. For consistency with other credit cards and for transparency to the benefit of consumers, the CFPB has determined to apply this provision to covered overdraft credit accounts accessible by hybrid debit-credit cards.

Disclosure-Related Requirements

The CARD Act also applies special rules to disclosure-related requirements in subpart B and subpart G with respect to covered overdraft credit accounts accessed by a hybrid debit-credit card. These provisions include disclosure requirements for account opening disclosures (§ 1026.6(b)), periodic statements (§ 1026.7(b)), and timing for disclosures (§ 1026.5(b)).

One industry commenter suggested that the CFPB consider whether all credit card-specific disclosure requirements are appropriate for overdraft lines of credit or whether exceptions or modifications are appropriate. Another industry commenter said that calculating the APR for each overdraft fee would be impractical for an overdraft fee of short duration and small amount, apparently inaccurately assuming that, under Regulation Z, the APR for open-end credit includes charges other than the periodic rate. A consumer advocate commenter supported application of the solicitation and application disclosure requirements to hybrid debit-credit cards to promote meaningful and uniform disclosure of credit terms.

The CFPB has determined that Regulation Z and its commentary provide sufficient flexibility and instructions for a financial institution to meet the disclosure requirements in a manner appropriate for the particular credit card product the institution is offering. Regulation Z subpart B and subpart G, the related commentary, and the appendix G model and sample disclosures provide extensive instructions and guidance on the disclosure requirements. As such, modifications or exceptions to the disclosure requirements for hybrid debit-credit cards and additional guidance for complying with the requirements are not necessary. Consistency in the credit card disclosure requirements, including the APR and fee disclosures, will assist consumers in comparing the cost of various credit cards and various credit products.

Section 1026.7(b)(11) requires that the payment due date be the same day of the month for each billing cycle. As such the interval between due dates can be no shorter than monthly. In addition, § 1026.5(b)(2)(ii) requires that periodic statements be mailed or delivered at least 21 days prior to the payment due date disclosed on the periodic statement. One industry commenter noted that application of these requirements and the offset prohibition increase the credit risk to financial institutions of offering overdraft credit. Another industry commenter suggested that payments for small dollar lines of credit be permitted to be scheduled bi-weekly or semi-monthly and for the repayment period to be less than 21 days after a statement is delivered or mailed. On the other hand, a consumer advocate commenter supported application of the existing repayment requirement at 21 days and same-day due date each month (as well as the offset prohibition) because it would give consumers a reasonable time period to pay their hybrid debit-credit card and give the consumers certainty on their payment due date for budgeting purposes.

The CFPB has determined that a special exception to the credit card timing requirements for billing cycles, periodic statements, and due dates is not warranted for covered overdraft credit accounts accessed by hybrid debit-credit cards. Hybrid debit-credit card consumers should have these same consumer protections as other credit card consumers.

ii. Special Credit Card Provisions (§ 1026.12)

Existing § 1026.12 contains special rules applicable to credit cards and credit card accounts, including rules regarding the conditions under which a credit card may be issued, the liability of cardholders for unauthorized use, cardholder rights to assert against the card issuer claims and defenses that the cardholder has against the merchant, and the prohibition on offsets by issuers. Existing § 1026.12(a) and (b) are exceptions to the general rule that Regulation Z applies only to consumer credit. The CFPB did not propose to change the regulatory text of existing § 1026.12.

However, the CFPB proposed to revise comment 12–1 on the scope of § 1026.12 to clarify that the provisions of § 1026.12 relating to card issuance and liability apply to hybrid debit-credit cards. Specifically, the CFPB proposed to add a sentence to comment 12–1 clarifying that paragraphs (a) through (f) of § 1026.12 apply to hybrid debit-credit cards notwithstanding paragraph (g) of § 1026.12. Paragraph (g) addresses whether Regulation Z or Regulation E controls in instances where a transaction involves both credit and electronic fund transfer aspects.

The CFPB received few comments on the proposed changes to § 1026.12 and its commentary and no comments indicating a need to adjust the proposed language in comment 12–1. A consumer advocate commenter supported the revised comment, stating that the attendant protections are equally important for consumers who use overdraft credit on hybrid debit-credit cards. Therefore, for the reasons discussed in the proposal and above, the CFPB is finalizing comment 12–1 as proposed but with the addition of a cite to the definition of hybrid debit-credit cards, for convenience. Proposed changes to additional guidance on unsolicited issuance in § 1026.12(a) and the right of a cardholder to assert claims or defenses against a card issuer in § 1026.12(c) are discussed below.

iii. Clarification to Issuance of Credit Cards (§ 1026.12(a))

TILA section 132 generally prohibits creditors from issuing credit cards except in response to a request or an application. TILA section 132 explicitly exempts credit cards issued as renewals of or substitutes for previously accepted credit cards from this prohibition.[230] Section 1026.12(a) of Regulation Z implements TILA section 132 and

[230] 15 U.S.C. 1642.

provides that regardless of the purpose for which a credit card is to be used, including business, commercial, or agricultural use, no credit card shall be issued to any person except: (1) in response to an oral or written request or application for the card; or (2) as a renewal of, or substitute for, an accepted credit card.

The CFPB did not propose changes to the existing regulatory text for § 1026.12(a). It did, however, propose certain revisions to related commentary to clarify how the prohibition on issuing unsolicited credit cards applies to hybrid debit-credit cards.

Clarifications to Explicit Request Requirement (§ 1026.12(a)(1))

As discussed above, under the proposal and as finalized in this rule, a hybrid debit-credit card is a credit card that a consumer may use from time to time to obtain covered overdraft credit from a very large financial institution. To the extent that covered overdraft credit from a very large financial institution would be accessible through a hybrid debit-credit card, a request for such credit would constitute an application for a credit card with overdraft features. Therefore, the prohibition set forth in § 1026.12(a)(1) on issuing a credit card except in response to an oral or written request or application for the card applies to hybrid debit-credit cards.

Existing comment 12(a)(1)–1 states that the request or application for a card must be explicit and that a request for an overdraft plan tied to a checking account does not constitute an application for a credit card with overdraft checking features. The CFPB proposed to revise comment 12(a)(1)–1 to clarify that a very large financial institution cannot issue a hybrid debit-credit card to a person without first receiving an oral or written request or application from that person for the hybrid debit-credit card.

A consumer advocate commenter supported the proposed clarification, stating that it promotes TILA's purposes of ensuring the informed use of credit and prevents creditors from pushing on people credit that they may not want. The commenter further asserted that unwanted or unsolicited credit could lead to problems managing finances, damage to credit reports, debt collection harassment, and other harms, and that ensuring the informed and desired use of overdraft credit is important for hybrid debit-credit cards just as it is for other credit cards.

For the same reasons, the consumer advocate commenter supported the changes the CFPB proposed to existing comment 12(a)(1)–2, which explains that the addition of a credit feature or plan to a non-credit card that would turn that card into a credit card under § 1026.2(a)(15)(i) constitutes issuance of a credit card. The commenter further noted that consumers should not have overdraft credit features added to their asset accounts without their request. Comment 12(a)(1)–2 currently provides two examples of when the addition of credit features constitutes issuance of a credit card. Proposed comment 12(a)(1)–2.iii set out the scenario of extending covered overdraft credit through a hybrid debit-credit card as a third example of an action that would constitute issuance of a credit card.

Because the clarification promotes TILA's purposes of ensuring the informed use of credit and for the reasons discussed above, the CFPB is finalizing the proposed changes to the commentary for paragraph 12(a)(1) with only nonsubstantive changes. As explained in the proposed rule, if a very large financial institution initially allowed a consumer to use a debit card to access overdraft credit that is not "covered overdraft credit" as defined in § 1026.62, the very large financial institution would be issuing a credit card if it then allowed the consumer to use the same card to access covered overdraft credit. Under that illustration, the debit card would convert into a hybrid debit-credit card that is a credit card under § 1026.2(a)(15)(i) and is subject to the issuance limitations in § 1026.12(a).

Clarifications to Replacement Card Requirements (§ 1026.12(a)(2))

As an additional exception to the general prohibition on the unsolicited issuance of a credit card, § 1026.12(a)(2) allows the issuance of a credit card to a person when the card is issued as a renewal of, or substitute for, an already accepted credit card. Existing comment 12(a)(2)–5 (the so-called one-for-one rule) explains that an accepted card generally may be replaced by no more than one renewal or substitute card. For example, the card issuer may not replace a credit card permitting purchases and cash advances with two cards, one for the purchases and another for the cash advances. However, comment 12(a)(2)–6 currently provides three exceptions to the one-for-one rule. In particular, existing comment 12(a)(2)–6.i explains that the unsolicited issuance rule in § 1026.12(a) does not prohibit the card issuer from replacing a single card that is both a debit card and a credit card with a credit card and separate card with only debit functions (or debit functions plus an associated overdraft capability), since the card with only debit functions could be issued on an unsolicited basis under Regulation E.

The CFPB proposed to revise comment 12(a)(2)–6.i in two respects. First, a revision would add a clarification that a hybrid debit-credit card is an example of a single card that is both a debit card and a credit card. Second, language in an existing parenthetical that addresses debit functions and associated access to overdraft credit would be revised to align terminology relating to overdraft credit across Regulation Z, in light of the proposed amendments. Specifically, the CFPB proposed to remove the phrase "an associated overdraft capability" and replace it with the phrase "an associated capability to extend overdraft credit that is not covered overdraft credit as defined in § 1026.62." The revision to the terminology in the parenthetical would not change how the provision applies to card issuers. Rather, the purpose of these proposed revisions is to clarify that a very large financial institution may replace a hybrid debit-credit card with a credit card and a separate debit card so long as the separate debit card does not provide the capability to extend covered overdraft credit (*i.e.,* overdraft that is subject to a finance charge or payable by written agreement in more than four installments).

The CFPB received no comments on the proposed revision of comment 12(a)(2)–6.i and, because the clarification promotes TILA's purposes of ensuring the informed use of credit, is finalizing the revision as proposed. The CFPB did not propose, and has not made, changes to the two other existing exceptions to the one-for-one rule in comments 12(a)(2)–6.ii and –6.iii.

iv. Right of Cardholder To Assert Claims or Defenses Against Card Issuer (§ 1026.12(c))

When a cardholder has a dispute with a person honoring the credit card, TILA section 170 generally provides that the cardholder may assert against the card issuer all claims (other than tort claims) and defenses arising out of the transaction.[231] Regulation Z § 1026.12(c) implements this section of TILA.

TILA does not except overdraft credit from the scope of cardholders' right to assert claims or defenses against card issuers. However, in 1981 the Board created a non-statutory exception for the use of a debit card in connection with an overdraft credit plan.[232] This

[231] 15 U.S.C. 1666i.

[232] 46 FR 20848, 20865 (Apr. 7, 1981).

exception is in existing comment 12(c)–3.

As discussed above, the CFPB proposed to update exceptions in Regulation Z and thus increase consumer protections that apply to covered overdraft credit offered by very large financial institutions. Accordingly, the CFPB proposed to narrow the overdraft exception in comment 12(c)–3 such that a ''hybrid debit-credit card'' would be covered by the consumer protections in § 1026.12(c). As discussed above, under § 1026.62(b)(5) a ''hybrid debit-credit card'' includes a debit card that a consumer may use from time to time to obtain covered overdraft credit from a very large financial institution. The CFPB further proposed conforming revisions to the commentary for § 1026.12(c)(1).

The CFPB received few comments on the proposal to apply the consumer protections in § 1026.12(c) to hybrid debit-credit cards. A consumer advocate commenter supported the proposal and stated that these consumer protections are important whether the payment is made by a credit card drawing on overdraft credit or on other credit. The commenter asserted that these consumer protections give card issuers greater incentive to vet and monitor the merchants who they authorize to accept their cards because it makes the card issuers more accountable for the merchants' conduct. The commenter further asserted that both credit and debit cards are issued on the same major networks and vetting and monitoring of the merchants that card issuers authorize to accept their cards already takes place and applies to both debit and credit cards. The commenter stated that the existing exception for hybrid debit-credit cards in comment 12(c)–3 is not in the TILA statute and the CFPB has the authority to remove or narrow the exception. The commenter further stated that, while the Board noted operational problems cited by commenters in 1981 when the Board added the exception in existing comment 12(c)–3, card issuers—particularly very large financial institutions covered by the definition of ''hybrid debit-credit card''—have far greater technology and resources today to address operational issues than they did over 40 years ago.

A nonprofit commenter suggested without explanation that a § 1026.12(c) exception for hybrid debit-credit cards could provide room for innovative and affordable small dollar overdraft line of credit products.

For the reasons stated below, the CFPB is finalizing comment 12(c)–3, as well as the conforming revisions to the commentary for § 1026.12(c)(1), as proposed. Consistent with TILA, the CFPB has determined that the consumer protections in § 1026.12(c) are important whether a credit card accesses covered overdraft credit or another type of credit from a very large financial institution. Moreover, the CFPB has determined that the rule provides room for innovative and affordable overdraft credit and that operational concerns alluded to by the Board in 1981 no longer justify the overdraft exception that the Board added in comment 12(c)–3, particularly for very large financial institutions, given advances in information technology systems over the last 40 years. The existing exception would not change for financial institutions with total assets of $10 billion or less.

v. Credit Card Applications and Solicitations (§ 1026.60)

Existing § 1026.60 includes certain requirements related to applications and solicitations for credit cards. Among other things, it requires certain disclosures in connection with credit card applications and solicitations and prescribes content and format of the application or solicitation. Existing § 1026.60(a)(5) excepts certain types of credit from the requirements of § 1026.60, including § 1026.60(a)(5)(ii), which excepts overdraft lines of credit tied to asset accounts accessed by check-guarantee cards or by debit cards; § 1026.60(a)(5)(iii), which excepts lines of credit accessed by check-guarantee cards or by debit cards that can be used only at automated teller machines; and § 1026.60(a)(5)(iv), which excepts lines of credit accessed solely by account numbers except for a covered separate credit feature solely accessible by an account number that is a hybrid prepaid-debit card as defined in § 1026.61.

The CFPB proposed to amend § 1026.60 to narrow the exception for overdraft lines of credit. Specifically, the proposal would amend § 1026.60(a)(5)(ii), (iii), and (iv) so that those exceptions would not apply to covered overdraft credit accessed by a hybrid debit-credit card. As explained above, the CFPB is defining a ''hybrid debit-credit card'' as any card (including a debit card) that can access covered overdraft credit offered by a very large financial institution. Accordingly, the proposed amendments to § 1026.60(a)(5)(ii), (iii), and (iv) would narrow the exception so that the requirements of § 1026.60 would apply to covered overdraft credit offered by a very large financial institution when that credit can be accessed by any card, including a debit card.

For the reasons stated below, the CFPB is finalizing the changes to § 1026.60 as proposed.

Comments Received

As discussed in the disclosure-related requirements discussion in the CARD Act section above, the CFPB received several comments about the application of disclosure-related requirements to covered overdraft credit that can be accessed by a hybrid debit-credit card. With respect to § 1026.60, for example, an industry commenter said that more guidance is needed. For example, this industry commenter noted that many of the APR and fee disclosures would show ''$0'' for all except the overdraft fee. The commenter noted that the commentary states that disclosures need only be given as applicable but the proposed rule did not state how financial institutions should adapt the forms for overdraft credit.

Final Rule

For the reasons discussed below, the CFPB is finalizing amendments to § 1026.60 as proposed. The requirements in § 1026.60 implement provisions of the Fair Credit and Charge Card Disclosure Act of 1988.[233] The purpose of the law was to provide for more detailed and uniform disclosures of rates and other cost information in applications and in solicitations to open credit and charge card accounts. The statute applies the disclosure requirements broadly to any application to open a credit card account for any person under an open-end consumer credit plan or to a solicitation to open such an account without requiring an application. In implementing the statutory requirements, the Board narrowed the scope of coverage by adopting the exceptions in what is now § 1026.60(a)(5), determining that the requirements should apply only to ''traditional'' credit or charge accounts that are used primarily to purchase goods and services.[234]

The CFPB has determined that, as with the CARD Act provisions, covered overdraft offered by a very large financial institution that is accessible by a hybrid debit-credit card should be subject to the requirements of § 1026.60. In excepting certain types of credit from those requirements, the Board noted only that the requirements should apply only to ''traditional'' credit cards that are used to purchase goods and services. However, given the expanded use of debit cards to purchase goods and

[233] Public Law 100–583, 102 Stat. 2960 (Nov. 3, 1988).

[234] 54 FR 13855, 13856–57 (Apr. 6, 1989).

services, many of which are linked to accounts that offer overdraft credit, the distinction between ''traditional'' credit cards and debit cards that can access overdraft credit appears far less clear. The CFPB has determined that the requirements of § 1026.60 should be applied consistent with the broad statutory language to cards that can access covered overdraft credit, and that doing so will carry out the purposes of TILA by assuring a meaningful disclosure of credit terms and avoiding the uninformed use of credit.

As noted in the discussion of the CARD Act disclosure requirements above, with respect to comments that more guidance is needed, the CFPB reviewed the credit card disclosure requirements and determined that Regulation Z and its staff commentary provide sufficient flexibility and instructions for a financial institution to meet the disclosure requirements in a manner appropriate for the particular credit card product the institution is offering. As one of the industry commenters accurately noted, for § 1026.60's application and solicitation disclosures, comment 60(a)(2)–4 states that generally, disclosures need only be given as applicable. In addition, Regulation Z subpart B and subpart G, the related staff commentary, and appendix G model and sample disclosures provide extensive instructions and guidance on the disclosure requirements. As such, modifications or exceptions to the disclosure requirements for hybrid debit-credit cards and additional guidance for complying with the requirements are not necessary. Consistency in the credit card disclosure requirements, including the APR and fee disclosures, will assist consumers in comparing the cost of various credit cards and various credit products.

vi. ''Charge Card'' (§ 1026.2(a)(15)(iii))

The CFPB proposed to amend the definition of ''charge card'' in § 1026.2(a)(15)(iii) to exclude a hybrid debit-credit card from the definition. Under the proposed amendment, a hybrid debit-credit card would be subject to the same disclosure and other rules as other credit cards, rather than certain special rules for charge cards. The CFPB proposed the amendment because it preliminarily determined that consumers using hybrid debit-credit cards would benefit from the TILA and Regulation Z provisions that apply to credit cards generally.

The CFPB did not receive any comments on the proposed change to the definition of charge card and is finalizing this definition as proposed for the reasons stated below.

TILA defines ''charge card'' as ''a card, plate, or other single credit device that may be used from time to time to obtain credit which is not subject to a finance charge.'' [235] Because hybrid debit-credit cards would generally access credit that is subject to a finance charge, they do not fit within the statutory definition of charge card. The term ''charge card'' was introduced into TILA with the Fair Credit and Charge Card Disclosure Act of 1988, which amended TILA to define ''charge card'' as ''a card, plate, or other single credit device that may be used from time to time to obtain credit *which is not subject to a finance charge*'' (emphasis added).[236] In its rule implementing the 1988 act, the Board expanded the definition of ''charge card'' such that, in Regulation Z, the definition includes any card on which *there is no periodic rate*.[237] In other words, a card with a finance charge that is not a periodic rate is excluded from the statutory charge card definition but is included within the Regulation Z definition of that term. The Board sought to address a perceived inconsistency between that statutory definition and the fact that some disclosure provisions that apply to charge cards reference finance charges.

Under both the statutory and regulatory definitions, a charge card is a type of credit card. Thus, where Regulation Z provisions apply to credit cards, the provisions also generally apply to charge cards. However, in specific provisions, which are listed in comment 2(a)(15)–3.i, the term charge card is distinguished from credit card such that different requirements apply. One example of such a provision is § 1026.7(b)(11), which, in accordance with TILA, requires on credit card periodic statements the disclosure of a payment due date and requires that that date be the same day of the month for each billing cycle. The Board in Regulation Z excluded charge cards from these requirements.[238] The CFPB has determined, however, that these requirements should apply to a debit card that can access a covered overdraft credit account (*i.e.,* a hybrid debit-credit card). The CFPB accordingly is excluding hybrid debit-credit cards from the Regulation Z definition of charge card. This approach is consistent with TILA; in applying the TILA and Regulation Z credit card provisions to debit cards that can access covered overdraft, the CFPB is merely declining to exercise its regulatory authority to implement TILA with respect to hybrid debit-credit cards in the ways that the Board previously did with respect to charge cards.

The CFPB understands that charge cards are typically offered to higher income individuals with prime or super-prime credit, and they often have no set credit limit.[239] In contrast, current users of non-covered overdraft credit often are lower-income consumers with lower credit scores.[240] Subsequent to the CFPB's proposal, many of these consumers may be offered hybrid debit-credit cards, which will access covered overdraft credit that typically will be subject to finance charges, and therefore do *not* fit the statutory definition of a ''charge card.'' Accordingly, consistent with TILA, and to ensure that consumers who use covered overdraft credit benefit from the full protection of the Regulation Z credit card rules, the CFPB is amending the regulatory definition of ''charge card'' such that a 'hybrid debit-credit card' will *not* be within the credit card subset ''charge card'' but will nonetheless remain in the larger set ''credit card.'' This will ensure that a hybrid debit-credit card that accesses covered overdraft credit offered by a very large financial institution will be subject to the same disclosure and other rules as other credit cards, including the § 1026.7(b)(11) requirements discussed above.

3. Compulsory Use of Preauthorized Transfers (§ 1005.10(e)(1))

The CFPB proposed to apply the Regulation E compulsory use prohibition to covered overdraft credit extended by very large financial institutions. EFTA's compulsory use prohibition, EFTA section 913(1), prohibits any person from conditioning the extension of credit to a consumer on the consumer's repayment by means of preauthorized EFTs.[241] However, the Board in 1981 adopted in Regulation E § 1005.10(e)(1) a non-statutory exception to that prohibition for overdraft credit plans.[242] The CFPB proposed to eliminate that exception when covered overdraft credit is provided by a very large financial

[235] 15 U.S.C. 1637(c)(4)(E).

[236] *See* Public Law 100–583, sec. 2, 102 Stat. 2960 (Nov. 3, 1988).

[237] 54 FR 13855, 13856 (Apr. 4, 1989).

[238] *See* § 1026.7(b)(11)(ii)(A); *see also* 75 FR 7658, 7672–73 (Feb. 22, 2010).

[239] *See* Fed. Trade Comm'n, *Comparing Credit, Charge, Secured Credit, Debit, or Prepaid Cards* (Dec. 2021), *https://consumer.ftc.gov/articles/comparing-credit-charge-secured-credit-debit-or-prepaid-cards.*

[240] *See* CFPB 2017 Data Point at 6.

[241] 15 U.S.C. 1693k(1).

[242] 46 FR 2972 (Jan. 13, 1981).

institution. As a result, a very large financial institution providing covered overdraft credit would be required to offer a consumer at least one method of repaying an overdraft credit balance other than automatic repayment by preauthorized EFT. For example, in addition to an automatic repayment option, the institution could offer consumers an option to repay their outstanding overdraft credit balances by expressly authorizing (*e.g.,* on the institution's website or smartphone application) a one-time transfer of funds from the consumer's asset account. For the reasons discussed below, the CFPB is finalizing as proposed the application of the compulsory use prohibition to covered overdraft credit extended by very large financial institutions.

Many industry commenters opposed the CFPB's proposal. They argued that the requirement to offer consumers a repayment option other than automatic repayment would impose costs that would not have commensurate consumer benefit. Specifically, they argued that the requirement would result in one-time costs to implement an alternative repayment method and a process for obtaining consumers' decisions whether to use automatic repayment or the alternative, and ongoing costs of maintaining the alternative and handling the higher costs associated with those consumers who choose the alternative, including the cost of higher risk of non-repayment. They asserted that if institutions cannot guarantee themselves the repayment method of automatic transfers, the result would be a higher underwriting bar than is currently in place. They also asserted that these costs would not result in any material consumer benefit because almost all consumers will choose automatic repayment. Further, they stated, it is appropriate for consumers to choose automatic repayment because it ensures consumers do not miss repayments and thereby incur concomitant costs such as late fees and higher interest rates.

Many consumer advocate commenters supported the CFPB's proposal. They argued that improvements in technology have reduced institutions' costs associated with providing alternative means of repayment and that any costs in this area have not inhibited the credit card market (where the compulsory use prohibition has long applied). They also stated that the requirement would benefit consumers by improving their control over their funds. Further, they stated, any increased risk of non-repayment would appropriately incentivize institutions to offer overdraft credit that is affordable.

The CFPB has determined that advances in information technology in the decades since the Board's 1981 adoption of the compulsory use exception for overdraft have reduced institutions' costs of obtaining repayment by means other than automatic repayment by preauthorized EFT. For example, an institution can establish at reasonable cost an internet computer or smartphone interface through which consumers may easily initiate—such as by tapping a ''button'' on a smartphone screen—repayment of a monthly credit balance.

For similar reasons, the CFPB has also determined that application of the prohibition will not inappropriately increase institutions' risk of nonrepayment. Specifically, the CFPB finds that technology makes it virtually costless for institutions to remind consumers of their repayment obligation, such as through app notifications on smartphones as well as text and email messages. The CFPB also finds that technology makes it virtually costless for consumers to act in response to those notifications, such as by clicking on a notification and then making one or a few clicks (depending on the details of the repayment process the institution establishes) to specify the amount to repay, identify the funding source, and initiate the repayment. This ease of notification and consumer response helps increase the likelihood that those who can repay the credit will do so. As a result, any increased nonrepayment risk to institutions resulting from application of the compulsory use prohibition will serve as an appropriate incentive to institutions to offer covered overdraft credit to those consumers who can and will repay it, *i.e.,* to offer covered overdraft credit to those consumers who will not be harmed by it.

For these reasons, the CFPB has determined that applying the compulsory use prohibition to covered overdraft credit provided by a very large financial institution will carry out the purposes of EFTA by safeguarding consumers' rights in EFT systems. This determination is consistent with Congress's original intent in adopting the prohibition.

Offset Prohibition in 12 CFR 1026.12(d)(1)

While the CFPB did not propose to amend the Regulation Z prohibition against offset, it is closely related to the Regulation E compulsory use prohibition discussed above. Further, commenters provided feedback on application of the offset prohibition. Below the CFPB summarizes the substance of the prohibition and addresses the comments that the CFPB received.

''Offset'' is a term used to describe a practice whereby an institution uses funds from an incoming deposit to a consumer's asset account at the institution to immediately obtain repayment of the consumer's debt to the institution, such as an outstanding overdraft balance in the asset account. TILA and Regulation Z prohibit that practice with respect to credit card accounts. Specifically, TILA section 169(a) (15 U.S.C. 1666h(a)) and 12 CFR 1026.12(d)(1) prohibit an institution from using funds in a consumer's asset account at the institution to offset consumer debt arising from a credit card plan the institution provides to the consumer. Thus, when a financial institution ties a consumer's asset account (*i.e.,* a covered asset account) to covered overdraft credit accessible by credit card (*i.e.,* a hybrid debit-credit card), the institution may not use funds in the consumer's asset account to offset the consumer's overdraft credit balance.

Periodic deductions are a different practice than offset. TILA section 169(a)(1) (15 U.S.C. 1666h(a)(1)) permits an institution to periodically deduct all or part of a consumer's credit card debt from the consumer's asset account if the periodic deductions are in accordance with the consumer's preauthorized written agreement. This TILA provision is implemented in 12 CFR 1026.12(d)(3), which the CFPB did not propose to amend. Thus, when a very large financial institution provides covered overdraft credit that is accessible by a card, the institution must comply with the offset prohibition, but may obtain a consumer's preauthorized written agreement to periodic deductions of the consumer's overdraft balances from the consumer's asset balances held at the institution. Pursuant to the Regulation E compulsory use prohibition (discussed above), the institution must also provide the consumer with a repayment option other than periodic deduction.

Many industry commenters opposed application of the offset prohibition. They argued that the offset prohibition would increase risk of nonrepayment and result in higher underwriting standards relative to institutions' standards today for non-covered overdraft credit, thereby eliminating access to overdraft credit for those subprime or deeply subprime consumers (or those without any credit history) who use it today. As a result, they argued, these consumers would have no choice but to use alternative credit products such as payday loans.

Many consumer advocate commenters supported application of the offset prohibition. They observed that Congress adopted the prohibition because it was concerned about an institution's power to collect credit card debt by offsetting against money in a consumer's asset account at the institution, thereby causing other consumer payments from the account to go unpaid. They argued that the same concerns apply to covered overdraft credit, *i.e.,* that an institution's offset of overdraft credit reduces a consumer's ability to prioritize which obligations to repay and can cause consumer obligations other than overdraft to go unpaid. Consumer advocates argued that that effect is exacerbated by the high fees that typically accompany overdraft credit, because those fees increase the loss of consumer control and the amount that is offset and thus the amount of other consumer obligations that go unpaid. In light of these current consumer harms and costs from overdraft credit, consumer advocates supported higher underwriting standards for overdraft credit relative to today.

The CFPB has determined that application of the offset prohibition to above breakeven overdraft credit provided by very large financial institutions will serve the consumer protection purposes for which Congress adopted the prohibition (avoiding the uninformed use of credit and protecting consumers against inaccurate and unfair credit billing and credit card practices). To the extent the prohibition increases risk of nonrepayment and thereby causes institutions to decline some overdraft credit transactions that they currently authorize, the CFPB finds that these changes will not result in lost benefit for many of the consumers who use overdraft credit today, because the credit is often of little or no benefit for these consumers. Further, many of these consumers will be able to find other forms of consumer credit (should they think it necessary to do so). In sum, when a hybrid debit-credit card can access covered overdraft credit, the card is a type of credit card and the CFPB finds that consumers using such a card should receive the same TILA protections, including those of the offset prohibition, that any other credit card consumer receives.

Defining ''Periodically''

The CFPB requested comment on whether it should define ''periodically'' to mean no more frequently than once per calendar month, or some other interval for covered overdraft credit accounts tied to covered asset accounts. The CFPB received very few comments and no specific information in response. The CFPB is not taking any action at this time pursuant to this request for comment. The CFPB notes that § 1026.7(b)(11) requires the payment due date for credit card accounts under an open-end (not home-secured) consumer credit plan to be the same every month.

4. Definition of Overdraft Services in Regulation E (§ 1005.17(a))

The CFPB proposed to add comment 17(a)–2 to clarify that the added defined terms in Regulation Z regarding covered overdraft credit do not change the scope of the definition of overdraft services under Regulation E § 1005.17(a). The proposed comment clarified that covered overdraft credit, which includes above breakeven overdraft credit, is not an overdraft service under § 1005.17(a) because it is a line of credit subject to Regulation Z.

Very few commenters addressed this aspect of the CFPB's proposal and those that did supported it. The CFPB adopts comment 17(a)–2 as proposed.

V. Effective and Compliance Date

Consistent with TILA section 105(d), the CFPB proposed that the final rule have an effective date of the October 1 that follows by at least six months the date it is published in the **Federal Register**.[243] The CFPB sought comment on the proposed effective date including whether such date should be different, and if so, when and why. For the reasons discussed below, the effective date is finalized as proposed. As a result, this rule will become effective on October 1, 2025.

Consumer advocates generally supported the proposed effective date. Industry commenters opposed the effective date because they stated it would not be sufficient time to implement required changes, particularly with respect to covered overdraft credit. They stated that they would need anywhere from 12 to 24 months to comply with the rule. These commenters explained that the rule would require a comprehensive review and restructuring of every aspect of their overdraft programs, from operations to technology to customer service. One commenter stated that it will need to perform an impact analysis to determine how to change its programs and then implement those changes, which will require working with third party vendors, training employees, testing, and communicating changes to consumers. With respect to communicating changes to consumers, the commenter stated that a change in terms notice is unlikely to be sufficient and it would need to engage in an extended campaign to inform consumers about the changes and effects. One industry commenter noted that for existing debit cards on asset accounts, institutions would need to determine whether to continue offering debit cards on overdraft credit, informing their consumers about the change in card status, giving consumers time to accept the new card status, and possibly changing the card number.[244]

As discussed further above, the CFPB's rule would apply only to very large financial institutions. Accordingly, financial institutions that are not very large financial institutions would not need to make any changes in response to the rule.

With respect to very large financial institutions, the changes that the rule would require vary depending on the institution's current activities. If a very large financial institution already offers non-covered overdraft services in compliance with existing regulations and, in response to the rule, chooses to provide those services at or below its breakeven price, it could continue to provide such services without making any operational changes in response to the rule, apart from developing a process to confirm that its pricing for such services complied with the rule's breakeven standard provisions if the financial institution chooses to use that method. Alternatively, using the $5 benchmark may further simplify compliance with the rule. If a financial institution needs extra time to convert to the breakeven method, they could charge $5 fees on October 1, 2025, and then convert to the breakeven amount at its own pace.

If a very large financial institution currently offers non-covered overdraft services in compliance with existing regulations, and, in response to the rule, chooses to provide above breakeven overdraft credit, it would need to ensure that such credit complies with Regulation Z. If the very large financial institution is unable to bring to market by the rule's effective date an above breakeven overdraft credit program that complies with Regulation Z, including the credit card rules, the institution still could comply with the rule by charging breakeven or $5 overdraft fees in the interim.

If a very large financial institution currently offers covered overdraft credit

[243] 15 U.S.C. 1604(d).

[244] Whether the debit card number must change under these circumstances is not governed by the CFPB under any of its rules.

in compliance with Regulation Z and, in response to the rule, chooses to continue offering such credit, the very large financial institution would need to comply with the rule by: (1) beginning to comply with the newly applicable Regulation Z provisions including, if applicable, changes to the examples of finance charges and the credit card provisions that would newly apply to certain types of covered overdraft credit; and (2) offering consumers a means of repaying their overdrafts other than by preauthorized EFTs.

Many very large financial institutions currently provide overdraft lines of credit subject to Regulation Z. Subsequent to the effective date of the rule, these lines of credit would be covered overdraft credit accounts, regardless of whether they are above or below breakeven pricing. However, the institution would not be opening a new credit account (*i.e.,* would not be newly opening an account that is subject to Regulation Z) because a credit account—the overdraft line of credit—already existed prior to the effective date of the rule. Thus, Regulation Z requirements triggered by credit-account opening (such as §§ 1026.5, 1026.6, 1026.51, and 1026.52(a) mentioned above) would not apply to these previously existing overdraft lines of credit.[245] However, other Regulation Z requirements such as change-in-terms requirements would continue to apply to them.[246]

In general, financial institution commenters were more concerned about implementing the rule where they do not currently provide covered overdraft credit accounts. Many such institutions do already offer credit cards and therefore have in place a compliance framework that meets applicable Regulation Z requirements. Those that do not could prioritize ensuring that their pricing of non-covered overdraft credit complies with the rule's breakeven or benchmark provisions, as described above. If needed, those institutions could delay offering new covered overdraft credit accounts to ensure compliance with Regulation Z requirements, including those tied to credit account opening.

For these reasons, the proposed effective date is sufficient for a very large financial institution to make appropriate changes necessary to comply with the rule. Accordingly, this rule has an effective date of October 1, 2025.

VI. Other Comments

A. Possible Alternative or Additional Requirements

Some commenters proposed various exemptions from the rule such as exempting credit unions and exempting check transactions. As to the credit union exemption, commenters raised that there are differences between credit unions large enough to be covered by this rule and other very large financial institutions covered by the proposed rule, including noting that credit unions are member-focused and are subject to different market incentives. Also, as discussed below regarding the implications for other laws, commenters stated that Federal credit unions are generally subject to a usury limit under the Federal Credit Union Act and asserted that it would be economically unfeasible for them to provide covered overdraft credit. These commenters also noted the small number of credit unions that would be directly covered at this time but argued that the rule could nevertheless have broad impact. As to the check exemption, one commenter argued that checks and debit cards are used by consumers in different ways and for differently sized purchases and that there may be a greater consumer impact when a check is not honored, including but not limited to possible NSF fees.

The CFPB has considered these requests for exemptions but declines to add exemptions at this time. While credit unions may operate differently from banks in some respects, those differences are generally not material in the context of overdraft credit. In addition, the relatively small number of credit unions that will be covered by the very large financial institution designation and therefore subject to the final rule represent large entities with significant market impact. The CFPB has determined that any institution, including a Federal credit union, that qualifies as a very large financial institution should not be excluded from the rule solely because other applicable laws may limit the amount that they can charge consumers. The potential impact of other laws on institutions' overdraft credit products is discussed in parts VI.E and VII below. Applying the same rule to overdraft credit provided by all VLFIs is consistent with the policy goal of applying the same consumer protections to overdraft credit that apply to other types of consumer credit. The CFPB, as discussed further below, intends to monitor the impact of this final rule, including the potential impact on non-covered entities, which may include smaller credit unions. As to the check exemption, the CFPB did not propose such an exemption and does not believe that consumers should receive less protection for checks than for other transaction types such as debit card or ACH transactions. The CFPB also notes that consumer usage of checks has been and continues to decline, such that any exemption would have declining impact.[247]

Many industry commenters argued that instead of applying Regulation Z to above breakeven overdraft credit, the CFPB should have proposed a different rule that retains overdraft credit's current exclusions from the regulation and that encourages or mandates changes in practice for overdraft credit that some institutions have already implemented, including, for example: grace periods between when a consumer overdraws (or further overdraws) their account and when an institution assesses a fee; not assessing fees on de minimis overdraft balance amounts and overdraft transaction amounts; and processing transactions in an order that benefits consumers all else equal. Many of these commenters also suggested that the CFPB propose changes to the opt-in disclosure requirements in § 1005.17. In general, industry commenters argued that the CFPB's chosen approach of applying Regulation Z—and applying coverage under Regulation Z based on the price of the overdraft credit—would result in increased prices for other deposit account features, including for consumers who do not currently use overdraft credit.

The CFPB considered alternatives such as these prior to its issuance of the NPRM. The CFPB has determined that these alternative approaches would not adequately protect consumers who today use non-covered overdraft credit as an expensive short-term loan.

[245] The ability to pay analysis is also required prior to a credit line increase. *See* 12 CFR 1026.51(a)(i). This requirement is applicable upon the effective date of the rule.

[246] As noted, if a very large financial institution currently provides overdraft lines of credit in compliance with Regulation Z and chooses to continue providing them after the effective date (at which point the lines would be covered overdraft credit accounts), the institution would need to begin to provide consumers a repayment option other than preauthorized EFTs. For overdraft lines of credit (*i.e.,* covered overdraft credit accounts) extant as of the effective date where agreements are in place for preauthorized EFTs, beginning to provide the option would not trigger change-in-terms notice requirements under § 1026.9(c)(2) or § 1005.8(a)(1). However, when a card issuer opens a covered overdraft credit account on or after the effective date, section 1026.12(d)(3) requires the card issuer to clearly disclose the fact that the option exists. *See* comment 12(d)(3)–1.iii.

[247] *See* FRS, *The Federal Reserve Payments Study: 2022 Triennial Initial Data Release, https://www.federalreserve.gov/paymentsystems/2023-April-The-Federal-Reserve-Payments-Study.htm* (last updated Nov. 13, 2024). There were 18.1 billion check payments in the U.S. in 2015, 14.0 billion in 2018, and 11.2 billion in 2021.

Because these consumers use overdraft credit in this way, the CFPB has determined that regulating overdraft credit as credit—*i.e.,* applying to that credit the congressionally chosen statutory framework for consumer credit—will better protect these consumers than would the alternatives suggested by industry commenters. For example, the TILA framework will facilitate consumers' ability to shop between institutions on the basis of the price institutions charge for providing covered overdraft credit. In contrast, consumers today generally do not shop between deposit accounts on the basis of institutions' fees for non-covered overdraft credit, which may explain, at least in part, why institutions' fees for non-covered overdraft credit persistently remain so high and consumers sometimes overdraw their accounts even though they have less expensive credit available elsewhere, such as through a credit card. Further, the TILA framework will require institutions to refrain from immediately taking consumers' incoming deposits to repay their outstanding overdraft balances, which will facilitate consumers' ability to control how their asset funds are used. In contrast, consumers today do not have a choice about their incoming deposits immediately being taken to repay overdrafts and the high fees. Moreover, the TILA framework will require institutions to provide separate periodic statements, and other required disclosures, for the covered overdraft credit account and for the covered asset account, which will facilitate consumers' ability to know when they are accessing overdraft credit and how much they are being charged for it.

In addition, nothing in the CFPB's rule precludes institutions from providing the consumer protective features that they provide today for non-covered overdraft credit, such as those described above, in the context of covered overdraft credit (or from continuing to provide them in the context of non-covered overdraft credit). For example, nothing in Regulation Z precludes an institution from: providing a grace period between when the institution extends covered overdraft credit and when the institution assesses a finance charge (whether a fee or a periodic rate) on the credit; providing de minimis amounts of covered overdraft credit without assessing a finance charge for the credit; or, processing covered overdraft credit transactions in an order that benefits consumers by minimizing the associated finance charges.

Regarding comments that the CFPB's chosen approach could increase prices for other deposit account features, the CFPB discusses in the ''Offsetting changes to other deposit account prices'' section of the CFPA section 1022(b) Analysis below the possibility of potential increases to other deposit account prices as a result of this rule, and concludes that there is uncertainty about whether lost overdraft revenue would be replaced by increases to fees on deposit accounts, taking into account the fact that the lost revenue would be relatively low if divided by account per month, and that the CFPB has not observed offsetting price increases when financial institutions recently reduced a comparable amount of overdraft revenue voluntarily. And even if financial institutions wish to do so, these prices are likely to be more salient to consumers than overdraft fees, and so the CFPB expects there to be more efficient competition over those prices, which will limit the extent to which financial institutions are able to increase those prices.

Many commenters other than industry commenters—including academic, nonprofit, and consumer advocate commenters—argued that *in addition* to the breakeven standard for the dollar amount of an overdraft fee for non-covered overdraft credit, the CFPB should restrict the number of overdraft fees for such credit that an institution may assess in a given time period (such as a day, week, month, or year). The CFPB is not adopting this additional restriction at the present time. The CFPB believes that its breakeven standard for the dollar amount of a fee for non-covered overdraft credit will provide sufficient consumer protection and that an additional restriction on the number of such fees that may be assessed is not necessary at the present time. The CFPB also believes that this additional restriction could result in increased implementation cost and complexity for institutions that might not be justified by the increased consumer benefit it would achieve.

Other commenters encouraged the CFPB to pursue disclosure-type alternatives or additions to the rulemaking, such as increased financial education. These commenters felt that better financial education could empower consumers, which may reduce reliance on overdraft programs. Other commenters suggested revised consumer opt-in disclosures, more comprehensive, upfront disclosure of fee structures, or requiring an annual opt-out notice to consumers who previously opted-into overdraft programs. Another commenter suggested new disclosures to prevent misleading advertising. One industry commenter stated that whether a product or a service is a courtesy depends on more than whether the bank makes a reasonable profit, and encouraged the CFPB to consider the full suite of features surrounding an overdraft program in determining whether to exempt the program from Regulation Z. Two commenters suggested enhanced regulatory reporting for overdraft fees while a consumer advocate commenter suggested imposing fines for banks that abuse overdraft practices.

Before issuing the proposal, the CFPB also considered changes such as these, including modifying the opt-in disclosure requirements at § 1005.17 of Regulation E. The CFPB did not propose such disclosure interventions and declines to pursue them at this time. After considering the comments, the CFPB has determined, as it preliminarily concluded in the proposal, that Regulation E opt-in disclosures would not communicate the cost of above breakeven overdraft credit as effectively as Regulation Z disclosures. As discussed above, applying Regulation Z will ensure that above breakeven overdraft credit is disclosed as a credit product and treated like other credit products. In addition, Regulation E disclosures distinguish between overdraft transactions completed via electronic fund transfers and overdraft transactions completed via other funds transfer methods (such as checks), whereas Regulation Z disclosures would apply to above breakeven overdraft transactions regardless of fund transfer method. Modifying the opt-in disclosure requirements at § 1005.17 of Regulation E also would not provide other substantive protections available through Regulation Z, such as the ability to pay requirements and the offset prohibition discussed above. These substantive protections are important. For example, by requiring financial institutions to assess consumers' ability to pay, the rule will ensure that financial institutions confirm that consumers can make the required minimum periodic payments under the terms of their account based on their income or assets and their current obligations. As another example, by prohibiting offset and requiring the due date to be on the same day each month for covered overdraft credit accessible by a hybrid debit-credit card, the rule will give consumers more time to repay overdraft credit and greater control over how to structure those repayments.

The CFPB also observes that the Truth in Savings Act already prohibits misleading deposit account advertisements, including misleading deposit account advertisements related to overdraft.[248] The CFPB's analysis of whether and when overdraft is or is not a courtesy is discussed elsewhere in this notice. As noted, the CFPB intends to monitor the impact of the final rule and may consider additional interventions as necessary in the future.

B. Usury Limits

Many industry commenters asserted under various bases that the CFPB's proposed rule would constitute an impermissible usury limit. Some asserted that the proposal to apply TILA and Regulation Z to above breakeven overdraft credit would constitute a usury limit in contravention of CFPA section 1027(o) because VLFIs would no longer be permitted to provide non-covered overdraft credit at a price above that amount. Other industry commenters conceded that section 1027(o) does not apply. Some asserted that TILA is a disclosure statute limited to ensuring adequate disclosure of credit terms and that the CFPB exceeded its authority by attempting to apply substantive limits to institutions' pricing of overdraft credit. Some asserted that the application of TILA's substantive protections, including the protections of the CARD Act, to covered overdraft credit would constitute an effective usury limit because, they argued, it would be infeasible for very large financial institutions to provide overdraft credit in compliance with those substantive protections. Some asserted that the proposed rule would constitute an impermissible usury limit because the application of Regulation Z to covered overdraft credit—*i.e.,* the shift in the legal status of overdraft credit from being not subject to Regulation Z (non-covered overdraft credit) to being subject to Regulation Z (covered overdraft credit)—would result in the application of usury limits in other laws to covered overdraft credit, including limits in the Military Lending Act (10 U.S.C. 987), the Federal Credit Union Act (12 U.S.C. 1751 *et seq.*), and States' laws.

Applying TILA to above breakeven overdraft credit does not create a usury limit under CFPA section 1027(o). That section states that the CFPB has no authority ''to establish a usury limit applicable to an extension of credit offered or made by a covered person to a consumer, unless explicitly authorized by law.'' This CFPB rule applying Regulation Z to above breakeven overdraft credit does not ''establish a usury limit'': it does not impose a fee or rate cap or ban fees above a certain threshold, and, under the rule, an institution may charge any price it wishes for overdraft credit so long as it complies with Regulation Z.[249]

It is true that the shift in the legal status of overdraft credit as a result of the CFPB's rule, from not being subject to Regulation Z (non-covered overdraft credit) to being subject to Regulation Z (covered overdraft credit), may result in other laws' usury limits applying to certain instances of covered overdraft credit, such as the limits found in the Military Lending Act (MLA), the Federal Credit Union Act (FCUA), and States' laws. Nonetheless, the CFPB's rule applying Regulation Z to covered overdraft credit is not thereby ''establish[ing] a usury limit'' because the CFPB's rule does not establish any applicable usury limit. Instead, the legislatures that adopted those laws—*e.g.,* the U.S. Congress and State legislatures—established those usury limits. The potential impact of the usury limits in those other laws on covered overdraft credit is discussed elsewhere in this notice.

Moreover, commenters appear to mischaracterize the benchmark and breakeven thresholds to suggest that they create regulatory obligations and apply them to credit priced above those thresholds. Overdraft services are credit and overdraft fees are finance charges under TILA, but for the existing regulatory exception in Regulation Z. The CFPB is narrowing that exception in this final rule to the breakeven or benchmark level. This means the breakeven and benchmark thresholds do not apply heightened regulatory obligations on more expensive credit. TILA does that. The failure to shield credit above a certain threshold from Congressionally created consumer protections is not the creation of a usury rate.

Regardless, TILA's requirements, which the CFPB's rule applies to covered overdraft credit, are not so onerous as to constitute an effective usury limit. As noted, TILA includes numerous substantive consumer protections that are implemented in Regulation Z and that the CFPB is applying to covered overdraft credit. Many very large financial institutions already provide credit cards, including subprime credit cards, that comply with all of Regulation Z's substantive protections. Consumers of subprime credit cards share the same general characteristics as many consumers who use overdraft credit. The CFPB fully expects that covered overdraft credit can and will comply with the same substantive Regulation Z protections that subprime credit cards do. Accordingly, applying those Regulation Z protections to covered overdraft credit is not so onerous as to constitute an effective usury limit.

Finally, some commenters asserted that the proposed rule would constitute an unlawful taking prohibited by the Fifth Amendment to the U.S. Constitution. The rule is not a limitation on Constitutionally protected private property that renders property unusable and is not an unlawful taking under the Fifth Amendment.

C. Other Comments Regarding Statutory Authority

One commenter asserted that the CFPB lacked authority to issue this Rule, arguing that the rule constituted a matter of vast economic and political significance subject to the ''major questions'' doctrine. Another contended that the CFPB lacked the authority to establish rules for overdraft services based on the price of the service because the TILA statutory provisions at issue do not reference credit price, whereas other credit laws (such as the Home Ownership and Equity Protection Act and the Military Lending Act) do.

Consistent with the discussion above, the CFPB has the statutory authority to implement this rule. First, this rule does not implicate the ''major questions'' doctrine. This rule updates existing regulatory exceptions for overdraft credit offered by very large financial institutions and does not rely on a novel interpretation of the CFPB's statutory authority. As discussed above, the plain meaning of TILA's statutory definition of ''credit'' encompasses overdraft credit. Overdraft credit has only been partially excluded from TILA coverage by the operation of preexisting regulatory exceptions, including from the definition of ''finance charge.'' The major questions doctrine is a canon of judicial interpretation used to determine whether Congress delegated authority to an agency. This final rule does not create new obligations, but rather, it partially removes portions of existing regulation that act to relieve industry of

[248] *See* 12 U.S.C. 4302(d); *see also* 12 CFR 1030.8(a) and 12 CFR 707.8(a).

[249] No provision in Regulation Z limits the price that an institution may charge for credit, including covered overdraft credit. The fee harvester provision in § 1026.52(a), which implements TILA section 127(n) (15 U.S.C. 1637(n)), limits to 25 percent of the credit limit the amount of fees, other than penalty fees (which are addressed in § 1026.52(b)), that may be charged during the first year of a credit card account. However, the fee harvester provision does not limit charges that are assessed as periodic rates.

certain obligations Congress created by statute. It would be illogical to conclude an agency does not have delegated authority to remove a regulatory exception from a statute, but that the regulatory exception was nonetheless issued based on a valid delegation. Instead, both the Federal Reserve's original rule creating the exception and this rule partially removing it are pursuant to authority granted to the agencies by Congress, as described herein. Furthermore, the economic impact of this rule, as discussed elsewhere in this notice, is significantly lower than any level that would implicate the major questions doctrine.

Second, nothing in the relevant provisions of TILA precludes the CFPB from considering the price of a credit product when partially rescinding a regulatory exception to TILA's coverage. For the reasons described above, the rule's changes to § 1026.4(c)(3) are consistent with TILA and reasonable. The fact that Congress has regulated other credit products based in part on their price does not render these considerations forbidden in this context.

D. Data Supporting Application of Regulation Z to Overdraft

Some industry commenters asserted that the data the CFPB cited for its proposal to apply Regulation Z to above breakeven overdraft credit provided by very large financial institutions is outdated and therefore unreliable because some of the data predates the pandemic and some large institutions' reduction or elimination of overdraft and NSF fees during the pandemic timeframe. As a result, these commenters assert, the CFPB is using insufficient and flawed data to justify its policy change of now applying Regulation Z to above breakeven deposit account overdraft credit provided by these institutions. These commenters stated, in particular, that the CFPB is relying primarily on its own 2012 data to identify and analyze consumers who overdraft, including ''frequent overdrafters'' (more than 10 overdraft fees in a year), which are the consumers that will be most affected by the rule. The CFPB's 2012 data identified about 9 percent of checking accounts as belonging to frequent overdrafters, whereas commenters argued that more recent survey research has found that only roughly 1.5 percent to 3 percent of banked households report more than 10 overdraft fees in a year.[250]

The CFPB did not primarily rely on the 2012 data and assessed a number of evidentiary sources including more recent studies, but it was appropriate to include all of the data cited in the proposal. The CFPB is finalizing this rule not because of the precise percentage of overdrafters or frequent overdrafters but because the CFPB has concluded that above breakeven overdraft credit offered by very large financial institutions should no longer be exempt from TILA's consumer credit protection for the reasons discussed above. Even were one to assume that the difference between recent surveys and CFPB data is due in whole or in part to an actual and permanent change in overdrafting frequency, the CFPB's rule would remain justified for the reasons discussed herein.

Moreover, it remains true and uncontroverted that overdraft is inordinately profitable for institutions and that this profit is made off consumers who are financially disadvantaged.[251] Specifically, evidence provided by the CFPB shows that net losses from overdraft were only 14 percent of overdraft fees.[252] And in 2024 the CFPB found that five large institutions' average net losses from overdraft were only about 6 percent of overdraft fees across all overdraft transactions, and about 16 percent of overdraft fees across only fee-assessed transactions.[253] Also, recent uncontroverted evidence reaffirms that financially vulnerable households continue to be more likely to pay overdraft fees than are other households. Specifically, about 17 percent of all households with a checking account—*i.e.,* households across all levels of financial health—reported incurring at least one overdraft or NSF fee in 2022 [254] and 2023.[255] In contrast, over that same time period, forty-six percent of financially vulnerable households reported incurring at least one overdraft fee and just 4 percent of financially healthy households reported incurring at least one overdraft fee.[256] Commenters did not offer data to contradict these figures. Accordingly, the CFPB finds both that the overdraft fees consumers pay are about seven times higher than large institutions' losses from overdraft and that financially vulnerable consumers are more likely to pay overdraft fees than are other consumers.

Applying Regulation Z to above breakeven overdraft credit offered by VLFIs will benefit the financially vulnerable consumers who currently pay the preponderance of overdraft fees. The CFPB does not predict exactly how very large financial institutions will react to this final rule. Nonetheless, the CFPB notes that some very large financial institutions already offer overdraft credit at prices well below the median marketwide price. Whether very large institutions offer consumers non-covered, below-breakeven (courtesy) overdraft credit or covered overdraft credit that complies with the requirements of Regulation Z, the CFPB believes that such overdraft credit will be provided to these consumers on terms that are more beneficial to them than the terms on which non-covered overdraft credit currently is provided. Those disadvantaged consumers who are not offered any overdraft credit at all will benefit from avoiding the harms associated with today's non-covered overdraft credit and from using alternative forms of credit that are more beneficial (less harmful) to them to the extent available.

E. Implications for Other Laws

Commenters noted the cumulative effect of the proposed rule and other Federal and State regulatory actions would result in higher costs for financial institutions, and higher costs and limited account availability for consumers. Industry commenters identified regulatory actions by the CFPB, the Board, FDIC, OCC, FTC, SEC, and various State agencies, such as the CFPB's credit card late fee rule,[257] the Board's Regulation II,[258] and the prudential regulators' Basel III endgame

[250] These commenters point to the following three examples of more recent survey research. In survey research by FHN, 9 percent of overdrafters, representing roughly 1.5 percent of all banked households, reported having incurred more than 10 overdraft fees in 2022 (FHN Brief 2023). In survey research by the Federal Reserve Bank of New York, less than 1 percent of individuals reported overdrafting more than 10 times (*see* Donald P. Morgan & Wilbert van der Klaauw, *Learning by Bouncing: Overdraft Experience and Salience,* Liberty Street Econ. (Apr. 2024), *https://libertystreeteconomics.newyorkfed.org/2024/04/learning-by-bouncing-overdraft-experience-and-salience/*). In survey research by the Consumer Bankers Association, 3 percent of consumers reported overdrafting 10 or more times in the past 12 months. CBA, *Nationwide Survey of Consumer Overdraft Services Use and Sentiment: Post COVID–19 Pandemic* (Mar. 2024), *https://consumerbankers.com/wp-content/uploads/2024/04/2024.03.21-CBA-Overdraft-Survey.pdf.*

[251] CFPB 2017 Data Point.

[252] CFPB 2013 White Paper at 17.

[253] The CFPB found the average overdraft fee at these institutions to be $32.50 and the average amount attributable to losses to be $2.00 per overdraft transaction regardless of whether a fee was assessed, and $5.34 per fee-assessed transaction. CFPB Overdraft and NSF Practices Report.

[254] FHN Brief 2023.

[255] FHN, *FinHealth Spend Report 2024,* at 16 (Aug. 2024), *https://finhealthnetwork.org/wp-content/uploads/2024/08/FinHealth-Spend-Report-2024-FHN.pdf.*

[256] FHN Brief 2023.

[257] 89 FR 19128 (Mar. 15, 2024).

[258] 88 FR 78100 (Nov. 14, 2023).

proposal.[259] In addressing the changes to overdraft products and practices with this rule, the CFPB is aware of these other regulatory changes and proposals. As noted above, in the course of developing this rule, the CFPB met with other regulators to better understand the interaction of this rule with other laws and has determined that proceeding with the rule is appropriate to effectuate the purposes of TILA.

Commenters also discussed the interaction of the rule with other statutes, regulations, and guidance. For example, industry commenters stated that the rule would result in the Equal Credit Opportunity Act (ECOA) and Regulation B applying to all financial institutions at any overdraft fee level. These commenters also stated that the CFPB did not consider the procedural burdens that applying ECOA to overdraft credit would impose on banks, such as keeping records and providing adverse action notices.

The CFPB has considered the costs of applying the ECOA and Regulation B to overdraft credit. The ECOA prohibition against discrimination already applies to covered and non-covered overdraft credit regardless of the overdraft fee amount and regardless of the size of the creditor.[260] The 2005 Joint Guidance on Overdraft Protection Programs makes that point in its discussion of the application of ECOA and Regulation B to overdrafts.[261] However, non-covered overdraft credit is likely exempt from certain Regulation B requirements such as the requirement regarding adverse action notices [262] due to the Regulation B exemption for incidental credit.[263] Covered overdraft credit, such as an overdraft line of credit, does not qualify for that exemption and thus must comply with certain Regulation B requirements such as the requirement regarding adverse action notices. With this final rule and its change to the definition of finance charge, previously non-covered overdraft credit will become covered overdraft credit (*i.e.,* above breakeven overdraft credit) and will no longer qualify for the Regulation B exemption for incidental credit. Such newly covered overdraft credit must comply with Regulation B requirements such as the requirement regarding adverse action notices. Commenters provided no compelling reasons why financial institutions should not have to comply with these provisions of ECOA when they provide covered overdraft credit.

Commenters also noted the impact of the proposed rule on the effect of certain statutes and regulations promulgated and administered by other Federal or State actors due to those statutes and regulations incorporating the Regulation Z definition of finance charge. State Attorneys General commenters stated that the rule would benefit States' enforcement of their own consumer protection laws, especially in States where a practice that violates Federal law also violates the State's consumer protection law. As discussed above, industry commenters noted that deeming fees for above breakeven overdraft credit to be finance charges would result in above breakeven overdraft credit exceeding usury limits under the MLA, the FCUA, and State usury laws. Consumer advocates noted that the impact of the rule on other laws benefits consumers, and that Congress and applicable agencies or other government entities have the authority to amend the statutes or implementing regulations and guidance as they see fit. Assuming the commenters are correct about the interaction of this rule with price caps under the MLA, FCUA and State usury laws, Congress or other Federal or State agencies and government entities are the appropriate entities to address the effects of those laws on the overdraft credit market.

An industry commenter also stated that the proposal conflicts with OCC guidance and with the prudential regulators' capital requirements. Citing the OCC 2001 proposal to amend its rules governing investment securities, bank activities and operations, and leasing,[264] and the 2007 Interpretive Letter 1082 on overdraft practices,[265] the commenter stated that the OCC does not treat overdrafts as credit nor treat the overdraft charges as interest. Even assuming the industry commenter's statements are accurate, the CFPB and OCC are interpreting and acting under different statues, the CFPB under TILA and the OCC under the National Bank Act. With respect to TILA, a consumer advocate commenter noted that the 2001 OCC interpretive letter states that an ''overdraft would be 'credit,' as defined by the Truth in Lending Act and Regulation Z.'' [266]

State regulators commented that applying Regulation Z to above breakeven overdraft credit would trigger additional capital requirements and that the additional capital requirements in combination with higher compliance costs and higher risks for financial institutions would render offering above breakeven overdraft credit impractical. The CFPB understands that, unrelated to whether the credit is subject to Regulation Z, (1) all extensions of overdraft credit—whether covered or non-covered—trigger capital requirements; and (2) it is a fact-specific analysis as to whether a particular overdraft credit contract would trigger capital requirements for credit not yet extended, including an analysis of whether there is a ''commitment,'' whether it is ''unconditionally cancelable,'' and what the resulting capital requirement would be.[267]

After considering comments about the cumulative impact of and interaction with other laws and after consulting with other agencies, the CFPB has determined to issue this final rule in order to effectuate the purposes of TILA.

[259] 88 FR 64028 (Sept. 18, 2023).

[260] *See* 15 U.S.C. 1691(a); 12 CFR 1002.4(a) which prohibits a creditor from discriminating on the basis of race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to contract); to the fact that all or part of the applicant's income derives from a public assistance program; or to the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act. *See* 12 CFR 1002.2(l) defining a creditor as a person who, in the ordinary course of business, regularly participates in a credit decision, including setting the terms of the credit. *See* 12 CFR 1002.2(j) which defines credit as the right granted by a creditor to an applicant to defer payment of a debt, incur debt and defer its payment.

[261] The 2005 Joint Guidance on Overdraft Protection Programs states that under ECOA and Regulation B, creditors are prohibited from discriminating against an applicant on a prohibited basis in any aspect of a credit transaction. This prohibition applies to overdraft protection programs. Thus steering or targeting certain consumers on a prohibited basis for overdraft protection programs while offering other consumers overdraft lines of credit or other more favorable credit products or overdraft services, will raise concerns under the ECOA. 70 FR 9127, 9131 (Feb. 24, 2005).

[262] *See* 12 CFR 1002.2(c) and 1002.9.

[263] 12 CFR 1002.3(c)(1) defines incidental credit as consumer credit not made pursuant to the terms of a credit card account; not subject to a finance charge (as defined in Regulation Z, 12 CFR 1026.4); and not payable by agreement in more than four installments.

[264] *See* 66 FR 8178, 8180 (Jan. 30, 2001) (stating that the OCC's proposed rule amends § 7.4001(a) to clarify that the term ''NSF fees'' includes only those fees imposed by a creditor bank when a borrower attempts to pay an obligation to that bank with a check drawn on nonsufficient funds. Fees that a bank charges for its deposit account services—including overdraft and returned check charges—are not covered by the term ''NSF fees.'' These fees are therefore not ''interest'' but, rather, are charges covered by 12 CFR 7.4002); *see also* 66 FR 34784, 34786 (July 2, 2001) (adopting the proposed change in the final rule).

[265] *See* OCC Interpretive Letter 1082 (May 17, 2007) (stating that a bank ''is not creating a 'debt' that it then 'collects' by recovering the overdraft and the overdraft fee from the account'' and that, ''[u]nder these circumstances, the [b]ank's rights to collect debts under [S]tate law . . . are not implicated'').

[266] OCC Interpretive Letter No. 914 (Aug. 3, 2001). *See also* 70 FR 9127, 9129 (Feb. 24, 2005) (stating that ''[w]hen overdrafts are paid, credit is extended'').

[267] *See* 12 CFR parts 3, 217 and 324.

The CFPB acknowledges that these other laws may impose additional obligations and could affect a very large financial institution's decision whether to offer covered overdraft credit. Institutions must consider the interaction of various laws when considering whether to offer any consumer credit product.

VII. CFPA Section 1022(b) Analysis

A. Overview

In developing this final rule, the CFPB has considered the final rule's potential benefits, costs, and impacts per section 1022(b)(2)(A) of the Consumer Financial Protection Act of 2010 (CFPA). The CFPB requested comment on the preliminary analysis in the 2024 proposal as well as submissions of more data that could have informed the CFPB's analysis of the potential benefits, costs, and impacts. In developing the final rule, the CFPB has consulted with the appropriate prudential regulators and other Federal agencies, including about the consistency of this final rule with any prudential, market, or systemic objectives administered by those agencies, in accordance with section 1022(b)(2)(B) of the CFPA. The CFPB also consulted with agencies described in TILA section 149.

The goal of this final rule is to allow consumers to better compare certain overdraft credit to other types of credit and to provide consumers with several substantive protections that already apply to other consumer credit, while still encouraging the availability of overdraft coverage. The section proceeds as follows. First, it describes data limitations and the quantification of benefits, costs, and impacts. Second, it presents the baseline for its analysis. Third, it summarizes comments received and the CFPB's responses. Fourth, it goes through the potential benefits and costs, first to consumers and then to covered persons. Fifth and sixth, it summarizes specific impacts on financial institutions with $10 billion in assets or less and on consumers in rural areas, respectively.

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

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

Specifically, this discussion is based on the CFPB's analysis of public Call Reports and other publicly available data sources, internal data from multiple supervisory information requests, as described in part II above, as well as research reports published by the CFPB. The CFPB also consulted the academic literature and policy analyses of United Kingdom and State regulators.

The CFPB acknowledges several important limitations that prevent a full determination of benefits, costs, and impacts. Quantifying the benefits, costs, and impacts requires quantifying consumer and depository institution responses to the proposed changes, and the CFPB finds the body of knowledge on relevant behavioral responses and elasticities incomplete. In particular, the CFPB is not aware of evidence that could be used to predict how changes to overdraft pricing will affect negative balance periods or the expected substitution effects across asset accounts and between deposit accounts with overdraft coverage and other forms of credit, including the consumer impact from delaying or forgoing some transactions. Similarly, the CFPB has found little reliable quantitative evidence available on the cost and effectiveness of steps financial institutions might take to facilitate clients' money management or timely repayment on overdrawn accounts; reprice any of their services; remunerate their staff, suppliers, or sources of capital differently; or enter or exit any or all segments of the checking account market. Thus, while the quantitative data and research available to the CFPB provide an important basis for understanding the likely effects of the final rule, the data and research are insufficient to fully quantify the potential effects of the final rule for consumers and very large financial institutions. This reflects, in part, the fact that the effects of the final rule will depend on choices made by independent actors in response to the final rule, and the data and research available to the CFPB do not allow reliable predictions of those choices.

In light of these data limitations, the analysis below provides quantitative estimates where possible and a qualitative discussion of the final rule's benefits, costs, and impacts. General economic principles and the CFPB's expertise, together with the available data, provide insight into these benefits, costs, and impacts. The 2024 proposal requested additional data or studies that could help quantify the benefits and costs to consumers and covered persons of the final rule. The CFPB received little new informative data from commenters in response to this request; this information is discussed in part VII.E.

C. Baseline for Analysis

To evaluate the final rule's benefits, costs, and impacts, the CFPB measures the final rule's benefits, costs, and impacts against a baseline in which the CFPB takes no action. This baseline assumes existing regulations remain in place and that market conditions in the overdraft market do not change from their current state.

Some changes, including changes to the definition of finance charge, may affect other legal requirements under various Federal and State laws, including the Military Lending Act, usury limits, capital requirements, and interchange fees. The CFPB is not responsible for interpreting those laws and regulations, and therefore has imperfect insight as to how they might interact with the final rule. Nevertheless, the ensuing analysis discusses some interactions as the CFPB understands them under current rules, as of September 2024.

The discussion below assumes that, without action, both the overdraft credit market and the broader consumer checking market would function in the manner understood through past CFPB research, external academic literature, and supervisory activity. The CFPB bases its prediction for the baseline on market conditions and market data from the 2022 calendar year. As a result, its baseline reflects changes to the overdraft market through 2022, including changes to checking account pricing (both fee and net interest revenue) and changes to the speed, cost, availability, and prevalence of payment systems.

The CFPB sees that both the market and the regulatory environment are changing rapidly and might continue to do so absent the rule, but for purposes of the baseline the CFPB generally uses data from 2022 and established law at the time of drafting to characterize the status quo.

D. Comments Received

1. General Comments on the 1022(b)(2)(A) Analysis

Several academic and policy research groups argued that the CFPB's consideration of the proposed rule's potential benefits and costs in the 1022(b)(2)(A) section of the proposal lacked sufficient rigor. They contended the CFPB failed to quantify many of the tangible costs it identified as likely

resulting from the proposed rule. The CFPB acknowledged certain limitations in part VIII.B of the proposal and considered all the available data and evidence. In the 2024 proposal, the CFPB requested that commenters provide additional data that could help inform the rule. While few comments contained relevant empirical information, the CFPB also considered the qualitative information provided by commenters in analyzing the potential benefits and costs of the rule. Nevertheless, the CFPB does not have sufficient data to precisely estimate every potential benefit and cost of the rule. The CFPB has reasonably evaluated all available data and evidence to provide quantitative benefit and cost estimates when possible and relied on economic principles and its subject matter expertise to provide qualitative benefit and cost estimates when suitable quantitative data were not available.

Multiple industry trade groups claimed the CFPB did not appropriately consider the proposal's potential to reduce consumer access to overdraft services as required by the CFPA. The CFPB did consider access to credit in the proposal and in this final rule, as mandated. The trade groups also said this outcome would cause significant harm to consumers who rely on overdraft as a short-term liquidity tool. The CFPB has considered the full effects of the rule on consumers, including of any potential loss of access, as part of its analysis in parts VII.E and VII.F. If covered financial institutions opt to comply with the final rule by lowering their non-covered overdraft fees and charging consumers the benchmark fee, they may also choose to use tighter underwriting standards for the non-covered overdraft credit that they extend. This could result in less non-covered overdraft credit access for some consumers. Given the evidence discussed in parts VII.E and VII.F below, a reduction in non-covered overdraft could also be beneficial to some affected consumers, and covered financial institutions may have incentives to offer other products in place of non-covered overdraft to help consumers cover potential deposit account shortfalls. Covered financial institutions that opt to use the breakeven standard will not have the same incentive to reduce non-covered overdraft credit access.

Some industry commenters, including banks and credit unions, stated that the CFPB's sample of institutions used to determine the benchmark overdraft fees was small and not representative of the broader market. On the contrary, the CFPB considers its recent relevant data from some major market participants together with the comment record, sufficient to establish a benchmark fee that allows a reasonable number of firms to break even while providing greater transparency and less administrative burden. Some of these commenters stated that each institution should be allowed to determine its own costs of providing overdraft services. The CFPB highlights that the benchmark fee is not a regulatory obligation and that the breakeven standard allows for any institution that prefers not to use the benchmark fee to calculate their own costs and losses to determine the appropriate fee.

2. Comments Concerning the Proposal's Impact on Consumers

Numerous consumer advocates, nonprofits, and academic commenters expressed strong support for the proposal. They felt it would provide important new protections for vulnerable consumers who bear a disproportionate share of overdraft fees. Low-income Americans, communities of color, and students were highlighted as groups that would particularly benefit. Commenters cited statistics showing these populations are substantially more likely to incur multiple overdraft charges. Any resulting lower fees would therefore be seen as beneficial for these populations. The CFPB is in general agreement with these statements.

Many individual commenters and consumer advocates shared personal stories illustrating the financial distress caused by overdraft fees. Examples included people going hungry because an unexpected overdraft charge deprived them of money for food or having to forgo needed medication because of fee-induced cash shortfalls. Several commenters said high overdraft charges had pushed them out of the banking system altogether. Commenters indicated that by curtailing institutions' ability to impose onerous fees, the proposal was seen as promoting greater financial inclusion and access. These comments illustrate some of the consumer benefits the CFPB expects from potentially lower charges for overdraft credit.

However, some industry groups, along with a few academic and individual commenters, stated that significantly lowering overdraft fees could restrict access to short-term liquidity for consumers who need it most. These commenters argued that if banks and credit unions can no longer profitably provide this service, these cash-strapped consumers may be pushed toward predatory payday lenders and other high-cost credit alternatives. Or they may be cut off from credit entirely and forced to forego the consumption that higher-priced overdraft credit might have funded. Further, some commenters argued that consumers generally value overdraft services because such services allow them to avoid the inconvenience and embarrassment of having transactions declined. The CFPB notes that the impact analysis of the proposal discussed possible effects on credit access in part VIII.D and VIII.G of the proposal and expects that credit is most likely to be withheld in situations where the borrower may be better off not accessing overdraft credit because of risks like default, account closure, collections, losses of future deposit account access, and the availability of cheaper alternative sources of liquidity.

Several industry commenters also expressed concern that the proposal would lead to higher costs for other basic banking services or that institutions may reduce the banking services they provide to low-income households. They predicted that institutions may introduce new maintenance fees or balance requirements on checking accounts to compensate for lost overdraft revenue. Some asserted that this outcome could prompt more low-income consumers to become unbanked. However, consumer advocate commenters generally disagreed, arguing competitive pressures would prevent any drastic increases in account costs. They also noted that underserved consumers would still come out ahead financially even if modest new fees were introduced, given the outsize impact that overdraft charges currently have on lower-income consumer households. The CFPB understands that maintenance fees may already be as high as the market can bear (depository institutions are unlikely to be foregoing potential profits from higher deposit account maintenance fee pricing in the current market), but any small increase in the use of maintenance fees would introduce predictable, transparent, equal, and fair pricing for widely used deposit services and would replace a cross-subsidy from supernormal profits on a product used primarily by more resource constrained consumers. The CFPB includes a more detailed discussion of these potential responses by covered financial institutions in part VII.E.1.

3. Comments Concerning the Proposal's Impact on Covered Persons

Several commenters expressed concern that applying Regulation Z to above breakeven overdraft credit would

have a negative impact on the market for financial services, stating, for example, that the proposed changes are a one-size-fits-all approach that would stifle competition and innovation. The CFPB notes that the final rule allows covered financial institutions the flexibility to determine whether providing non-covered overdraft at the benchmark fee, using the breakeven standard, or, alternatively, providing consumers with covered overdraft credit makes the most sense for their institution. To the extent that covered financial institutions elect to substitute towards offering more covered overdraft credit, if anything, market competition should be enhanced by the rule as market participants compete through more transparent prices, and disclosures improve the salience of prices for different available credit options to consumers. Numerous industry commenters strongly objected to the CFPB's calculation of the benchmark fees for non-covered overdraft. They said the proposed benchmarks failed to account for all of the costs institutions incur to maintain overdraft programs. In addition to losses from unpaid overdrafts, banks and credit unions described substantial expenses related to compliance, disclosure, technology, and customer service that would not be recouped under the proposed potential benchmarks. While some portion of such costs may be directly traceable to providing overdraft coverage, generally these costs are more appropriately classified as costs of providing deposit services to consumers as opposed to costs of providing overdraft coverage to deposit account customers. Requiring that the costs of providing deposit accounts be borne primarily by the low-balance consumers most likely to be charged overdraft fees is cross-subsidizing deposit account use for higher-balance accounts through fees assessed primarily on low-balance accounts. The CFPB acknowledges that some covered institutions may have overdraft costs that exceed the $5 benchmark fee. For this impact analysis, the CFPB reiterates that institutions will be able to break even on non-covered overdraft even if the $5 benchmark is too low to cover their traceable costs, whether enumerated in the non-exhaustive examples of section 1026.62(d)(2) or not, by resorting to the breakeven standard. Many industry commenters stated that if the rule were finalized as proposed, they would be forced to stop offering overdraft services altogether. Several smaller institutions said it would be impossible for them to profitably provide these services under market pressure from very large financial institutions. Even if some larger banks continued overdraft programs, commenters anticipated they would significantly tighten eligibility standards. The CFPB notes again that non-covered overdraft will not generate losses to institutions offering it as any covered financial institution has the option to use the breakeven standard, and some other expected responses have been detailed in the sections below. Restricting access to only a subset of customers will not make non-covered overdraft any more profitable for institutions using the breakeven standard. Institutions using the benchmark fee may have a short-term incentive to stop paying overdraft transactions when the expected cost of doing so is higher than the benchmark fee and they choose not to apply the breakeven standard. Some industry groups claimed that shifting current overdrafts to a Regulation Z model (of covered overdraft) would entail significant new compliance costs and restrictions that would make the products unprofitable and impractical. The CFPB disagrees, as mass market credit products offered under Regulation Z are prevalent, including subprime credit cards in particular. The CFPB includes a more detailed discussion of the potential for increased covered overdraft credit access in response to the final rule in part VII.E and VII.H below. Several industry commenters claimed the proposal would disproportionately harm smaller community banks and credit unions, asserting that these institutions often derive a greater share of their overall revenue from overdraft fees compared to large national banks and typically have a higher share of low-income customers who rely on overdraft. If the rule curtails this income stream, commenters warned it could threaten the viability of some smaller institutions, spurring further industry consolidation. The comments stated that this outcome would be detrimental to traditionally underserved communities that depend on local banks and credit unions for access to basic financial services. The CFPB notes that the rule will only apply to very large financial institutions and therefore will not have any direct impact on smaller financial institutions. To the extent that very large financial institutions respond to the rule by offering overdraft credit to consumers at more favorable rates, the rule could generate some competitive pressure that may indirectly affect smaller financial institutions. However, the CFPB notes that some very large financial institutions already offer overdraft at prices well below the median market price, or without assessing any fee at all. The CFPB does not expect overdraft price reductions in response to the rule to exert different competitive pressures for smaller financial institutions than past price reductions that some very large financial institutions have already implemented. In particular, the CFPB does not expect the final rule to make overdraft prices more salient for consumers at small financial institutions, and thus the final rule is unlikely to increase shopping for deposit accounts based on overdraft prices.

A number of credit unions argued the proposal failed to account for their unique structure and constraints. They argued that as not-for-profit cooperatives, credit unions use overdraft fees to support services and programs that benefit their membership as a whole, and that curtailing this revenue could force them to cut back on financial education, community development efforts, and other initiatives. The CFPB acknowledges that its impact analysis does not attempt to estimate how much of prior supernormal profits were invested in prosocial activities or cross-subsidies to consumers in even greater need than typical overdrafters. Commenters also noted that most credit unions are subject to an 18 percent interest rate cap, which they asserted would make it very difficult to offer overdrafts as a Regulation Z line of credit. They said this limit puts credit unions at a competitive disadvantage to banks, which are not subject to the same restriction. The CFPB acknowledges that the few credit unions among very large financial institutions subject to the rule may face additional constraints on their covered overdraft programs in accordance with the requirements of the Federal Credit Union Act and associated regulations. The CFPB also understands that the nonprofit nature of credit unions makes changes offsetting the lost overdraft revenue more likely, or as much as lower profits will manifest as lower yields on deposits (as dividends to members), even mechanical. There was also widespread concern among industry commenters that while the proposal only directly applies to financial institutions with over $10 billion in assets, smaller entities would be under pressure to reduce their fees in order to remain competitive. Community banks and credit unions said they simply do not have the economies of scale to absorb the same loss of overdraft income that large

national banks can withstand. Several commenters urged the CFPB to exempt small institutions from the rule entirely in recognition of this dynamic. The CFPB does not expect that applying the rule to very large financial institutions will materially change market conditions for smaller market participants not subject to such constraints, including the large majority of credit unions not subject to this rule. The existence of a wide range of fees and product offerings under the baseline suggests that there are unlikely to be large changes in the rate of consumers that are currently served by small financial institutions not covered by the final rule shopping for or switching between banks due to the rule. To the extent that some consumers become more sensitive to overdraft fees when choosing a financial institution, the CFPB expects that small institutions will find ways to offer these consumers value that convinces them to stay.

E. Potential Benefits and Costs to Consumers and Covered Persons

1. Potential Benefits and Costs to Consumers

In addition to other changes discussed later in this section and the further changes discussed in the following section, the final rule will apply Regulation Z to above breakeven overdraft credit that is currently excepted from the regulation (*i.e.,* it is currently non-covered overdraft credit). Overdraft credit is above breakeven overdraft credit when a very large financial institution imposes a charge or combination of charges for such credit that exceeds the greater of either the average of the institution's costs and losses for providing non-covered overdraft credit (as defined in the final rule) or the benchmark fee published by the CFPB. The CFPB anticipates that its final rule generally will benefit consumers in two ways. First, some very large financial institutions may reduce their fees so that they can continue offering non-covered overdraft credit. In general, lower overdraft fees for non-covered overdraft credit will benefit consumers by reducing the amount they pay through these fees. Second, some financial institutions may continue offering above breakeven overdraft credit and apply the Regulation Z regulatory framework. In general, applying the Regulation Z regulatory framework to above breakeven overdraft credit will benefit consumers by promoting their informed use of such credit and by applying TILA's substantive protections. The CFPB's analysis may underestimate or overestimate the final rule's benefits to consumers depending on how various market participants, such as financial institutions covered by the final rule, entities not covered by the final rule, and consumers, respond to the final rule. The discussion below begins with an analysis of the final rule's direct benefits to consumers assuming that very large financial institutions comply with the final rule by lowering their fees for non-covered overdraft credit. The discussion then considers how other potential responses by very large financial institutions could impact the final rule's direct benefits to consumers. Next, the discussion considers how the final rule might impact consumer behavior, including demand for both covered and non-covered overdraft credit, demand for alternative credit products, and deposit behavior. Finally, the discussion briefly considers how institutions not covered by the final rule may respond to the final rule.

i. Estimated Savings to Consumers if All Very Large Financial Institutions Use the CFPB's Proposed Benchmark Fee or Breakeven Standard

Under the final rule, overdraft credit offered by very large financial institutions that currently is non-covered overdraft credit could remain non-covered overdraft credit if the per-transaction price for such credit were less than or equal to the $5 benchmark fee established by the CFPB. Consequently, if all very large financial institutions were to use the benchmark fee to comply with the rule, the final rule's direct benefits to consumers, assuming no change in overdraft frequency, could be as high as the difference between the total fees currently paid by consumers for non-covered overdraft credit and the total fees they will pay if non-covered overdraft credit were priced at the $5 benchmark fee. Today, fees for non-covered overdraft credit are generally greater than $30 per transaction.[268] Under the final rule, fees for any non-covered overdraft product provided by a very large financial institution will be substantially lower. From Call Report data, the CFPB estimates that consumers paid $5.98 billion in overdraft fees to very large banks and thrifts in 2022. For this estimate, the CFPB started with CFPB-supervised banks' total reported consumer overdraft-related service charges levied on those transaction account and non-transaction savings account deposit products intended primarily for individuals for personal, household, or family use.[269] This amount was $6.42 billion in 2022, including fee revenue from both overdraft and NSF transactions. In prior work, the CFPB has estimated that, between January 2011 through June 2012, 18.9 percent of such revenue at several very large financial institutions was NSF fee revenue.[270] However, most of the largest banks eliminated NSF fees during 2022; the CFPB estimates that nearly two-thirds of supervised banks had eliminated NSF fees by mid-2023, representing an estimated 97 percent of annual NSF fee revenue earned by those institutions.[271] For purposes of this analysis, the CFPB estimates that the NSF fee share in 2022 was half as large as the earlier 18.9 percent share, so supervised banks' overdraft fees are an estimated 90.55 percent of the 2022 fee total, or $5.81 billion. This total does not include fee revenue from credit unions that are very large financial institutions, since credit union call reports did not include data on overdraft fee revenue in 2022.[272] To estimate overdraft revenue earned by CFPB-supervised (very large) credit unions, the CFPB estimates the overdraft revenue earned by all credit unions and distributes that estimated revenue to credit unions above and below $10 billion in assets based on those groups' relative share of member shares and deposits. The CFPB has estimated that overdraft revenue reported by banks with over $1 billion in assets comprises approximately 77 percent of the total overdraft/NSF revenue earned by banks and credit unions combined, while credit union overdraft/NSF revenue comprises approximately 15 percent of such revenue (overdraft/NSF revenue of banks under $1 billion in assets comprises approximately 7 percent of

[268] In narrative responses to supervisory information requests, financial institutions generally stated that discretionary overdraft fees are set using factors such as: (1) the direct and indirect cost of offering OD services, (2) deterrence effects, (3) positioning with respect to other competitors, (4) customer feedback, experiences, and utility, (5) regulatory requirements and (6) safety and soundness concerns. CFPB 2024 Overdraft NSF Report at 11.

[269] This information is reported in Schedule RI, Memorandum item 15.a on the FFIEC 031 and 041 forms, as of September 2023. For most institutions, this definition also includes fees associated with sustained negative balances. Few charges related to overdraft transactions are reported as net interest revenue, if any.

[270] CFPB 2014 Data Point at 10 tbl.2.

[271] CFPB October 2023 Data Spotlight.

[272] Some State-charted credit unions reported substantial overdraft revenue under California's Financial Code sec. 521. *See* Dep't of Fin. Prot. & Innovation, *Annual Report of Income from Fees on Nonsufficient Funds and Overdraft Charges* (Mar. 2023), *https://dfpi.ca.gov/wp-content/uploads/sites/337/2023/04/Annual-Report-of-Income-from-Fees-on-Nonsufficient-Funds-and-Overdraft-Charges_2023.pdf* (DFPI 2023 Report).

such revenue).[273] Banks with more than $1 billion in assets reported $7.72 billion in overdraft/NSF revenue in 2022, 90.55 percent or $7 billion of which the CFPB estimates is overdraft revenue for reasons explained above. Assuming this $7 billion represents 77 percent of the market total overdraft revenue, the CFPB estimates that credit unions earned 15 percent of the total, or $1.43 billion in overdraft revenue in 2022. At the end of 2022, very large credit unions held 24.1 percent of all member shares and deposits held by federally insured credit unions. Applying this 24.1 percent to $1.43 billion, the CFPB estimates that very large credit unions earned $0.34 billion in overdraft fees in 2022, and that very large financial institutions collectively earned $6.16 billion.[274] From information collections by the CFPB, it estimates the average overdraft fee amount to be $32.50.[275] The CFPB initially assumes that a reduction in the fee for non-covered overdraft credit will affect neither the quantity of credit demanded nor the quantity supplied, meaning that the application of the benchmark fee across the entire market will imply mechanical savings for consumers, unaffected by behavioral responses.[276] As discussed in part IV.D.3, the CFPB has finalized $5 as the benchmark fee. Assuming $5 will be the new average fee across the market, the decline in market total revenue will be proportional to the decline in the average fee amount. Thus, using a 2022 baseline, a $5 fee will save consumers $5.2 billion (84.6 percent of the 2022 total) annually. Savings from lower fees will be particularly valuable in cases when they protect liquidity at times when the consumer needs it most. Consumers with low balances may deplete their asset account less frequently if they have paid less in overdraft fees in the past, and thus their asset account recovered to a higher balance after a sufficiently large deposit. Moreover, if fees, in particular multiple or cascading fees, deplete less of the buffer the depository institution is willing to lend to the consumer (*i.e.,* the shadow line of their non-covered overdraft credit), the consumer might be able to cover more or larger transactions with it when they have depleted their asset account. The same shadow line will permit more consumption. Current users of non-covered overdraft credit will enjoy similar benefits even if they end up with substitute products like covered overdraft credit, or linked asset or credit accounts, as long as the new source of liquidity is cheaper than non-covered overdraft is currently. A large reduction in fees for non-covered overdraft could reduce some operating costs associated with complaints, collections, and account closures. Such benefits to covered persons do not need to reflect an equal but opposite pecuniary cost to consumers. Fewer complaints, collections, or account closures can save money for both the accountholder and the depository institution, who somehow split the value that would have been spent otherwise. These gains will mitigate some losses covered persons suffer from lower fee revenue, so they lose less on net, in total. The CFPB understands from its general monitoring activities that complaints fell by 70 percent or more at depository institutions that radically decreased overdraft fees recently. With lower fees and charges, the CFPB expects more non-covered or covered overdraft credit accounts to recover from negative balance episodes. Very large financial institutions with per-incident costs and losses traceable to overdrawing transactions above the $5 benchmark fee will have an incentive to set fees for non-covered overdraft using the breakeven standard described at proposed § 1026.62(d)(1)(i). Consumer gains when very large financial institutions with per-incident costs and losses above the benchmark fee use the breakeven standard will be less as their fee will not drop all the way to $5. The gains for consumers will be even smaller if the application of the breakeven standard imposes additional administrative costs on the institutions who use it, and, in turn, those institutions shift some of these costs to their customers. However, the CFPB expects these administrative costs to be small compared to revenue. Data produced in response to the CFPB's supervisory information collections on 2022 overdraft practices suggest that at least some very large financial institutions will have traceable costs and losses per overdraft fee charged greater than the benchmark fee level, such that they could find it more advantageous to use the breakeven standard. The CFPB has less data on the costs and losses of other very large financial institutions, whose costs and losses (mostly their charge-off losses) may be higher than for some institutions

[273] *See* CFPB 2021 Data Point at 7 (estimating combined overdraft/NSF revenue for credit unions and for banks with less than $1 billion in assets using 2014 data collected from core processors for the number of accounts by asset size and the overdraft/NSF revenue per account, and from 2014 call report data for distribution of institutions by asset size, and then assuming that overdraft/NSF revenue at small institutions saw the same growth from 2014 to 2019 as at large banks to arrive at the 2019 estimates). For purposes of this analysis, the CFPB assumes that banks with assets over $1 billion, banks with assets below $1 billion, and all credit unions represent the same relative portions of total marketwide overdraft/NSF revenue in 2022 as they did in 2019.

[274] The CFPB used FFIEC call report data on overdraft and NSF fee revenue from 2022 rather than 2023 to estimate benefits and costs to ensure consistency with the overdraft-related cost data the CFPB collected and used to inform the benchmark fee, which are only available from 2022. Total overdraft and NSF fee revenue paid by consumers at banks with more than $1 billion in total assets was somewhat lower in 2023 than in 2022—$5.83 billion in 2023 as compared to $7.61 billion in 2022 (As in 2022, data on banks below $1 billion in assets are not available for 2023.) This would suggest that the estimated benefits, costs, and impacts on consumers and covered persons could be somewhat smaller if the analysis relied on data from 2023 rather than 2022. *See* CFPB Data Spotlight, *Overdraft/NSF Revenue in 2023 down more than 50% versus pre-pandemic levels, saving consumers over $6 billion annually* (Apr. 2024), *https://www.consumerfinance.gov/data-research/research-reports/data-spotlight-overdraft-nsf-revenue-in-2023-down-more-than-50-versus-pre-pandemic-levels-saving-consumers-over-6-billion-annually/* (2024 CFPB Data Spotlight).

[275] The CFPB collected information about some very large financial institutions' 2022 overdraft practices. For those institutions with available data on the number of instances of non-covered overdraft when the institution charged a fee, the reported weighted average fee amount was $32.50. CFPB 2024 Overdraft NSF Report. Based on the CFPB's review of publicly available information between December 2022 and July 2023, the unweighted median non-covered overdraft fee amount across all very large financial institutions was $35. Past CFPB research publications have reported the median non-covered overdraft fee as $35; this median was also based on data from very large financial institutions. A $35 fee is higher than the $25.77 average fee recently reported by the New York State Department of Financial Services for 2022 based on surveyed entities, most of which would not be subject to this final rule. *See* N.Y. State Dep't of Fin. Servs., *Consumer Fee Practices in New York* (July 14, 2023), *https://www.dfs.ny.gov/system/files/documents/2023/07/rpt_20230714_consumer_fee_practices_nys.pdf.* The Department of Financial Protection and Innovation of the State of California annually tabulates State-chartered banks' and credit unions' revenue from overdraft charges but not the fee amounts. *See* DFPI 2023 Report. Note that to the extent market revenue or fees for very large financial institutions were lower by the effective date of the proposed rule, the proportional drop from a smaller market total would amount to less than these extrapolations from 2022 market revenue totals and fees. Bankrate's 2023 checking account and ATM fee survey reports that the average overdraft fee was 11 percent lower than a year before. *See* Karen Bennet et al., *Survey: ATM fees reach 26-year high while overdraft fees inch back up, Bankrate.com* (Aug. 21, 2024) *https://www.bankrate.com/banking/checking/checking-account-survey/.*

[276] This assumption approximates the situation where overdraft transactions are inadvertent (a fixed quantity demanded) and always met at the prevailing price, even after the supply curve shifts downward with the benchmark fee. As discussed elsewhere, this outcome is unlikely to hold exactly. Consumers might be less attentive to avoid overdraft when it is cheaper, though many might have larger buffers if earlier fees have depleted their account balances less than they would under the baseline. Financial institutions might also meet demand only at higher prices, applying the breakeven standard approach or offering covered overdraft credit instead.

in its supervisory information collection. However, because the costs and losses of providing non-covered overdraft are driven largely by credit losses, and because these losses depend on underwriting policies, which, as discussed below, very large financial institutions may change in response to the final rule, current cost and loss levels may not be a reliable indicator of future cost and loss levels under the final rule. Overdraft fees are incurred by consumers in an estimated 17 percent of households annually.[277] Among these, the consumers who will benefit most from the final rule are those that incur the largest number of overdraft fees. Thus, a change in fee amounts will have an outsized impact on specific groups of consumers. The CFPB collected 2022 calendar year information from entities it supervises (the group that will be affected by the final rule), which reinforced patterns of disparity that prior CFPB research and others have established: [278] Overdraft and NSF fees comprised 53 percent of all fees that the institutions charged to consumer checking accounts, nearly three quarters of all fees charged to accounts with an average balance below $500 (lower balance accounts), and nearly three quarters of all fees charged to accounts where accountholders opted to authorize overdraft fees on debit card and ATM overdraft transactions (opted-in accounts). While overdraft-related fees averaged approximately $65 per year over all accounts, accountholders of opted-in accounts and accountholders of lower-balance accounts paid over $165 and $220, respectively, in total overdraft fees per year on average. Therefore, the benefits of any fee changes driven by the final rule will be predominantly experienced by accountholders who had either opted-in accounts or lower-balance accounts. Indeed, in aggregate, across all institutions represented in the CFPB's Supervisory Information collection, one-fifth of accounts were lower-balance accounts, but these accounts paid 68 percent of per-item overdraft fees assessed. In fact, at least one institution charged over half of per-item overdraft fees to accounts that were both lower-balance accounts and opted-in accounts, even though only five percent of accounts fell into this category. Furthermore, accounts that paid for overdraft most often (12 or more overdraft fees per year) were nearly five times as prevalent among opted-in accounts than not-opted-in accounts. Overdraft use, and therefore the potential benefit from reduced fees, is also correlated with other consumer characteristics. As lower-income accountholders pay more fees, and minorities pay more fees even after controlling for income, these groups are more likely to benefit from the proposed changes.[279]

ii. Responses by Very Large Financial Institutions Covered by the Final Rule

Consumer gains will likely differ from the mechanical effect of lower fees on non-covered overdraft as described in the section above if some very large financial institutions tailor their offering to the new environment as the final rule allows. The discussion in this part starts with the possibility that institutions might adjust underwriting standards or overdraft coverage limits for non-covered overdraft credit when the marginal profit on each non-covered overdraft transaction falls. Then the text turns to the decision of whether to waive the fees on some overdraft transactions. Next is the analysis of decisions about whether to instead extend products that substitute for non-covered overdraft, primarily covered overdraft credit but also transfers from linked asset accounts. Finally, this part discusses repricing of financial products, like maintenance fees on the underlying checking account.

Availability of Non-Covered Overdraft Credit

Assuming that very large financial institutions comply with the final rule by lowering their fees for non-covered overdraft credit, these lower fees may change very large financial institutions' decisions about whether to extend non-covered overdraft credit for a given transaction on a given account. Financial institutions generally have discretion in setting overdraft policies.[280] When a financial institution decides whether to cover an overdraft transaction, it generally trades off the revenue from charging a fee against expected marginal costs and charge-off losses, although decisions about extending credit and charging or waiving a fee may also take into account their impact on the lifetime value of the customer as well as the financial institution's reputation.[281] Lower potential fee revenue could impact the decision to extend non-covered overdraft credit. In addition, very large financial institutions often offer services that are substitutes for non-covered overdraft credit, including covered overdraft credit and the option of linking other asset accounts to a checking account such that those other accounts can, sometimes for a fee, be accessed in the event of a shortfall. If fees for non-covered overdraft credit were limited for very large financial institutions, they could have incentives to limit access to non-covered overdraft credit but encourage consumers to take advantage of these substitute services. Having said that, firms that use the breakeven standard and not the benchmark fee could be disincentivized from reducing overdraft transactions because to do so will necessarily reduce the firms' cost and loss basis for the next year's fee calculation for remaining overdraft customers but not yield profits over the long run. In principle, very large financial institutions could respond to the final rule's changes by underwriting non-covered overdraft credit more conservatively, by reducing credit limits (whether or not disclosed to the accountholder) for accountholders with higher expected credit losses, or even by eliminating access to non-covered overdraft credit for some consumers who currently qualify for such credit, though as discussed, the firms may offer other products instead. To the extent that very large financial institutions opt to reduce access to non-covered overdraft, it could result in an increased likelihood that transactions are declined for some consumers. The CFPB understands that depository institutions rarely charge NSF fees on declined ATM or one-time debit card transactions when there were nonsufficient funds at the time the transaction was attempted. The CFPB expects that this will somewhat

[277] FinHealth Spend Research Reports from 2021, 2022 and 2023 have estimated that 17 percent of responding households have paid an overdraft fee in the prior 12 months between November 2021 and January 2023. *See generally,* FHN, *Market Analysis: FinHealth Spend Research–Latest Research, https://finhealthnetwork.org/finhealth-spend-research/* (last visited Dec. 3, 2024).

[278] *See* CFPB Fall 2023 Highlight; *see also* CFPB 2014 Data; CFPB 2017 Data Point.

[279] Oz Shy & Joanna Stavins, *Who Is Paying All These Fees? An Empirical Analysis of Bank Account and Credit Card Fees* (Fed. Rsrv. Bank of Bos., Working Paper No. 22–18, 2022), *https://www.bostonfed.org/-/media/Documents/Workingpapers/PDF/2022/wp2218.pdf.*

[280] Institutions authorize and pay transactions that they are contractually obligated to, such as ''authorize positive, settle negative'' (APSN) transactions, since under applicable payment system rules, once a transaction is authorized, the financial institution must pay the transaction. Pursuant to the CFPA, charging an overdraft fee on such transactions can be unfair.

[281] In response to supervisory information requests, financial institutions said that when setting limits for discretionary overdraft they consider factors that could be relevant both to the risk of charge-off and to the lifetime value of the customer, including (1) age of the account, (2) available balance, (3) account transaction activity and history, (4) standing of the account, and (5) existence of direct deposits. CFPB 2024 Overdraft NSF Report at 8.

attenuate any increase in likelihood that institutions decline these transactions since their expected revenue from the decline is negligible. While assessing NSF fees when declining ATM or one-time debit card transactions may make this response more likely, doing so would harm customers, damage consumer goodwill by charging a fee in return for no service, and, as noted by the Board in its preamble to the 2009 Opt-In Rule, ''could raise significant fairness issues'' under the Federal Trade Commission (FTC) Act because ''the institution bears little, if any, risk or cost to decline authorization of an ATM or one-time debit card transaction.'' [282]

Limited access to non-covered overdraft could be beneficial to consumers with access to cheaper credit options they mistakenly forgo or who would have preferred that a transaction was declined rather than incurring an overdraft fee. Some consumers who would not have repaid the overdraft credit may avoid the negative effects of default, including account closures, debt collection calls and litigation, and reporting to account screening consumer reporting agencies (which are specialty deposit credit reporting agencies) that can make it difficult to open a checking account at another financial institution. Consumers often overdraw their account when they have liquid funds or available cheaper credit. In these cases, consumers might benefit from using those options instead of overdraft credit. However, there are scenarios, even when there are other credit options available and overdraft is more expensive, that the prompt completion of the transaction would be more valuable to consumers than the fee charged.

The CFPB is aware of an empirical study finding that relaxing restrictions to overdraft fees may result in increased access to deposit accounts with overdraft coverage.[283] Contrary to some commenters' claims, the CFPB considered this study carefully in its proposal and reconsidered it for the final rule.[284] The work analyzed an episode in 2001 in which national banks' sudden exemption from State fee caps permitted some banks to increase their fees for non-covered overdraft. The study attempts to identify the effect of the regulatory change by comparing national banks (which became exempt from State fee restrictions) to State banks (which did not), and also comparing banks in States that had such restrictions to States that did not. The authors find that the analyzed change to fee caps seems to have led to higher overdraft fees at national banks in these States, expanded overdraft coverage at these banks, and more low-income households opening deposit accounts. In the survey data the study uses, about 56 percent of consumers in the lowest income quartile did not have checking accounts before the regulatory change, and the authors estimate that this share fell by about five percentage points after the change.[285] The estimates are consistent with the regulatory change making it more profitable, in those States affected, for national banks to provide accounts to consumers who maintain low balances. The authors do not find evidence that the newly banked consumers regretted (or at least reverted) their choice or suffered worse financial health, and they suggest that this is consistent with welfare improvements for these consumers in the short run. These estimates do not make the CFPB expect substantial consumer harm from this final rule. As with most modern empirical research in economics, the study focuses attention on the internal validity of the findings, *i.e.,* the measurement of the causal effect of the policy change at the time and place that it took effect. The study's causal reasoning requires that differential trends at national and State institutions in affected States would have continued to diverge (or converge) at the same linear rate in the absence of the exemption from State fee caps, and evaluating these assumptions is difficult given the five-year window for which the study has data.[286] Assuming the internal validity of the findings, differences in both the economic context and the nature of the regulatory change make it unlikely that the study's findings will apply directly in the context of this final rule. The study authors suggest that relaxing caps may have been beneficial to consumers without bank accounts in 2001, but this is difficult to conclude without strong assumptions about how consumers value deposit account access, overdraft credit, and overdraft fees. In addressing which of the four proposed benchmark fees the CFPB should adopt in this final rule, an academic commenter urged the CFPB to adopt one of the lower proposed benchmarks fees while acknowledging that these would be more likely to result in reduced overdraft credit limits for some consumers. The commenter asserted that ensuring consumers can make better-informed borrowing choices or that they would face substantially lower per-episode non-covered overdraft fees would be preferrable to permitting higher non-covered overdraft fees, even if those fees were less than half of the prevailing fees charged in today's market. The CFPB also notes that the final rule will not impose limits on all overdraft fees but rather will require very large financial institutions to comply with Regulation Z when offering covered overdraft credit.

A prominent precedent for a U.S. policy change affecting overdraft fee revenue was the implementation of the opt-in rule of Regulation E in August 2010. The CFPB is not aware of a careful empirical study that isolates the effect of this change in the market. That said, there was a substantial decrease in marketwide overdraft revenue following the introduction of the opt-in rule and

[282] 74 FR 59033, 59041 (Nov. 17, 2009). In 2010, card issuers reported that their median per-transaction cost of nonsufficient funds handling was one cent. 76 FR 43394, 43398 (July 20, 2011). Since then, the transacted weighted average cost of nonsufficient funds handling has fallen to $0.005. FRS, *2021 Interchange Fee Revenue, Covered Issuer Costs, and Covered Issuer and Merchant Fraud Losses Related to Debit Card Transactions,* at 39 tbl.14A (Oct. 2023), *https://www.federalreserve.gov/paymentsystems/files/debitfees_costs_2021.pdf.* Nonsufficient funds handling costs were described in the survey as ''[c]osts of handling of events in which an account does not have enough funds to settle an authorized debit card transaction between the time of authorization of that transaction and the settlement of that transaction.'' *Id.* at 28 n.25. Based on this description, the cost of handling events in which the debit card transaction was not authorized is likely even lower.

[283] *See* Jennifer L. Dlugosz et al., *Who Pays the Price? Overdraft Fee Ceilings and the Unbanked* (Fed. Rsrv. Bank of N.Y., Staff Rep. No. 973, June 2021), *https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr973.pdf* (revised July 2023) (Dlugosz 2021 Study).

[284] Comments citing this study generally overlooked the CFPB's consideration of some negative consequences of unpaid overdraft or declined transactions. The CFPB has not ruled out and does not rule out decreased overdraft credit or checking account access for some consumers, but does not expect consumer harm from such potential outcomes to necessarily outweigh consumer gains from lesser charges, more transparent pricing, and more efficient competition in overdraft credit and deposit account markets.

[285] The study cites three possible reasons why the share with checking accounts might be lower in their data than other surveys or administrative records: their focus on checking accounts and exclusion of savings and money market accounts, the nearly 10 year difference in timing between their survey and other available survey evidence, and the known underreporting of bank account ownership in survey data relative to administrative records shown in a 2021 study by Yogo, Cox, and Whitten. *See* Dlugosz 2021 Study at 17 n.19; *see also* Yogo et al., *Financial Inclusion Across the United States* (Dec. 6, 2021), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3934498* (last revised Nov. 25, 2024) (Cox 2021 Study).

[286] An academic discussant of an earlier draft of the study recommended further analysis to allay similar concerns. *See* Christopher Palmer, MIT Sloan & NBER, *Who Pays the Price? Overdraft Fee Ceilings and the Unbanked,* Presentation at the Boston Fed Day Ahead Conference, at 9 (Jan. 6, 2022), *https://web.mit.edu/cjpalmer/www/discussions/Palmer%20Discussion%20of%20DMM.pdf.*

a smaller decrease in total service charges, which suggests less than fully offsetting price responses.[287] However, isolating the effect of the opt-in rule is made more difficult by the fact that the implementation of the cap on very large financial institutions' interchange fees on debit cards came a mere three months later, and the Great Recession might also confound the effects of the opt-in rule alone. The CFPB's market monitoring activities also indicate that some institutions ceased to offer ''free checking'' after the 2010 changes.[288] The downward trend in the share of American adults without a bank account does not seem to have broken around the time of these changes in the long-running series of the Survey of Consumer Finances, and the FDIC's Survey of Household Use of Banking and Financial Services, which started in 2009, shows a small increase in the unbanked share in 2011 before steady declines thereafter.[289] According to the CFPB's market monitoring, recent voluntary decreases in overdraft revenue at many large American depository institutions have not coincided with conspicuous restrictions of checking offerings or increases in other fees, though this period corresponded to increases in net interest revenue on deposits resulting from a changing interest rate environment.[290] In some cases, in response to the final rule, the above referenced more conservative underwriting may lead lenders to reject transactions they would not have rejected under the baseline where consumers do not have other viable options. In such cases, those consumers will no longer have the option to use non-covered overdraft as credit, which means transactions will be declined, but also, the consumers will not incur its high cost and potential risks of account closure. Overdraft use can also decrease due to financial institution responses that cause no consumer harm. With smaller profits on each transaction, very large financial institutions could have more of an incentive to educate their depositors and help them avoid negative balance episodes.[291] Financial institutions will also have less of an incentive to inflate the number of overdraft transactions with transaction posting orders designed to increase the number of overdraft fees.

One industry trade commenter summarized responses from 21 member banks answering its survey about their overdraft practices in 2023 to support its assertion that the CFPB could quantify the impact of the rule on availability of non-covered overdraft, and asserted that the survey results show that the final rule would lead to a significant reduction in the amount of credit available to customers through non-covered overdraft, which the commenter stated was not accounted for in the proposal. The commenter provided results for 13 of the 21 member banks that responded to the survey, excluding responses for banks that did not offer overdraft or did not meet the definition of a very large financial institution. Among these 13 respondents, the reported average amount of non-covered overdraft credit available to overdraft customers in 2023 was $756, and on average overdraft consumers ''used'' about half of the available credit in 2023. Respondents reported that they would reduce the amount of available non-covered overdraft credit under different potential benchmark fee amounts. Furthermore, the survey's methodology provides an insufficient basis to credibly quantify potential impacts of the rule. For example, the study's description of its methodology does not make clear how the measure of credit used is calculated, making it difficult to evaluate if the calculation captures the relevant economic concept.[292] In any event, at the $7 benchmark fee amount, five out of ten respondents reported that the reduction in average available overdraft credit would not exceed 50 percent. Even at the $3 benchmark, two out of ten claimed the available overdraft credit would be reduced by 50 percent or less. Either scenario is consistent with an expectation that only heavy users of overdraft would face an effective reduction in their overdraft credit available to cover transactions; respondents stated that, on average, overdrafters used only half of their available credit line and currently extended liquidity also covers the excess overdraft fees that the final rule will reduce.[293] The survey thus suggests that many financial institutions will be able to use the $5 benchmark fee without meaningfully reducing overdraft access or use for many consumers.

Waiver Policies

Currently, a substantial fraction of overdraft fees is waived by financial institutions, either because regulation

[287] As discussed in part I.B above, marketwide overdraft revenue (for both banks and credit unions) is estimated at approximately $25 billion in 2009, and fell to an estimated $12 billion in 2011. According to bank call report data, total bank deposit service charges fell from $41.7 billion in 2009 to $33.1 billion in 2011 and remained at a similar level in following years. While other factors may explain part of the reduction in deposit service charges, the large and persistent decrease suggests that banks did not make up all of the lost overdraft revenue from the 2009 opt-in rule by increasing other prices.

[288] *See, e.g.,* E. Scott Reckord, *At many big banks, no more free checking,* L.A. Times (Feb. 4, 2011), *https://www.latimes.com/archives/la-xpm-2011-feb-04-la-fi-free-checking-20110204-story.html.*

[289] *See* Paola Boel & Peter Zimmerman. *Unbanked in America: A Review of the Literature.* Econ. Comment Number 2022–07, Fed. Rsrv. Bank of Clev. (May 26, 2002), *https://www.clevelandfed.org/publications/economic-commentary/2022/ec-202207-unbanked-in-america-a-review-of-the-literature.* Note that the increase in the FDIC measure may have been impacted by the Financial Crisis.

[290] *See* CFPB May 2023 Data Spotlight.

[291] Various pieces of evidence have bolstered the view that overdraft is a mistake for many. Stango and Zinman document that surveying consumers about overdraft makes them use it less, strongly suggesting that they overuse the service when they are paying less attention. *See* Victor Stango & Jonathan Zinman, *Limited and Varying Consumer Attention: Evidence from Shocks to the Salience of Bank Overdraft Fees,* 27 Rev. Fin. Stud. 990 (2014), *https://academic.oup.com/rfs/article/27/4/990/1603971.* Alan et al. ran an experiment in Turkey, where overdraft fee discounts lowered use while messages about availability raised it, suggesting that consumers are overdrawing their account without regard to the actual fees and even a discounted price is too high for them when it draws their attention. *See* Sule Alan et al., *Unshrouding: Evidence from Bank Overdrafts in Turkey,* 73 J. Fin. 481 (2018), *https://onlinelibrary.wiley.com/doi/full/10.1111/jofi.12593.* Grubb modeled the direct and indirect consequences of just-in time ''bill-shock alerts'' (*e.g.,* for debit card transactions) on consumers and finds that the overdraft market is ripe for such reminders, as people differ in how much attention they pay to their available balance. *See* Michael D. Grubb, *Consumer Inattention and Bill-Shock Regulation,* 82 Rev. Econ. Stud. 219 (2015), *https://academic.oup.com/restud/article/82/1/219/1543467.* Grubb et al. indeed report on field experiments in the U.K. where timely text message alerts saved consumers 11 to 27 percent of overdraft fees, which also shows that many had available funds elsewhere. *See* Michael D. Grubb et al., *Sending Out an SOS: Automatic Enrollment Experiments for Overdraft Alerts* (forthcoming in the Journal of Finance, accepted May 8, 2024), *https://sites.google.com/bc.edu/michael-grubb/research.* Heidhues and Köszegi use overdraft as their prime example of markets where providers exploit the mistakes of some consumers. *See* Paul Heidhues & Botond Köszegi, *Naïveté-Based Discrimination,* 132 The Q. J. Econ. 1019 (2017), *https://academic.oup.com/qje/article/132/2/1019/2724551?searchresult=1.* Gathergood and Olafsson find in granular administrative data some overdraft behaviors impossible to rationalize. *See* John Gathergood & Arna Olafsson, *The Co-holding Puzzle: New Evidence from Transaction-Level Data* (Oct 10, 2023), *https://ssrn.com/abstract=3607560.*

[292] For example, it is not clear if the credit used as calculated in the study reflects the highest overdraft balance a consumer had during the year, the sum of all overdraft transactions during the year, average monthly overdraft balances within the year, or some other measure.

[293] At the commenter's ''average amount of overdraft liquidity available per customer'' of $756, this would be expected to cover nine overdraft transactions at an average overdraft transaction amount of $50 (*see* FHN Brief 2024) and an average overdraft fee of $32.50 (*see* CFPB 2024 Overdraft NSF Report at 13). Under the benchmark fee of $5, available overdraft liquidity close to half the current average among the survey respondents ($385) would still cover seven overdraft transactions at the average transaction amount.

does not allow fees on transactions that are paid per contractual obligations (such as debit APSN transactions without opt-in), pursuant to an automatic policy like a daily maximum, or at the discretion of a customer service representative or manager, often called a discretionary waiver or a reversal after the fact. Lower fee amounts will change institutions' incentives related to whether to waive the fee by policy or discretion, which is a subset of overall waivers. For this decision, the depository institution trades off the net revenue from charging the fee against the expected value of a marginally better relationship with the customer. Lower fee amounts will affect both parts of this tradeoff. Lower potential fee revenue will mean that depository institutions will have less to lose by waiving a fee, while they also imply that there is less at stake for the consumer, likely making fee waivers less important to maintaining good customer relationships. As discussed in the Overdraft and NSF Practices Report, the $5 benchmark fee would not have covered the average charge-off losses across the institutions in the CFPB's data for 2022 if they had applied their current waiver policies (charging $5 only in instances where they actually charged their current higher fee in 2022).[294] This suggests that institutions that currently waive or reverse fees might reconsider their policies if the benchmark fee did not allow them to recoup their costs and losses on their non-covered overdraft credit product, if product-specific profit targets were more important in practice than the marginal incentives for individual waivers. If an institution was to adopt the breakeven standard, it will charge higher fees but may still have an incentive to tailor its waiver policies to foster customer goodwill and retention according to the accountholder's lifetime value to the institution. A decrease in the chance of a waiver will shift the consumer experience from higher overdraft fees (as much as $35) that might be waived discretionarily, to lower overdraft fees (as low as $5) that are more predictable. On net, the CFPB expects that this shift will lower costs and create more predictability for consumers. In addition, the discretionary nature of some fee waivers can lead to the potential for disparate treatment of customers, as some customers may be more likely to get an overdraft fee waived than others. This disparate treatment amounts to what has been called ''contractual inequality.''[295] A substantial decrease in discretionary waivers is likely to move towards more equality of waiver rates across underprivileged and more privileged groups.

Expanding Covered Overdraft Credit or Other Substitutes for Non-Covered Overdraft

Financial institutions may choose to offer covered overdraft credit in addition to or instead of non-covered overdraft credit. Whether consumers will choose to apply for and use covered overdraft products, and whether very large financial institutions will find it profitable to offer them, depends on a number of factors, and available evidence does not permit the CFPB to confidently predict whether or how such products will develop. In particular, it will depend on the price that the market will bear for these products in new segments, as well as the cost and time required to develop reliable underwriting and consumer acquisition systems to support such products.

Lines of credit on any such new covered overdraft product might be smaller than on existing covered overdraft lines of credit, which generally focus on premium market segments. If underwriting these covered overdraft credit lines on the new accounts will require extensions of existing systems or new installations at many institutions, transitioning a new customer base to covered overdraft credit will take time and experimentation, even at institutions with experience underwriting credit cards or extant overdraft lines of credit. The frequent overdrafter population might be profitable to underwrite with small lines, but few financial institutions will have experience underwriting such small lines of credit covered by Regulation Z for this population (either for a credit card or extant overdraft lines of credit). The effective date will leave time for very large financial institutions to experiment before implementation, which could facilitate development of new covered overdraft credit offerings.

If frictions slowed the transition of consumers from non-covered to covered overdraft credit, fewer consumers will receive the new coverage at institutions that try to move some of their overdraft customers into a covered product.

Past experience offers little guidance on the extent to which very large financial institutions will attempt to transition current non-covered overdraft transactions into a covered product. As depository institutions generally target existing covered overdraft credit as a premium product at customers with low charge-off risks and high expected lifetime value to the institution, inertia might imply that customers who are more likely to struggle to recover from a negative balance episode continue to access a non-covered overdraft product subject to the new breakeven or benchmark limits, keeping non-covered overdraft fees higher under the breakeven standard than otherwise.[296] Institutions may find it harder to quickly adjust credit limits for covered overdraft credit than for non-covered overdraft credit, and this difference may be more pronounced when extending overdraft credit that is less likely to be repaid.

The disclosure provisions of Regulation Z might result in more competitive pressure on the pricing of covered overdraft credit products than currently exists for non-covered overdraft credit. An increase in competitive pressure could mean that new covered overdraft products will be less expensive than existing non-covered overdraft products for the same consumers and coverage.[297]

Consumers will also stand to gain from the availability of covered overdraft credit because meeting periodic minimum payments, which are generally lower than the full balance, will allow them to revolve their overdraft debt and cover more extended needs for liquidity. They could also pay less in per-transaction fees if their asset account, not depleted by full repayment of prior overdrafts, will cover more transactions while the credit account

[294] CFPB Overdraft and NSF Practices Report at 6.

[295] Manisha Padi, *Contractual Inequality,* 120 Mich. L. Rev. 825, 834–40 (2021), *https://repository.law.umich.edu/cgi/viewcontent.cgi?article=8399&context=mlr.*

[296] Interest rates are similar on arranged and unarranged overdrafts in the United Kingdom, following recent regulation setting a comparable pricing structure on both. *See* Danail Vasilev et al., Fin. Conduct Auth., *Evaluation Paper 23/1: An evaluation of our 2019 overdrafts intervention* (Apr. 2023), *https://www.fca.org.uk/publication/corporate/ep23-1.pdf* (FCA 2023). This could suggest similar pricing for covered overdraft credit as for current non-covered overdraft credit, even if it becomes better disclosed and the credit limits are clearer than current shadow lines. However, the same British reform also resulted in expanding arranged overdraft lines and smaller unarranged lines in addition, which suggests that covered overdraft credit could also become competitive or prevalent in the United States.

[297] Regulatory constraints may also affect the fees charged for covered overdraft credit. For example, for open-end covered overdraft credit accounts accessible with a hybrid debit-credit card, the fee-harvesting provisions in § 1026.52(a) would limit some fees that very large financial institutions can charge in the first year of a new account to 25 percent of the approved credit line. Section 1026.52(a) does not, however, limit charges that are assessed as periodic rates.

carries a balance. Periodic repayment saves consumers some per-transaction finance charges at the cost of somewhat higher periodic charges resulting from a credit balance remaining outstanding for longer. Furthermore, consumers who cannot repay the overdrawn amount within 60 days, when non-covered overdraft credit balances are typically charged off, might benefit from revolving their covered overdraft credit balance for a longer period of time.

Consumers who go delinquent on new covered overdraft credit accounts will have their credit negatively impacted if the delinquency is reported to consumer reporting agencies, though not necessarily with more dire consequences than with a negative report to account screening consumer reporting agencies (which are specialty deposit credit reporting agencies) after involuntary account closure due to a negative balance on the original asset account that would have resulted from similar behavior with non-covered overdraft credit in the absence of the final rule.

When consumers at very large financial institutions are offered covered overdraft credit, that covered overdraft credit will not be subject to the Regulation E opt-in requirement for non-covered debit card overdraft. However, it will be subject to Regulation Z's application and solicitation requirements and limitations on the issuance of credit cards if it can be accessed by a hybrid debit-credit card. Financial institutions will not be required to permit consumers to consent separately to overdraft charges on one-time debit card and ATM transactions, versus overdraft on other transaction types, the way Regulation E requires. A very large financial institution will be permitted, instead, to simply give the consumer the choice to apply for covered overdraft credit that will be extended to cover any overdrawing transaction (whether it be check, ACH, debit card, ATM, or any other form). Once the account is established, the CFPB expects those covered overdraft accounts to be presented to consumers as a credit account on phone applications, accounts on websites, and periodic statements, which will call attention to the fact that covered overdraft credit is a credit product.

Consumers who choose to have covered overdraft credit that is accessible by a hybrid debit-credit card might be better off than those who are opted into non-covered overdraft credit on one-time debit card and ATM transactions today if the same amount of credit for the same transactions costs less, as discussed above, or because of the other protections included in this final rule. Where a financial institution only offers covered overdraft credit bundled for all transaction types, consumers who are not opted in today will gain the right to, effectively, refrain from opting into overdraft on transactions other than one-time debit and ATMs. They will lose, however, the ability to refrain from opting into overdraft for one-time debit and ATMs while intentionally keeping overdraft for other transactions. It is unclear how many consumers would prefer the default of Regulation E, particularly given evidence that consumer understanding of the Regulation E opt-in right is low.[298]

If very large financial institutions chose to offer closed-end covered overdraft credit, such closed-end covered overdraft credit will not be subject to the substantive protections discussed above. Instead, it will be subject to the disclosure requirements that apply to closed-end credit. The CFPB believes it is unlikely that this product will be provided.

With non-covered overdraft credit less profitable for financial institutions and available to fewer consumers, both institutions and consumers will have greater incentive to take advantage of linked accounts. Institutions might offer and promote more of these opportunities. Transfer fees on linked asset accounts to cover overdrawing checking account debits can result in costs for consumers but protect them from unnecessary borrowing if they indeed have liquid assets elsewhere. Links to existing credit lines like credit cards will not have this benefit but give more control to consumers to shop for rates and decide on repayment, with potentially still lower transfer fees than fees on non-covered overdraft credit under the final rule. Transfer fees for transfers from both savings accounts and credit accounts have been less common among the largest banks in recent years than they were prior.[299]

Offsetting Changes to Other Deposit Account Prices

As discussed above, the final rule will lead to reductions in non-covered overdraft revenue at many very large financial institutions, and it is uncertain whether that revenue will be replaced, potentially by revenue from covered overdraft or other substitute products. Overdraft provider responses to this lost revenue will affect both the sum of consumer gains and their distribution across market segments and populations. Total consumer gains will be lower if very large financial institutions make up for lost overdraft fee revenue and any potential increase in costs by raising revenue through increasing other checking account prices or decreasing rates paid on deposit accounts. Whether financial institutions will offset lost overdraft fee revenue in this way for some or all deposit accounts will depend on a number of factors, including overall profitability of deposit accounts and the nature of competition among financial institutions. Without predicting exactly how firms will respond, the CFPB believes a reduction in overdraft fee revenue need not translate into increased maintenance fees, especially for high-balance consumers.[300] In addition, as discussed in this section, very large financial institutions will generate revenue by assessing charges on covered overdraft credit or other credit products that substitute for non-covered overdraft.

To give an upper bound on how much lost revenue might be offset on a per-account basis, the CFPB estimates the mechanically lost revenue per account from non-covered overdraft fees without any behavioral responses. While full offset of the revenue loss is not a likely scenario, calculating this upper bound provides some quantitative context for understanding the limits of potential lost revenue and corresponding changes that might result. The CFPB does not have current information on the number of active checking accounts at all very large financial institutions but requested such information for 2022 from eight very large financial institutions in a supervisory capacity. For these institutions, the overall average overdraft fee revenue from any active account-month was $3.77. Of course, the final rule will not eliminate all non-covered overdraft fee revenue. With the $5 benchmark (and again, assuming for analytical purposes full adoption of the benchmark), financial institutions will lose approximately 84.6 percent in weighted average fee revenue (from $32.50 average fees to the $5 benchmark), totaling a revenue loss of $3.19 per account per month.

The magnitude of this extreme upper bound on lost revenue per account

[298] *See* Pew 2017 Chartbook at 1, 6 fig. 5 (three out of four consumers do not understand they have a right to not opt-in to overdraft on debit card transactions).

[299] Based on the CFPB's review of publicly available information in June 2023, of the 20 banks reporting the most in overdraft/NSF revenue in 2021, 18 were not charging a transfer fee to transfer funds from a savings account to cover an overdraft, and 16 were not charging a fee to transfer funds from a credit account.

[300] Today's market features checking accounts with neither maintenance nor overdraft fees.

reassures the CFPB that any potential losses to banking access can remain limited. In fact, there are large financial institutions for which this final rule is unlikely to result in substantial reductions in revenue.[301] Furthermore, this decrease in overdraft revenue is likely to be on par with, if not lower than, the voluntary decrease in revenue many large financial institutions already absorbed between 2019 and 2022, without apparent disruptions to checking and overdraft access.[302] The proposed fee reductions are in some ways similar to new regulations of the overdraft market in the United Kingdom in 2019, whose impacts the Financial Conduct Authority evaluated ex-post with a careful causal analysis. Their findings are generally consistent with the CFPB's expectations about limited disruption to checking and credit access and no complete offset of lost overdraft revenue.[303]

Offsetting changes in prices, if any, will limit the benefits to consumers from the final rule (as well as the corresponding costs to covered persons), but also redistribute the burden of paying for consumer checking services in the United States. Those consumers who are currently frequent users of high-cost non-covered overdraft credit will benefit substantially from lower fees even if checking account APY or maintenance fees adjust, as those adjustments are unlikely to be similarly concentrated. Consumers who currently receive cross-subsidies from frequent (or just occasional) overdrafters but might now receive lower net interest or pay higher maintenance fees to their checking provider, will incur only modest losses under the final rule relative to the baseline. Thus, to the extent that covered financial institutions respond to the rule by increasing deposit account maintenance fees or decreasing net interest paid for deposit accounts, this will decrease the total benefit to consumers from the final rule. However, as these prices are likely to be more salient to consumers, the CFPB expects there to be more efficient competition which will limit the extent to which covered financial institutions are able to pass along price increases (or net interest decreases) to consumers. Furthermore, and as mentioned above, any offsetting changes in prices are likely to be less regressive than overdraft fee revenue and thereby would replace a cross-subsidy from supernormal profits on a product used primarily by more resource constrained consumers.[304]

Under the baseline scenario for this analysis, very large financial institutions generally do not charge nonsufficient fund fees for transactions that consumers attempt to authorize in close to real time, which could include non-recurring debit card transactions or certain person-to-person transactions. Thus, consumers that end up with less access to overdraft credit due to this final rule (and therefore more declined transactions) are not likely to pay fees on these types of transactions that they attempted but that were not authorized. Other types of declined transactions might trigger NSF fees to the extent those fees are not subject to the penalty fees limitation in § 1026.52(b), although, as noted earlier, a significant majority of supervised entities subject to this final rule eliminated NSF fees during 2022 and early 2023.

iii. Responses by Consumers

A lower price for non-covered overdraft credit will lead some consumers to use the product more on the margin, assuming it remains available to them. For those who are attentive to the price of the product, who are also likely to use the product deliberately and experience liquidity and convenience benefits outweighing the cost, any additional utilization will likely provide net benefits. Inattentive consumers, for whom overdraft has already often been a mistake, will continue to be unlikely to pay attention to and rationally consider the lower cost of overdrawing their balance, and will thus be unlikely to use overdraft more even at a lower price.

Some consumers might keep a lower deposit balance as long as their overdraft protection seems sufficient but is now cheaper. As consumers with checking account balances forgo a net interest margin of 250 basis points[305] relative to short-term Treasury bill yields, on average, every $500 in deposits shifted from a checking account to an account with short-term Treasury bill yields would earn each consumer an additional average $12.50 over a year. Others might keep higher balances in their checking accounts if the final rule were to reduce their access to overdraft credit or if more salient use of overdraft credit made them try harder to avoid it. The cost-of-credit disclosures required for covered overdraft credit make its use more salient for the switchers than non-covered overdraft used to be. Consumers who keep more in their checking account may forgo more interest on their savings if they would have otherwise kept it in higher-yielding accounts.

While the rate of consumers switching depository institutions is relatively low, some consumers may also choose different depository institutions as account terms change as a result of the final rule. The ability to do so will generally increase consumer benefits and reduce consumer costs. For example, consumers who frequently overdraft at banks that are not very large financial institutions could switch to an account at a very large financial institution if non-covered overdraft credit is available there at lower cost. Conversely, a consumer at a very large financial institution that loses access to non-covered overdraft credit as a result of the rule could switch their account to another institution that is not covered by the final rule.

To the extent that marginal consumers could expect to pay a predictable and lower amount for checking overall, the final rule will encourage unbanked or underbanked customers to return to the banking system and gain access to deposit insurance and the low-cost payments system banks provide.

Overdraft use might also change because very large financial institutions will need to disclose newly covered overdraft credit to consumers as a credit product, which can only help them. For consumers who will use overdraft more because of this, their increased use may suggest that they will be deliberately taking advantage of a product worth its price for them. For consumers who will use overdraft less after these changes, better information might correct prior

[301] *See* CFPB, *Chart of Overdraft/NSF metrics for Top 20 banks based on overdraft/NSF revenue reported* (Feb. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_overdraft-chart_2022-02.pdf*.

[302] *See* CFPB May 2023 Data Spotlight.

[303] *See* FCA 2023.

[304] Minimum balance requirements typically affect fee waivers and not overall account access. To the extent that fees are introduced for consumers that fail to satisfy minimum balance requirements, the resulting fees will also disproportionately be assessed on more resource-constrained consumers. A discussion on the availability of non-covered overdraft credit is above. Upon opening, some accounts might require a larger balance to limit adverse selection. The CFPB expects non-covered overdraft access to be determined separately from basic checking and deposit account access, with limited changes to the supply of the latter. A discussion on potential demand responses to more transparent price changes is below.

[305] The FDIC has been reporting national average interest rates on checking accounts since 2009, separately for non-jumbo and jumbo accounts until 2021. For much of this history, nominal interest rates hit the zero lower bound. For months with four-week Treasury yields below one hundred basis points, the national average (non-jumbo) checking account paid 8.3 basis points less. In other times, partly because checking account APYs have not risen as fast as short-term nominal interest rates, checking accounts paid 251.7 basis points below the four-week Treasury bill yield, on average.

misunderstandings and prevent further mistakes.

Disclosure as a credit product will also help consumers compare the costs of different forms of credit (or other options to delay or forgo transactions), which provides direct benefits to those who are able to make more informed choices, and also provides indirect benefits to other potential users as more intensive comparison shopping will bring down prices among competitors. For example, Regulation Z requires disclosure of annual percentage rates, which aid consumers in comparing the cost of credit across products.

Consumers currently not opting into one-time debit card transaction coverage by their non-covered overdraft service under Regulation E may be more likely to opt into such coverage under lower prices. To the extent these consumers pay particular attention to the fee and how it might affect them, they are less likely to regret when they use non-covered overdraft credit than less attentive consumers and are thus more likely to benefit from the final rule.

iv. Responses by Financial Institutions Not Covered by the Final Rule

The final rule will only apply to very large financial institutions and will not lead to any new compliance costs for financial institutions not covered by the final rule.

The CFPB recognizes that a bank or credit union's demand for deposits (including demand and time deposits) derives from a multitude of factors, including, but not limited to, meeting expected loan demand and liquidity needs. In addition, when consumers select a deposit product, they rely on many factors unrelated to the overdraft pricing, including ATM and branch availability, interest rate, and expected customer service.

As the final rule outlines, many large financial institutions have already substantially reduced overdraft fees. During this time, there was no major shift in the total share of deposits from small financial institutions to very large financial institutions.

The CFPB acknowledges that it is difficult to predict with certainty as to how very large financial institutions will evolve their business models over time. Of course, as with any change in business strategies by market participants with substantial market shares, this may ultimately lead to evolving industry dynamics with uncertain benefits and costs.

2. Potential Benefits and Costs to Covered Persons

This final rule will affect the consumer business of certain depository institutions with more than $10 billion in assets. At the end of calendar year 2022, used for some tabulations here, this list included 176 depository institutions.

For covered persons, costs and benefits mostly mirror the existence and extent of each respective pecuniary benefit or cost to their customers, as detailed above, net of offsetting changes. As it did for consumers, the CFPB has carefully considered the various causes, mediating channels and modulating responses affecting costs and benefits to covered persons, and much of the discussion of the factors and mechanisms affecting potential consumer pecuniary benefits and costs in the previous section also applies to the potential costs and benefits, respectively, of the final rule for covered persons.

In particular, the final rule will reduce the revenue of very large financial institutions from non-covered overdraft credit, and these institutions may be able to offset this lost revenue in various ways, including expanding their offerings of covered overdraft or other services that substitute for non-covered overdraft credit. The extent to which depository institutions will be able to pass the price changes of checking accounts under the final rule onto input prices depends on the pricing pressures on capital, labor, and intermediary goods, and services that very large financial institutions pay for. Due to their complexity, the CFPB has not modeled them in detail.

The operating cost of offering covered overdraft may be higher than the cost of providing similar non-covered overdraft credit. This arises from the costs of complying with Regulations Z and E, and potentially other laws. Covered persons might bear these costs if market forces do not let them pass some of them on to the consumer.

Very large financial institutions already have to provide disclosures per Regulations DD and E for non-covered overdraft credit. If they chose to continue offering non-covered overdraft credit, they will need to update these systems to make sure they accurately disclose and charge the new lower fees. If they decide to offer covered overdraft credit instead to any customer, then the disclosures will follow Regulation Z. The one-time cost of setting up a new covered overdraft program or transitioning consumers to existing covered overdraft programs could be substantial. The compulsory use prohibition will impose an administrative burden on the institution to offer another form of payment to the covered overdraft credit customer, as well as the operating cost of collecting the payment.

As discussed in the previous section, mechanical application of the benchmark fee amount to existing non-covered overdraft could reduce revenue of very large financial institutions by $5.2 billion. This revenue impact on covered persons is limited by the final rule's design, which allows depository institutions to collect their costs and losses in overdraft fees. part IV.D.3 details why the CFPB believes that the $5 benchmark fee will allow some very large financial institutions to cover their costs and losses. Where the benchmark fee will not allow this, fees set based on the breakeven standard will allow institutions to recover their costs and losses over time. This mechanism ensures that even entities that will see less revenue due to this final rule need not take losses on overdraft credit, unless they charge lower fees than the final rule will allow. And financial institutions whose per-transaction traceable costs and losses are lower than the benchmark fee could charge that fee and thereby make a profit on overdraft.

The CFPB finds it plausible that a different revenue model for checking in the U.S. that may result from the final rule will have broader implications on counterparties, competitors, or new entrants, or elsewhere in the economy. Such considerations are too speculative for this impact analysis.

F. Potential Benefits and Costs to Consumers and Covered Persons of Further Provisions of the Proposed Rule

The final rule will also apply the Regulation E compulsory use prohibition to covered overdraft credit provided by a very large financial institution. The rule does not amend the Regulation Z prohibition against offset, nor the Regulation Z provision permitting periodic deductions. The final rule's approach to these provisions will affect the costs and benefits for consumers and covered persons of consumers potentially switching from non-covered overdraft to covered overdraft. Consumers who have access to covered overdraft credit but consciously avoid pre-authorized EFTs to repay covered overdraft credit are likely to benefit from the compulsory use prohibition, which will give them additional control over their finances, though they might be overoptimistic about their future repayment discipline, and mistakenly turn down automatic

payments, to their detriment. Consumers who forget to repay can incur additional costs, including late fees, default interest rates or negative credit reporting after a period of delinquency. Some consumers might not be able to switch to covered overdraft credit if their depository institution was on the margin of offering it and they deem the consumer too prone to delinquency without a pre-authorized EFT for repayment. It is less likely that existing users of covered overdraft credit will be impacted for the same reason, as they are typically premium customers not on the margin of profitability.

Covered persons should not incur substantial cost from establishing repayment options in addition to a preauthorized EFTs. They can feasibly establish processes for consumers to have the repayment option of authorizing individual EFTs. Covered overdraft credit accounts that are not accessible via a hybrid debit-credit card will not be subject to the no-offset provision of Regulation Z.

Consumers with covered overdraft who do not repay their balance with frequent preauthorized EFTs pay either more interest from debt held longer or the hassle cost of making unscheduled repayments more often.

1. Applying CARD Act Provisions of Regulation Z to Covered Overdraft Credit

On covered overdraft credit accounts accessible via a debit card (a hybrid debit-credit card), financial institutions cannot automatically offset the credit balance against a positive balance on the associated asset account after a deposit. Therefore, consumers will be able to pay new debit transactions from the asset account before they repay the credit account. As discussed above, this flexibility in when to repay debt will generally give consumers better opportunities to manage their finances, although in practice the extent of any benefit to consumers from being able to delay repayment depends on finance charges for the credit and whether delaying repayment out of the asset account allows them to avoid higher additional credit charges for new transactions.

Consumers making purchases using hybrid debit-credit cards that access covered overdraft credit will also benefit from the final rule's effect on dispute resolution for such purchases. The CFPB expects the burden on covered persons from this occasional service to be minimal.

The final rule will also require very large financial institutions that provide covered overdraft credit to do so through a credit account that is separate from the associated asset account. These provisions will clarify that a very large financial institution must treat existing deposit accounts with above breakeven overdraft credit that is currently non-covered overdraft credit, but that the institution chooses to provide as covered overdraft credit subsequent to the rule, as a new credit account for purposes of Regulation Z. Consumers with hybrid debit-credit cards able to access a covered overdraft credit account, and the very large financial institutions that provide these accounts, will then be subject to the CARD Act protections in subpart G of Regulation Z.

Section 1026.51 will require card issuers to consider consumers' ability to make the required minimum periodic payments under the terms of the account. This could generally reduce the amount of credit available to some consumers, and some consumers may benefit from this requirement if it makes it less likely that they are burdened with covered overdraft debt for which they are unlikely to be able to make required minimum periodic payments. Because benefitting from the ability-to-pay regulation's safe harbor requires lenders to estimate whether consumers can repay the minimum payment and all fees assuming full use of the credit line, this could result in firms setting more concrete and less fluid credit limits, could result in lower credit limits, and firms might institute minimum payment formulas that do not require full payment of overdrawn amounts every month.

Section 1026.52(a) will limit fees charged in the first year a covered overdraft credit account is open to 25 percent of the account's credit limit (Section 1026.52(a) does not restrict charges attributable to periodic interest rates; see comment 1026.52(a)(2)–1.). This could benefit consumers with hybrid debit-credit cards able to access a covered overdraft credit account in the first year the account is open. Any reduction in fees paid by consumers as a result of § 1026.52(a) will result in a corresponding cost to covered persons from decreased fee revenue. Developing and implementing pricing strategies for covered overdraft products that comply with these requirements could impose costs on the covered persons providing these products, though the CFPB does not expect these costs to impose a substantial direct burden.

Penalty fees, like declined transaction fees, for violating the terms of the covered overdraft credit account will be subject to limitations under § 1026.52(b), providing further benefits to consumers who would have paid such fees. For example, § 1026.52(b) will restrict NSF fees from being charged on ACH transactions on accounts that have covered overdraft credit that is accessible by a hybrid debit-credit card. Consumers that would have been charged penalty fees, including NSF fees on debit card or ACH transactions, will benefit by not being charged these fees. Similarly, financial institutions that would have received NSF fee revenue from these transactions will see a decrease in revenue. Yet, the CFPB understands that NSF fees are currently rarely charged on debit card transactions and, as discussed above, most of the largest banks have already eliminated all NSF fees. This suggests that the benefits to consumers and costs to covered persons from this restriction are likely to be limited.

Very large financial institutions will be required to provide credit account opening disclosures and comply with other requirements of credit account opening in connection with tying covered overdraft credit to deposit accounts that already exist. Applying new credit account opening requirements in connection with deposit accounts of consumers who already have existing non-covered overdraft credit that the institution chooses to replace with covered overdraft credit under the final rule will impose some costs on the depository institution.

Under the final rule, above breakeven overdraft credit will no longer qualify as ''incidental credit'' under § 1002.3 and thus will be newly subject to certain requirements under Regulation B, including with respect to providing notice and record-keeping. These obligations will have costs to covered persons which are detailed in the Regulation B Supporting Statement that has been filed with OMB in connection with this final rule and are available as part of its public docket.

2. Potential Interactions With Other Regulations

The final rule, including changes to the definition of finance charge, may affect other legal requirements under various Federal and State laws, including the Military Lending Act, usury limits, capital requirements, and interchange fees. The CFPB acknowledges that some or all of these legal requirements might also affect charges for non-covered and covered overdraft credit indirectly. Under the baseline, covered overdraft will be particularly affordable at Federal credit

unions and whenever MLA caps and other potential usury limits apply. As much as covered overdraft credit remains or becomes available in these scenarios under the final rule, it will be particularly beneficial to consumers and will entail a loss of revenue for covered persons as these regulations will restrict the interest rates at which credit can be extended to covered consumers. Due to the effects of these laws, covered overdraft may be less frequently offered to affected consumers. The CFPB has not attempted to quantify the effects of such changes because the CFPB does not predict the extent to which very large financial institutions will choose to offer covered overdraft credit that is subject to those rules.

G. Potential Impacts on Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets, as Described in CFPA Section 1026

As this final rule applies only to financial institutions with more than $10 billion in total assets, the CFPB expects no specific impact on small entities directly. Part VII.D.3 above discusses how the CFPB understands the final rule's indirect impact on these entities.

H. Potential Impacts on Consumer Access to Credit and on Consumers in Rural Areas

As discussed above, the final rule may lead to an increase in overdraft credit regulated by TILA and Regulation Z, and for remaining non-covered overdraft credit, a decrease in the fee. To the extent that consumers in rural areas bank with institutions other than very large financial institutions, the impact of the final rule on these areas will be limited. The CFPB has limited insight into overdraft practices in rural areas specifically. It is not aware of reasons to suggest more adverse or particular impacts in rural areas.

The CFPB has tabulated the share of the unbanked in lowest fifth of the income distribution in ZIP codes that the Census classified as urban, rural, or with a fraction rural.[306] With this precise measurement, both fully urban or fully rural areas see 74 percent of those with lowest incomes with a bank account, with slight variations in the ratio for the mixed ZIP codes in between. This makes the CFPB expect that urban and rural areas have similar exposure to overdraft fees and will likely experience similar impacts from the final rule.

The CFPB has also tabulated the average credit score in each ZIP code, in the latest year available in a public dataset released by researchers at the Board. Fully rural ZIP codes have higher credit scores (719.6 on average) than fully urban ZIP codes (713.7), though with even higher averages scores in mostly urban areas and the lowest averages for fairly rural areas. This again suggests that on average, rural areas will have as much access to newly underwritten covered overdraft credit as the rest of the United States.

VIII. Regulatory Flexibility Act Analysis

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

Small institutions, for the purposes of the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, are defined by the Small Business Administration. Effective March 17, 2023, financial institutions with less than $850 million in total assets are determined to be small.[307]

As this final rule only applies to financial institutions with more than $10 billion in total assets, it affects no small entities. Accordingly, the Director hereby certifies that the final rule will not have a significant economic impact on a substantial number of small entities. Thus, a FRFA is not required for this rule.

In the notice of proposed rulemaking, the Director certified that the final rule, if adopted, would not have a significant economic impact on a substantial number of small entities. Thus, neither an IRFA nor a small business review panel was required for this final rule. The CFPB requested comment on its analysis and any relevant data.

The CFPB received a number of comments on its RFA analysis from industry trade groups, financial institutions that would not be considered ''very large financial institutions,'' and at least one consumer advocate commenter. The industry trade groups and financial institutions asserted that the CFPB should have convened a SBREFA panel for the rule and that the RFA in the 2024 proposal did not have a sufficient factual basis. These industry commenters generally stated that the rule would substantially affect small and mid-sized financial institutions as they would face competitive market pressure to decrease overdraft prices if very large financial institutions decrease overdraft prices to comply with the rule. The consumer advocate commenter stated that the rule would not have a significant impact on a substantial number of small entities even if the CFPB lowered the threshold to $850 million or more in assets.

Any change in overdraft pricing by small and mid-sized financial institutions due to competitive pressures would be an indirect effect of this final rule. Indirect effects fall outside the scope of the RFA.

IX. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA), Federal agencies are generally required to seek the Office of Management and Budget's (OMB's) approval for information collection requirements prior to implementation.

Under the PRA, the CFPB may not conduct or sponsor and, notwithstanding any other provision of law, a person is not required to respond to an information collection unless the information collection displays a valid control number assigned by OMB.

The final rule amends 12 CFR 1026 (Regulation Z), which implements the Truth in Lending Act and is assigned OMB Control number 3170–0015, which expires 05/31/2025, as well as 12 CFR 1005 (Regulation E), which implements the Electronic Fund Transfer Act, which is assigned OMB control number 3170–0014, which expires 5/31/2025. However, this final rule may, in addition to the information collection requirements of Regulation Z, affect the information collection requirements contained in 12 CFR part 1002 (Regulation B), which implements ECOA, which is assigned OMB Control number 3170–0013 which expires 08/31/2026. A full description of those changes and the estimated burdens thereof can be found in the Supporting Statements for each affected regulation that have been filed with OMB in connection with this final rule and are available as part of its public docket.

[306] Cox et al. (2021) identified the unbanked in the universe of tax records as those not listing an account for rebates or payment over a 10 year period, focusing on the 50–59 age group in 2019. *See* Cox 2021 Study. The Census links ZCTAs to an urban area (or none).

[307] *See* U.S. Small Bus. Admin., *Table of size standards, https://www.sba.gov/document/support-table-size-standards* (last updated June 4, 2024).

The CFPB has a continuing interest in the public's opinions regarding this determination. At any time, comments regarding this determination may be sent to: The Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW, Washington, DC 20552, or by email to *CFPB_Public_PRA@cfpb.gov.*

X. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the CFPB will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States at least 60 days prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this rule as a ''major rule'' as defined by 5 U.S.C. 804(2).

XI. Severability

The CFPB proposed the following statement regarding severability and received no comments. Accordingly, the CFPB is finalizing it as proposed.[308]

If any provision of this rule, or any application of a provision, is stayed or determined to be invalid, the remaining provisions or applications are severable and shall continue in effect. For example, if the $5 benchmark in § 1026.62(d)(1)(ii) is overturned, the breakeven method under § 1026.62(d)(1)(i) will remain in effect, meaning very large financial institutions could charge overdraft fees in compliance with TILA, or use the breakeven exemption, but would not be able to use the $5 safe-harbor benchmark.

List of Subjects

12 CFR Part 1005

Banks, banking, Consumer protection, Credit unions, Electronic fund transfers, National banks, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 1026

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

Authority and Issuance

For the reasons set forth in the preamble, the CFPB amends 12 parts 1005 and 1026, as set forth below:

[308] The CFPB notes that this severability clause is not codified but forms an operative part of the rule.

PART 1005—ELECTRONIC FUND TRANSFER ACT (REGULATION E)

■ 1. The authority citation for part 1005 continues to read as follows:

Authority: 12 U.S.C. 5512, 5581; 15 U.S.C. 1693b. Subpart B is also issued under 12 U.S.C. 5601 and 15 U.S.C. 1693o–1.

Subpart A—General

■ 2. Section 1005.10 is amended by revising paragraph (e)(1) to read as follows:

§ 1005.10 Preauthorized transfers.

* * * * *

(e) *Compulsory use*—(1) *Credit.* No financial institution or other person may condition an extension of credit to a consumer on the consumer's repayment by preauthorized electronic fund transfers, except for credit extended under an overdraft credit plan or extended to maintain a specified minimum balance in the consumer's account. This exception does not apply to a covered separate credit feature accessible by a hybrid prepaid-credit card as defined in Regulation Z, 12 CFR 1026.61. This exception also does not apply to covered overdraft credit extended by very large financial institutions as those terms are defined in Regulation Z, 12 CFR 1026.62.

* * * * *

■ 3. In Supplement I to Part 1005—Official Interpretations:

■ a. Under *Section 1005.10—Preauthorized Transfers,* revise *10(e)(1) Credit;* and

■ b. Under *Section 1005.17—Requirements for Overdraft Services,* revise *17(a) Definition.*

The revisions read as follows:

Supplement I to Part 1005—Official Interpretations

* * * * *

Section 1005.10—Preauthorized Transfers

* * * * *

10(e) Compulsory Use

10(e)(1) Credit

1. *General rule for loan payments.* Creditors may not require repayment of loans by electronic means on a preauthorized, recurring basis.

2. *Overdraft credit plans not accessible by hybrid prepaid-credit cards and covered overdraft credit extended by very large financial institutions.* i. Section 1005.10(e)(1) provides an exception from the general rule for an overdraft credit plan other than for a covered separate credit feature accessible by a hybrid prepaid-credit card as defined in Regulation Z, 12 CFR 1026.61 and for covered overdraft credit extended by very large financial institutions as those terms are defined in Regulation Z, 12 CFR 1026.62. A financial institution may therefore require the automatic repayment of an overdraft credit plan, other than a covered separate credit feature accessible by a hybrid prepaid-credit card or covered overdraft credit extended by very large financial institutions, even if the overdraft extension is charged to an open-end account that may be accessed by the consumer in ways other than by overdrafts.

ii. Credit extended through a negative balance on the asset feature of a prepaid account that meets the conditions of Regulation Z, 12 CFR 1026.61(a)(4), is considered credit extended pursuant to an overdraft credit plan for purposes of § 1005.10(e)(1). Thus, the exception for overdraft credit plans in § 1005.10(e)(1) applies to this credit.

3. *Applicability to covered separate credit features accessible by hybrid prepaid-credit cards.* i. Under § 1005.10(e)(1), creditors may not require by electronic means on a preauthorized, recurring basis repayment of credit extended under a covered separate credit feature accessible by a hybrid prepaid-credit card as defined in Regulation Z, 12 CFR 1026.61. The prohibition in § 1005.10(e)(1) applies to any credit extended under such a credit feature, including preauthorized checks. See Regulation Z, 12 CFR 1026.61, and comment 61(a)(1)–3.

ii. Under Regulation Z, 12 CFR 1026.12(d)(1), a card issuer may not take any action, either before or after termination of credit card privileges, to offset a cardholder's indebtedness arising from a consumer credit transaction under the relevant credit card plan against funds of the cardholder held on deposit with the card issuer. Under Regulation Z, 12 CFR 1026.12(d)(3), with respect to covered separate credit features accessible by hybrid prepaid-credit cards as defined in 12 CFR 1026.61, a card issuer generally is not prohibited from periodically deducting all or part of the cardholder's credit card debt from a deposit account (such as a prepaid account) held with the card issuer under a plan that is authorized in writing by the cardholder, so long as the card issuer does not make such deductions to the plan more frequently than once per calendar month. A card issuer is prohibited under Regulation Z, 12 CFR 1026.12(d), from automatically deducting all or part of the cardholder's credit card debt under a covered separate credit feature from a deposit account (such as a prepaid account) held with the card issuer on a daily or weekly basis, or whenever deposits are made to the deposit account. Section 1005.10(e)(1) further restricts the card issuer from requiring payment from a deposit account (such as a prepaid account) of credit card balances of a covered separate credit feature accessible by a hybrid prepaid-credit card by electronic means on a preauthorized, recurring basis.

4. *Incentives.* A creditor may offer a program with a reduced annual percentage rate or other cost-related incentive for an automatic repayment feature, provided the program with the automatic payment feature is not the only loan program offered by the creditor for the type of credit involved. Examples include:

i. Mortgages with graduated payments in which a pledged savings account is

automatically debited during an initial period to supplement the monthly payments made by the borrower.

ii. Mortgage plans calling for preauthorized biweekly payments that are debited electronically to the consumer's account and produce a lower total finance charge.

* * * * *

Section 1005.17—Requirements for Overdraft Services

17(a) Definition

1. *Exempt securities- and commodities-related lines of credit.* The definition of ''overdraft service'' does not include the payment of transactions in a securities or commodities account pursuant to which credit is extended by a broker-dealer registered with the Securities and Exchange Commission or the Commodity Futures Trading Commission.

2. *Covered overdraft credit.* Under § 1005.17(a)(1), a line of credit subject to Regulation Z (12 CFR 1026) is not an overdraft service. Covered overdraft credit as that term is defined in 12 CFR 1026.62, is a line of credit subject to Regulation Z and is therefore not an overdraft service. Covered overdraft credit includes above breakeven overdraft credit extended by a very large financial institution as those terms are defined in 12 CFR 1026.62. Above breakeven overdraft credit extended by a very large financial institution is therefore not an overdraft service under § 1005.17(a).

* * * * *

PART 1026—TRUTH IN LENDING (REGULATION Z)

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

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

Subpart A—General

■ 5. Section 1026.2 is amended by revising paragraph (a)(15) to read as follows:

§ 1026.2 Definitions and rules of construction.

(a) * * *

(15)(i) *Credit card* means any card, plate, or other single credit device that may be used from time to time to obtain credit. The term *credit card* includes both a hybrid prepaid-credit card as defined in § 1026.61 and a hybrid debit-credit card as defined in § 1026.62.

(ii) *Credit card account under an open-end (not home-secured) consumer credit plan* means any open-end credit account that is accessed by a credit card, except:

(A) A home-equity plan subject to the requirements of § 1026.40 that is accessed by a credit card; or

(B) A covered overdraft credit account as defined in § 1026.62 offered by a creditor other than a very large financial institution as defined in § 1026.62 that is accessed by a debit card or account number.

(iii) *Charge card* means a credit card on an account for which no periodic rate is used to compute a finance charge. The term does not include a hybrid debit-credit card as defined in § 1026.62.

(iv) *Debit card* means any card, plate, or other single device that may be used from time to time to access an asset account other than a prepaid account as defined in § 1026.61. The term *debit card* does not include a prepaid card as defined in § 1026.61.

* * * * *

■ 6. Section 1026.4 is amended by revising paragraph (b)(2), adding paragraph (b)(12), and revising paragraph (c)(3) to read as follows:

§ 1026.4 Finance charge.

* * * * *

(b) * * *

(2) Service, transaction, activity, and carrying charges, including any charge imposed on a checking or other transaction account (except a prepaid account as defined in § 1026.61 or a covered asset account as that term is defined in § 1026.62) to the extent that the charge exceeds the charge for a similar account without a credit feature.

* * * * *

(12) With regard to a covered asset account as that term is defined in § 1026.62(b)(2):

(i) Any service, transaction, activity, or carrying charge imposed on the separate credit account required by § 1026.62(c); and

(ii) Any service, transaction, activity, or carrying charge imposed on the covered asset account to the extent that the charge exceeds a comparable charge imposed on a checking or other transaction account that does not have overdraft credit.

(iii) For purposes of paragraph (b)(12)(ii) of this section, a charge or combination of charges, including a per transaction fee, imposed on a covered asset account when overdraft credit is extended is not comparable to the following fees or charges imposed on a checking or other transaction account that does not have overdraft credit:

(A) A charge for authorizing or paying a transaction that overdraws the checking or other transaction account.

(B) A charge for declining to authorize or pay a transaction.

(C) A charge for returning a transaction unpaid.

(D) A charge for transferring funds into the checking or other transaction account from any credit account.

(E) A charge for transferring funds into the checking or other transaction account from any other asset account.

(c) * * *

(3) Charges imposed by a financial institution for paying items that overdraw an account, unless the payment of such items and the imposition of the charge were previously agreed upon in writing. This paragraph (c)(3) does not apply to credit offered in connection with a prepaid account as defined in § 1026.61. This paragraph (c)(3) also does not apply to above breakeven overdraft credit as defined in § 1026.62.

* * * * *

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

■ 7. Section 1026.60 is amended by revising paragraph (a)(5) to read as follows:

§ 1026.60 Credit and charge card applications and solicitations.

(a) * * *

(5) *Exceptions.* This section does not apply to:

(i) Home-equity plans accessible by a credit or charge card that are subject to the requirements of § 1026.40;

(ii) Covered overdraft credit as defined in § 1026.62 tied to asset accounts accessed by check-guarantee cards or by debit cards other than hybrid debit-credit cards as defined in § 1026.62;

(iii) Lines of credit accessed by check-guarantee cards or by debit cards, other than covered overdraft credit accessed by hybrid debit-credit cards, that can be used only at automated teller machines;

(iv) Lines of credit accessed solely by account numbers except for a covered separate credit feature solely accessible by an account number that is a hybrid prepaid-credit card as defined in § 1026.61 or covered overdraft credit accessible by an account number that is a hybrid debit-credit card;

(v) Additions of a credit or charge card to an existing open-end plan;

(vi) General purpose applications unless the application, or material accompanying it, indicates that it can be used to open a credit or charge card account; or

(vii) Consumer-initiated requests for applications.

* * * * *

■ 8. Section 1026.62 is added to read as follows:

§ 1026.62 Overdraft credit.

(a) *In general*—(1) Overdraft credit is subject to this section and this part as specified below.

(2) *Overdraft credit* is any consumer credit extended by a financial institution to pay a transaction from a checking or other transaction account (other than a prepaid account as defined in § 1026.61) held at the financial institution when the consumer has insufficient or unavailable funds in that account. The term overdraft credit includes, but is not limited to, any such consumer credit extended through a transfer from a credit card account or overdraft line of credit. The term does not include credit exempt from this part pursuant to § 1026.3.

(b) *Definitions.* For purposes of this section and this part, the following definitions apply:

(1) *Above breakeven overdraft credit* means overdraft credit extended by a very large financial institution to pay a transaction on which, as an incident to or a condition of the overdraft credit, the very large financial institution imposes a charge or combination of charges exceeding the average of its costs and charge-off losses for providing non-covered overdraft credit as described in paragraph (d) of this section.

(2) *Covered asset account* means a checking or other transaction account (other than a prepaid account as defined in § 1026.61) provided by a very large financial institution that is tied to overdraft credit provided by the very large financial institution.

(3) *Covered overdraft credit* means overdraft credit that is subject to a finance charge or is payable by written agreement in more than four installments.

(4) *Covered overdraft credit account* means a credit account through which a financial institution extends or can extend covered overdraft credit. For example, the term includes any line of credit, credit card account, credit feature, credit plan, or credit subaccount through which the financial institution extends or can extend covered overdraft credit.

(5) *Hybrid debit-credit card* means any card, plate, or other single credit device that a consumer may use from time to time to obtain covered overdraft credit from a very large financial institution.

(6) *Non-covered overdraft credit* means overdraft credit that is not subject to a finance charge and is not payable by written agreement in more than four installments.

(7) *Overdraft credit* has the meaning set out in paragraph (a)(2) of this section.

(8) *Very large financial institution* means an insured depository institution or an insured credit union that has total assets of more than $10,000,000,000 and any affiliate thereof, as determined under 12 U.S.C. 5515(a).

(c) *Structure of covered overdraft credit.* A very large financial institution shall not structure covered overdraft credit as a negative balance on a checking or other transaction account. The very large financial institution shall structure covered overdraft credit as a separate credit account. The separate credit account is a covered overdraft credit account. The tied checking or other transaction account is a covered asset account.

(d) *Charges exceeding the average of its costs and charge-off losses for providing non-covered overdraft credit*—(1) *General rule.* For purposes of paragraph (b)(1) of this section, any charge or combination of charges to pay a transaction exceeds the average of a very large financial institution's costs and charge-off losses for providing non-covered overdraft credit if the charge or combination of charges exceeds the greater of:

(i) The pro rata share of the very large financial institution's total direct costs and charge-off losses for providing non-covered overdraft credit in the previous year, calculated in accordance with this paragraph; or

(ii) $5.

(2) *Cost and loss calculation.* When calculating the pro rata share of the very large financial institution's total direct costs and charge-off losses for providing non-covered overdraft credit in the previous year, a very large financial institution may consider only those costs and charge-off losses specifically traceable to its provision of non-covered overdraft credit in the previous year. Such costs and charge-off losses include, but are not limited to, its cost of funds, its net charge-off losses, and operating expenses for its non-covered overdraft credit program. Such costs and charge-off losses do not include general overhead costs or charge-off losses due to unauthorized use, EFT errors, billing errors, returned deposit items, or rescinded provisional credit.

(3) For purposes of paragraph (d)(2) of this section, a cost or charge-off loss is specifically traceable if it has a direct relationship to the provision of non-covered overdraft services and the very large financial institution can provide evidence to demonstrate that direct relationship.

(4) For purposes of paragraph (d)(1) of this section, a charge or combination of charges includes all revenue received in connection with an overdraft transaction, including, but not limited to, any extended or sustained overdraft fees, any interest charges on outstanding overdraft balances, and any other payments the very large financial institution receives in connection with an overdraft transaction.

(5) When calculating the pro rata share of its total direct costs and charge-off losses for providing non-covered overdraft credit in the previous year, a very large financial institution must include all non-covered overdraft transactions from the previous year in its calculation.

(6) For purposes of paragraph (d)(1)(i) of this section, the term "previous year" means a period that encompasses, at the very large financial institution's option, any of the following periods:

(i) The prior calendar year,

(ii) Any 365-day period that begins within the prior calendar year,

(iii) The prior four financial quarters, or

(iv) The very large financial institution's prior accounting year.

■ 9. In Supplement I to Part 1026—Official Interpretations:

■ a. Under *Section 1026.2—Definitions and Rules of Construction* revise *2(a)(14) Credit, Paragraph 2(a)(15),* and *2(a)(20) Open-End Credit*;

■ b. Under *Section 1026.4—Finance Charge* revise *Paragraph 4(b)(2)* and *4(c)(3)*;

■ c. Under *Section 1026.12—Special Credit Card Provisions* revise the introductory text, and *Paragraph 12(a)(1), Paragraph 12(a)(2), 12(c) Right of Cardholder To Assert Claims or Defenses Against Card Issuer,* and *12(c)(1) General Rule*;

■ d. Under *Section 1026.55—Limitations on Increasing Annual Percentage Rates, Fees, and Charges,* revise *55(a) General Rule*; and

■ e. Under *Section 1026.57—Reporting and Marketing Rules for College Student Open-End Credit,* revise *57(a)(1) College student credit card.*

The revisions read as follows:

Supplement I to Part 1026—Official Interpretations

* * * * *

Subpart A—General

* * * * *

Section 1026.2—Definitions and Rules of Construction

* * * * *

2(a)(14) Credit

1. *Exclusions.* The following situations are not considered credit for purposes of the regulation:

i. Layaway plans, unless the consumer is contractually obligated to continue making payments. Whether the consumer is so obligated is a matter to be determined under

applicable law. The fact that the consumer is not entitled to a refund of any amounts paid towards the cash price of the merchandise does not bring layaways within the definition of credit.

ii. Tax liens, tax assessments, court judgments, and court approvals of reaffirmation of debts in bankruptcy. However, third-party financing of such obligations (for example, a bank loan obtained to pay off a tax lien) is credit for purposes of the regulation.

iii. Insurance premium plans that involve payment in installments with each installment representing the payment for insurance coverage for a certain future period of time, unless the consumer is contractually obligated to continue making payments.

iv. Home improvement transactions that involve progress payments, if the consumer pays, as the work progresses, only for work completed and has no contractual obligation to continue making payments.

v. Borrowing against the accrued cash value of an insurance policy or a pension account, if there is no independent obligation to repay.

vi. Letters of credit.

vii. The execution of option contracts. However, there may be an extension of credit when the option is exercised, if there is an agreement at that time to defer payment of a debt.

viii. Investment plans in which the party extending capital to the consumer risks the loss of the capital advanced. This includes, for example, an arrangement with a home purchaser in which the investor pays a portion of the downpayment and of the periodic mortgage payments in return for an ownership interest in the property, and shares in any gain or loss of property value.

ix. Mortgage assistance plans administered by a government agency in which a portion of the consumer's monthly payment amount is paid by the agency. No finance charge is imposed on the subsidy amount, and that amount is due in a lump-sum payment on a set date or upon the occurrence of certain events. (If payment is not made when due, a new note imposing a finance charge may be written, which may then be subject to the regulation.)

2. *Payday loans; deferred presentment.* Credit includes a transaction in which a cash advance is made to a consumer in exchange for the consumer's personal check, or in exchange for the consumer's authorization to debit the consumer's deposit account, and where the parties agree either that the check will not be cashed or deposited, or that the consumer's deposit account will not be debited, until a designated future date. This type of transaction is often referred to as a ''payday loan'' or ''payday advance'' or ''deferred-presentment loan.'' A fee charged in connection with such a transaction may be a finance charge for purposes of § 1026.4, regardless of how the fee is characterized under state law. Where the fee charged constitutes a finance charge under § 1026.4 and the person advancing funds regularly extends consumer credit, that person is a creditor and is required to provide disclosures consistent with the requirements of Regulation Z. (*See* § 1026.2(a)(17).)

3. *Transactions on the asset features of prepaid accounts when there are insufficient or unavailable funds.* Credit includes authorization of a transaction on the asset feature of a prepaid account as defined in § 1026.61 where the consumer has insufficient or unavailable funds in the asset feature of the prepaid account at the time the transaction is authorized to cover the amount of the transaction. It also includes settlement of a transaction on the asset feature of a prepaid account where the consumer has insufficient or unavailable funds in the asset feature of the prepaid account at the time the transaction is settled to cover the amount of the transaction. This includes a transaction where the consumer has sufficient or available funds in the asset feature of a prepaid account to cover the amount of the transaction at the time the transaction is authorized but insufficient or unavailable funds in the asset feature of the prepaid account to cover the transaction amount at the time the transaction is settled. See § 1026.61 and related commentary on the applicability of this regulation to credit that is extended in connection with a prepaid account.

4. *Overdraft credit.* Credit includes, for example, funds extended by a financial institution to a consumer to pay transactions that overdraw a checking or other transaction account held at the financial institution whenever the consumer has a contractual obligation to repay the funds.

Paragraph 2(a)(15)

1. *Usable from time to time.* A credit card must be usable from time to time. 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 credit cards.

2. *Examples.* i. Examples of credit cards include:

A. A card that guarantees checks or similar instruments, if the asset account is also tied to covered overdraft credit or if the instrument directly accesses a line of credit.

B. A debit card (other than a debit card that is solely an account number) that also accesses a credit account (that is, a debit-credit card or hybrid debit-credit card as defined in § 1026.62). See comment 2(a)(15)–2.ii.C for guidance on whether a debit card that is solely an account number is a credit card.

C. An identification card that permits the consumer to defer payment on a purchase.

D. An identification card indicating loan approval that is presented to a merchant or to a lender, whether or not the consumer signs a separate promissory note for each credit extension.

E. A card or device that can be activated upon receipt to access credit, even if the card has a substantive use other than credit, such as a purchase-price discount card. Such a card or device is a credit card notwithstanding the fact that the recipient must first contact the card issuer to access or activate the credit feature.

F. A prepaid card that is a hybrid prepaid-credit card as defined in § 1026.61.

ii. In contrast, credit card does not include, for example:

A. A check-guarantee or debit card with no credit feature or agreement.

B. Any card, key, plate, or other device that is used in order to obtain petroleum products for business purposes from a wholesale distribution facility or to gain access to that facility, and that is required to be used without regard to payment terms.

C. An account number that accesses a credit account, unless the account number can access an open-end line of credit to purchase goods or services or as provided in § 1026.61 with respect to a hybrid prepaid-credit card. An account number that can access an open-end line of credit to purchase goods or services includes an account number that can access a covered overdraft credit account offered by a very large financial institution. For example, if a creditor provides a consumer with an open-end line of credit that can be accessed by an account number in order to transfer funds into another account (such as an asset account with the same creditor), the account number is not a credit card for purposes of § 1026.2(a)(15)(i). However, if the account number can also access the line of credit to purchase goods or services (such as an account number that can be used to purchase goods or services on the internet), the account number is a credit card for purposes of § 1026.2(a)(15)(i), regardless of whether the creditor treats such transactions as purchases, cash advances, or some other type of transaction. Furthermore, if the line of credit can also be accessed by a card (such as a debit card), that card is a credit card for purposes of § 1026.2(a)(15)(i).

D. A prepaid card that is not a hybrid prepaid-credit card as defined in § 1026.61.

E. A check-guarantee or debit card that can access non-covered overdraft credit as defined in § 1026.62 and cannot access any other form of credit.

3. *Charge card.* i. Charge cards are credit cards where no periodic rate is used to compute the finance charge. The term *charge card* does not include a hybrid debit-credit card as defined in § 1026.62. Thus, covered overdraft credit extended by a very large financial institution through a hybrid debit-credit card is not subject to special charge card rules.

A. Under the regulation, a reference to credit cards generally includes charge cards. In particular, references to credit card accounts under an open-end (not home-secured) consumer credit plan in subparts B and G generally include charge cards.

B. The term *charge card* is, however, distinguished from credit card or credit card account under an open-end (not home-secured) consumer credit plan in §§ 1026.6(b)(2)(xiv), 1026.7(b)(11) (except as described in comment 2(a)(15)–3.ii below), 1026.7(b)(12), 1026.9(e), 1026.9(f), 1026.28(d), 1026.52(b)(1)(ii)(C), 1026.60, and appendices G–10 through G–13.

ii. A hybrid prepaid-credit card as defined in § 1026.61 is a charge card with respect to a covered separate credit feature if no periodic rate is used to compute the finance charge in connection with the covered separate credit feature. Unlike other charge card accounts, the requirements in § 1026.7(b)(11) apply to a covered separate

credit feature accessible by a hybrid prepaid-credit card that is a charge card when that covered separate credit feature is a credit card account under an open-end (not home-secured) consumer credit plan. Thus, under § 1026.5(b)(2)(ii)(A), with respect to a covered separate credit feature that is a credit card account under an open-end (not home-secured) consumer credit plan, a card issuer of a hybrid prepaid-credit card that meets the definition of a charge card because no periodic rate is used to compute a finance charge in connection with the covered separate credit feature must adopt reasonable procedures for the covered separate credit feature designed to ensure that

(1) periodic statements are mailed or delivered at least 21 days prior to the payment due date disclosed on the statement pursuant to § 1026.7(b)(11)(i)(A); and

(2) the card issuer does not treat as late for any purposes a required minimum periodic payment received by the card issuer within 21 days after mailing or delivery of the periodic statement disclosing the due date for that payment.

4. *Credit card account under an open-end (not home-secured) consumer credit plan.*

i. An open-end consumer credit account is a credit card account under an open-end (not home-secured) consumer credit plan for purposes of § 1026.2(a)(15)(ii) if:

A. The account is accessed by a credit card, as defined in § 1026.2(a)(15)(i); and

B. The account is not excluded under § 1026.2(a)(15)(ii)(A) or (B).

ii. The exclusion from credit card account under an open-end (not home-secured) consumer credit plan provided by § 1026.2(a)(15)(ii)(B) for covered overdraft credit offered by a creditor that is not a very large financial institution does not apply to a covered separate credit feature accessible by a hybrid prepaid-credit card (including a hybrid prepaid-credit card that is solely an account number) as defined in § 1026.61.

* * * * *

2(a)(20) Open-End Credit

1. *General.* This definition describes the characteristics of open-end credit (for which the applicable disclosure and other rules are contained in Subpart B), as distinct from closed-end credit. Open-end credit is consumer credit that is extended under a plan and meets *all 3* criteria set forth in the definition.

2. *Existence of a plan.* i. The definition requires that there be a plan, which connotes a contractual arrangement between the creditor and the consumer.

ii. With respect to a covered separate credit feature accessible by a hybrid prepaid-credit card as defined in § 1026.61, a plan means a program where the consumer is obligated contractually to repay any credit extended by the creditor. For example, a plan includes a program under which a creditor routinely extends credit from a covered separate credit feature offered by the prepaid account issuer, its affiliate, or its business partner where the prepaid card can be used from time to time to draw, transfer, or authorize the draw or transfer of credit from the covered separate credit feature 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, and the consumer is obligated contractually to repay those credit transactions. Such a program constitutes a plan notwithstanding that, for example, the creditor has not agreed in writing to extend credit for those transactions, the creditor retains discretion not to extend credit for those transactions, or the creditor does not extend credit for those transactions once the consumer has exceeded a certain amount of credit. See § 1026.61(a) and related commentary for guidance on the applicability of this regulation to credit accessible by hybrid prepaid-credit cards.

iii. Some creditors offer programs containing a number of different credit features. The consumer has a single account with the institution that can be accessed repeatedly via a number of sub-accounts established for the different program features and rate structures. Some features of the program might be used repeatedly (for example, an overdraft line) while others might be used infrequently (such as the part of the credit line available for secured credit). If the program as a whole is subject to prescribed terms and otherwise meets the definition of open-end credit, such a program would be considered a single, multifeatured plan.

iv. With respect to a covered asset account as defined in § 1026.62, a plan includes, for example, a program where the consumer is obligated contractually to repay any credit extended by the creditor. Such a program constitutes a plan notwithstanding that, for example, the creditor has not agreed in writing to extend credit for those transactions, the creditor retains discretion not to extend credit for those transactions, or the creditor does not extend credit for those transactions once the consumer has exceeded a certain amount of credit.

3. *Repeated transactions.* Under this criterion, the creditor must reasonably contemplate repeated transactions. This means that the credit plan must be usable from time to time and the creditor must legitimately expect that there will be repeat business rather than a one-time credit extension. The creditor must expect repeated dealings with consumers under the credit plan as a whole and need not believe a consumer will reuse a particular feature of the plan. The determination of whether a creditor can reasonably contemplate repeated transactions requires an objective analysis. Information that much of the creditor's customer base with accounts under the plan make repeated transactions over some period of time is relevant to the determination, particularly when the plan is opened primarily for the financing of infrequently purchased products or services. A standard based on reasonable belief by a creditor necessarily includes some margin for judgmental error. The fact that particular consumers do not return for further credit extensions does not prevent a plan from having been properly characterized as open-end. For example, if much of the customer base of a clothing store makes repeat purchases, the fact that some consumers use the plan only once would not affect the characterization of the store's plan as open-end credit. The criterion regarding repeated transactions is a question of fact to be decided in the context of the creditor's type of business and the creditor's relationship with its customers. For example, it would be more reasonable for a bank or depository institution to contemplate repeated transactions with a customer than for a seller of aluminum siding to make the same assumption about its customers.

4. *Finance charge on an outstanding balance.* i. The requirement that a finance charge may be computed and imposed from time to time on the outstanding balance means that there is no specific amount financed for the plan for which the finance charge, total of payments, and payment schedule can be calculated. A plan may meet the definition of open-end credit even though a finance charge is not normally imposed, provided the creditor has the right, under the plan, to impose a finance charge from time to time on the outstanding balance. For example, in some plans, a finance charge is not imposed if the consumer pays all or a specified portion of the outstanding balance within a given time period. Such a plan could meet the finance charge criterion, if the creditor has the right to impose a finance charge, even though the consumer actually pays no finance charges during the existence of the plan because the consumer takes advantage of the option to pay the balance (either in full or in installments) within the time necessary to avoid finance charges.

ii. 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, any service, transaction, activity, or carrying charges imposed on the covered separate credit feature, and any such charges imposed on the asset feature of the prepaid account to the extent that the amount of the charge exceeds comparable charges imposed on prepaid accounts in the same prepaid account program that do not have a covered separate credit feature accessible by a hybrid prepaid-credit card, generally is a finance charge. *See* § 1026.4(a) and (b)(11). Such charges include a periodic fee to participate in the covered separate credit feature, regardless of whether this fee is imposed on the credit feature or on the asset feature of the prepaid account. With respect to credit from a covered separate credit feature accessible by a hybrid prepaid-credit card, any service, transaction, activity, or carrying charges that are finance charges under § 1026.4 constitute finance charges imposed from time to time on an outstanding unpaid balance as described in § 1026.2(a)(20) if there is no specific amount financed for the credit feature for which the finance charge, total of payments, and payment schedule can be calculated.

iii. Regardless of whether a financial institution assesses such charges on a covered asset account as defined in § 1026.62 or a separate credit account, any service, transaction, activity, or carrying charges imposed by the financial institution for paying a transaction that overdraws a consumer's covered asset account held at the financial institution are generally finance

charges unless they are otherwise addressed by § 1026.4(b)(2), (b)(12), or (c). *See* § 1026.4(a), (b)(2), (b)(12), and (c). Additionally, such charges would constitute finance charges imposed from time to time on an outstanding unpaid balance, as described in § 1026.2(a)(20), if there is no specific amount financed for the plan for which the finance charge, total of payments, and payment schedule can be calculated.

5. *Reusable line.* The total amount of credit that may be extended during the existence of an open-end plan is unlimited because available credit is generally replenished as earlier advances are repaid. A line of credit is self-replenishing even though the plan itself has a fixed expiration date, as long as during the plan's existence the consumer may use the line, repay, and reuse the credit. The creditor may occasionally or routinely verify credit information such as the consumer's continued income and employment status or information for security purposes but, to meet the definition of open-end credit, such verification of credit information may not be done as a condition of granting a consumer's request for a particular advance under the plan. In general, a credit line is self-replenishing if the consumer can take further advances as outstanding balances are repaid without being required to separately apply for those additional advances. A credit card account where the plan as a whole replenishes meets the self-replenishing criterion, notwithstanding the fact that a credit card issuer may verify credit information from time to time in connection with specific transactions. This criterion of unlimited credit distinguishes open-end credit from a series of advances made pursuant to a closed-end credit loan commitment. For example:

i. Under a closed-end commitment, the creditor might agree to lend a total of $10,000 in a series of advances as needed by the consumer. When a consumer has borrowed the full $10,000, no more is advanced under that particular agreement, even if there has been repayment of a portion of the debt. (*See* § 1026.2(a)(17)(iv) for disclosure requirements when a credit card is used to obtain the advances.)

ii. This criterion does not mean that the creditor must establish a specific credit limit for the line of credit or that the line of credit must always be replenished to its original amount. The creditor may reduce a credit limit or refuse to extend new credit in a particular case due to changes in the creditor's financial condition or the consumer's creditworthiness. (The rules in § 1026.40(f), however, limit the ability of a creditor to suspend credit advances for home equity plans.) While consumers should have a reasonable expectation of obtaining credit as long as they remain current and within any preset credit limits, further extensions of credit need not be an absolute right in order for the plan to meet the self-replenishing criterion.

6. *Verifications of collateral value.* Creditors that otherwise meet the requirements of § 1026.2(a)(20) extend open-end credit notwithstanding the fact that the creditor must verify collateral values to comply with Federal, state, or other applicable law or verifies the value of collateral in connection with a particular advance under the plan.

7. *Open-end real estate mortgages.* Some credit plans call for negotiated advances under so-called open-end real estate mortgages. Each such plan must be independently measured against the definition of open-end credit, regardless of the terminology used in the industry to describe the plan. The fact that a particular plan is called an open-end real estate mortgage, for example, does not, by itself, mean that it is open-end credit under the regulation.

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Section 1026.4—Finance Charge

* * * * *

Paragraph 4(b)(2)

1. *Checking or transaction account charges.* A charge imposed in connection with a credit feature on a checking or transaction account (other than a prepaid account as defined in § 1026.61 or a covered asset account as that term is defined in § 1026.62) is a finance charge under § 1026.4(b)(2) to the extent the charge exceeds the charge for a similar account without a credit feature and the charge is not addressed by § 1026.4(b)(12). If a charge for an account with a credit feature does not exceed the charge for an account without a credit feature, the charge is not a finance charge under § 1026.4(b)(2). To illustrate:

i. A $5 service charge is imposed on an account with an overdraft line of credit (where the institution has agreed in writing to pay an overdraft), while a $3 service charge is imposed on an account without a credit feature; the $2 difference is a finance charge. (If the difference is not related to account activity, however, it may be excludable as a participation fee. See the commentary to § 1026.4(c)(4)).

ii. A $5 service charge is imposed for each item that results in an overdraft on an account with an overdraft line of credit, while a $25 service charge is imposed for paying or returning each item on a similar account without a credit feature; the $5 charge is not a finance charge.

2. *Prepaid accounts.* Fees or charges related to credit offered in connection with prepaid accounts as defined in § 1026.61 are discussed in §§ 1026.4(b)(11) and 1026.61 and related commentary.

* * * * *

Paragraph 4(c)(3)

1. *Assessing interest on an overdraft balance.* Except with respect to credit offered in connection with a prepaid account as defined in § 1026.61 and above breakeven overdraft credit as defined in § 1026.62(b)(1), a charge on an overdraft balance computed by applying a rate of interest to the amount of the overdraft is not a finance charge, even though the consumer agrees to the charge in the account agreement, unless the financial institution agrees in writing that it will pay such items.

2. *Credit accessed in connection with a prepaid account.* See comment 4(b)(11)–1 for guidance on when fees imposed with regard to credit accessed in connection with a prepaid account as defined in § 1026.61 are finance charges.

3. *Credit accessed in connection with a covered asset account.* See § 1026.4(b)(12) for guidance on when fees imposed on a covered asset account as defined in § 1026.62 are finance charges.

* * * * *

Section 1026.12—Special Credit Card Provisions

1. *Scope.* Sections 1026.12(a) and (b) deal with the issuance and liability rules for credit cards, whether the card is intended for consumer, business, or any other purposes. Sections 1026.12(a) and (b) are exceptions to the general rule that the regulation applies only to consumer credit. (See §§ 1026.1 and 1026.3.) Notwithstanding paragraph (g) of this section or Regulation E, 12 CFR 1005.12(a), paragraphs (a) through (f) of this section apply to hybrid debit-credit cards as defined in § 1026.62.

2. *Definition of ''accepted credit card''.* For purposes of this section, ''accepted credit card'' means any credit card that a cardholder has requested or applied for and received, or has signed, used, or authorized another person to use to obtain credit. Any credit card issued as a renewal or substitute in accordance with § 1026.12(a) becomes an accepted credit card when received by the cardholder.

12(a) Issuance of Credit Cards

Paragraph 12(a)(1)

1. *Explicit request.* A request or application for a card must be explicit. For example, a request for an overdraft plan tied to a checking account does not constitute an application for a credit card with overdraft checking features. Therefore, a very large financial institution cannot issue a hybrid debit-credit card to a person without first receiving an oral or written request or application for the hybrid debit-credit card. The term hybrid debit-credit card has the same meaning as provided in § 1026.62.

2. *Addition of credit features.* If the consumer has a non-credit card, including a prepaid card, the addition of a credit feature or plan to the card that would make the card into a credit card under § 1026.2(a)(15)(i) constitutes issuance of a credit card. For example, the following constitute issuance of a credit card:

i. Granting overdraft privileges on a checking account when the consumer already has a check guarantee card; or

ii. Allowing a prepaid card to access a covered separate credit feature that would make the card into a hybrid prepaid-credit card as defined in § 1026.61 with respect to the covered separate credit feature.

iii. Extending covered overdraft credit through a hybrid debit-credit card as defined in § 1026.62.

3. *Variance of card from request.* The request or application need not correspond exactly to the card that is issued. For example:

i. The name of the card requested may be different when issued.

ii. The card may have features in addition to those reflected in the request or application.

4. *Permissible form of request.* The request or application may be oral (in response to a telephone solicitation by a card issuer, for example) or written.

5. *Time of issuance.* A credit card may be issued in response to a request made before any cards are ready for issuance (for example, if a new program is established), even if there is some delay in issuance.

6. *Persons to whom cards may be issued.* A card issuer may issue a credit card to the person who requests it, and to anyone else for whom that person requests a card and who will be an authorized user on the requester's account. In other words, cards may be sent to consumer A on A's request, and also (on A's request) to consumers B and C, who will be authorized users on A's account. In these circumstances, the following rules apply:

i. The additional cards may be imprinted in either A's name or in the names of B and C.

ii. No liability for unauthorized use (by persons other than B and C), not even the $50, may be imposed on B or C since they are merely users and not cardholders as that term is defined in § 1026.2 and used in § 1026.12(b); of course, liability of up to $50 for unauthorized use of B's and C's cards may be imposed on A.

iii. Whether B and C may be held liable for their own use, or on the account generally, is a matter of state or other applicable law.

7. *Issuance of non-credit cards.* i. *Issuance of non-credit cards other than prepaid cards.* A. Under § 1026.12(a)(1), a credit card cannot be issued except in response to a request or an application. (See comment 2(a)(15)–2 for examples of cards or devices that are and are not credit cards.) A non-credit card other than a prepaid card may be sent on an unsolicited basis by an issuer that does not propose to connect the card to any credit plan; a credit feature may be added to a previously issued non-credit card other than a prepaid card only upon the consumer's specific request.

B. *Examples.* A purchase-price discount card may be sent on an unsolicited basis by an issuer that does not propose to connect the card to any credit plan. An issuer demonstrates that it proposes to connect the card to a credit plan by, for example, including promotional materials about credit features or account agreements and disclosures required by § 1026.6. The issuer will violate the rule against unsolicited issuance if, for example, at the time the card is sent a credit plan can be accessed by the card or the recipient of the unsolicited card has been preapproved for credit that the recipient can access by contacting the issuer and activating the card.

ii. *Issuance of a prepaid card.* Section 1026.12(a)(1) does not apply to the issuance of a prepaid card where an issuer does not connect the card to any covered separate credit feature that would make the prepaid card into a hybrid prepaid-credit card as defined in § 1026.61 at the time the card is issued and only opens a covered separate credit feature, or provides an application or solicitation to open a covered separate credit feature, or allows an existing credit feature to become a covered separate credit feature accessible by a hybrid prepaid-credit card as defined in § 1026.61 in compliance with § 1026.61(c). A covered separate credit feature may be added to a previously issued prepaid card only upon the consumer's application or specific request and only in compliance with § 1026.61(c). An issuer does not connect a prepaid card to a covered separate credit feature that would make the card into a credit card simply by providing the disclosures required by Regulation E, 12 CFR 1005.18(b)(2)(x), (b)(4)(iv), and (vii), with the prepaid card. See § 1026.12(a)(2) and related commentary for when a hybrid prepaid-credit card as defined in § 1026.61 may be issued as a replacement or substitution for another hybrid prepaid-credit card. See also Regulation E, 12 CFR 1005.5 and 1005.18(a), and related commentary, governing issuance of access devices under Regulation E.

8. *Unsolicited issuance of PINs.* A card issuer may issue personal identification numbers (PINs) to existing credit cardholders without a specific request from the cardholders, provided the PINs cannot be used alone to obtain credit. For example, the PINs may be necessary if consumers wish to use their existing credit cards at automated teller machines or at merchant locations with point of sale terminals that require PINs.

Paragraph 12(a)(2)

1. *Renewal.* Renewal generally contemplates the regular replacement of existing cards because of, for example, security reasons or new technology or systems. It also includes the re-issuance of cards that have been suspended temporarily, but does not include the opening of a new account after a previous account was closed.

2. *Substitution—examples.* Substitution encompasses the replacement of one card with another because the underlying account relationship has changed in some way—such as when the card issuer has:

i. Changed its name.

ii. Changed the name of the card.

iii. Changed the credit or other features available on the account. For example, the original card could be used to make purchases and obtain cash advances at teller windows. The substitute card might be usable, in addition, for obtaining cash advances through automated teller machines. (If the substitute card constitutes an access device, as defined in Regulation E, then the Regulation E issuance rules would have to be followed.) The substitution of one card with another on an unsolicited basis is not permissible, however, where in conjunction with the substitution an additional credit card account is opened and the consumer is able to make new purchases or advances under both the original and the new account with the new card. For example, if a retail card issuer replaces its credit card with a combined retailer/bank card, each of the creditors maintains a separate account, and both accounts can be accessed for new transactions by use of the new credit card, the card cannot be provided to a consumer without solicitation.

iv. Substituted a card user's name on the substitute card for the cardholder's name appearing on the original card.

v. Changed the merchant base, provided that the new card is honored by at least one of the persons that honored the original card. However, unless the change in the merchant base is the addition of an affiliate of the existing merchant base, the substitution of a new card for another on an unsolicited basis is not permissible where the account is inactive. A credit card cannot be issued in these circumstances without a request or application. For purposes of § 1026.12(a), an account is inactive if no credit has been extended and if the account has no outstanding balance for the prior 24 months. (See § 1026.11(b)(2)).

3. *Substitution—successor card issuer.* Substitution also occurs when a successor card issuer replaces the original card issuer (for example, when a new card issuer purchases the accounts of the original issuer and issues its own card to replace the original one). A permissible substitution exists even if the original issuer retains the existing receivables and the new card issuer acquires the right only to future receivables, provided use of the original card is cut off when use of the new card becomes possible.

4. *Substitution—non-credit-card plan.* A credit card that replaces a retailer's open-end credit plan not involving a credit card is not considered a substitute for the retailer's plan—even if the consumer used the retailer's plan. A credit card cannot be issued in these circumstances without a request or application.

5. *One-for-one rule.* An accepted card may be replaced by no more than one renewal or substitute card. For example, the card issuer may not replace a credit card permitting purchases and cash advances with two cards, one for the purchases and another for the cash advances.

6. *One-for-one rule—exceptions.* The regulation does not prohibit the card issuer from:

i. Replacing a single card that is both a debit card and a credit card, such as a hybrid debit-credit card as defined in § 1026.62, with a credit card and a separate debit card with only debit functions (or debit functions plus an associated capability to extend overdraft credit that is not covered overdraft credit as defined in § 1026.62), since the latter card could be issued on an unsolicited basis under Regulation E.

ii. Replacing a single card that is both a prepaid card and a credit card with a credit card and a separate prepaid card where the latter card is not a hybrid prepaid-credit card as defined in § 1026.61.

iii. Replacing an accepted card with more than one renewal or substitute card, provided that:

A. No replacement card accesses any account not accessed by the accepted card;

B. For terms and conditions required to be disclosed under § 1026.6, all replacement cards are issued subject to the same terms and conditions, except that a creditor may vary terms for which no change in terms notice is required under § 1026.9(c); and

C. Under the account's terms the consumer's total liability for unauthorized

use with respect to the account does not increase.

7. *Methods of terminating replaced card.* The card issuer need not physically retrieve the original card, provided the old card is voided in some way, for example:

i. The issuer includes with the new card a notification that the existing card is no longer valid and should be destroyed immediately.

ii. The original card contained an expiration date.

iii. The card issuer, in order to preclude use of the card, reprograms computers or issues instructions to authorization centers.

8. *Incomplete replacement.* If a consumer has duplicate credit cards on the same account (Card A—one type of bank credit card, for example), the card issuer may not replace the duplicate cards with one Card A and one Card B (Card B—another type of bank credit card) unless the consumer requests Card B.

9. *Multiple entities.* Where multiple entities share responsibilities with respect to a credit card issued by one of them, the entity that issued the card may replace it on an unsolicited basis, if that entity terminates the original card by voiding it in some way, as described in comment 12(a)(2)–7. The other entity or entities may not issue a card on an unsolicited basis in these circumstances.

* * * * *

12(c) Right of Cardholder To Assert Claims or Defenses Against Card Issuer

1. *Relationship to § 1026.13.* The § 1026.12(c) credit card ''holder in due course'' provision deals with the consumer's right to assert against the card issuer a claim or defense concerning property or services purchased with a credit card, if the merchant has been unwilling to resolve the dispute. Even though certain merchandise disputes, such as non-delivery of goods, may also constitute ''billing errors'' under § 1026.13, that section operates independently of § 1026.12(c). The cardholder whose asserted billing error involves undelivered goods may institute the error resolution procedures of § 1026.13; but whether or not the cardholder has done so, the cardholder may assert claims or defenses under § 1026.12(c). Conversely, the consumer may pay a disputed balance and thus have no further right to assert claims and defenses, but still may assert a billing error if notice of that billing error is given in the proper time and manner. An assertion that a particular transaction resulted from unauthorized use of the card could also be both a ''defense'' and a billing error.

2. *Claims and defenses assertible.* Section 1026.12(c) merely preserves the consumer's right to assert against the card issuer any claims or defenses that can be asserted against the merchant. It does not determine what claims or defenses are valid as to the merchant; this determination must be made under state or other applicable law.

3. *Transactions excluded.* Section 1026.12(c) does not apply to the use of a check guarantee card or a debit card (other than a hybrid debit-credit card) in connection with an overdraft credit plan, or to a check guarantee card used in connection with cash-advance checks.

4. *Method of calculating the amount of credit outstanding.* The amount of the claim or defense that the cardholder may assert shall not exceed the amount of credit outstanding for the disputed transaction at the time the cardholder first notifies the card issuer or the person honoring the credit card of the existence of the claim or defense. However, when a consumer has asserted a claim or defense against a creditor pursuant to § 1026.12(c), the creditor must apply any payment or other credit in a manner that avoids or minimizes any reduction in the amount subject to that claim or defense. Accordingly, to determine the amount of credit outstanding for purposes of this section, payments and other credits must be applied first to amounts other than the disputed transaction.

i. For examples of how to comply with §§ 1026.12 and 1026.53 for credit card accounts under an open-end (not home-secured) consumer credit plan, see comment 53–3.

ii. For other types of credit card accounts, creditors may, at their option, apply payments consistent with § 1026.53 and comment 53–3. In the alternative, payments and other credits may be applied to: Late charges in the order of entry to the account; then to finance charges in the order of entry to the account; and then to any debits other than the transaction subject to the claim or defense in the order of entry to the account. In these circumstances, if more than one item is included in a single extension of credit, credits are to be distributed pro rata according to prices and applicable taxes.

5. *Prepaid cards.* i. Section 1026.12(c) applies to property or services purchased with the hybrid prepaid-credit card that accesses a covered separate credit feature as defined in § 1026.61. The following examples illustrate when a hybrid prepaid-credit card is used to purchase property or services:

A. 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. In this case, the consumer is using credit accessed by the hybrid prepaid-credit card to purchase property or services where credit is drawn directly from the covered separate credit feature accessed by the hybrid prepaid-credit card to cover the amount of the purchase.

B. 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 a covered separate credit feature to the asset feature, and a transaction of $25 is debited from the asset feature of the prepaid account. In this case, the consumer is using credit accessed by the hybrid prepaid-credit card to purchase property or services because credit is transferred to the asset feature of the prepaid account to cover the amount of a purchase made with the card. This is true even though the $15 credit transaction is treated as ''nonsale credit'' under § 1026.8(b). *See* comments 8(a)–9.ii and 8(b)–1.vi.

ii. For a transaction at point of sale where a hybrid prepaid-credit card is used to obtain goods 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 covered separate credit feature, the amount of the purchase transaction that is funded by credit generally would be subject to the requirements of § 1026.12(c). The amount of the transaction funded from the prepaid account would not be subject to the requirements of § 1026.12(c).

12(c)(1) General Rule

1. *Situations excluded and included.* The consumer may assert claims or defenses only when the goods or services are ''purchased with the credit card.'' This would include when the goods or services are purchased by a consumer using a hybrid prepaid-credit card to access a covered separate credit feature as defined in § 1026.61 or using a hybrid debit-credit card to access a covered overdraft credit account as defined in § 1026.62. This could include mail, the internet or telephone orders, if the purchase is charged to the credit card account. But it would exclude:

i. Use of a credit card to obtain a cash advance, even if the consumer then uses the money to purchase goods or services. Such a transaction would not involve ''property or services purchased with the credit card.''

ii. The purchase of goods or services by use of a check accessing an overdraft account and a credit card used solely for identification of the consumer. (On the other hand, if the credit card is used to make partial payment for the purchase and not merely for identification, the right to assert claims or defenses would apply to credit extended via the credit card, although not to credit extended by the overdraft line. If partial payment for the purchase is made with a hybrid prepaid-credit card or a hybrid debit-credit card, the right to assert claims or defenses would apply to credit accessed from a covered separate credit feature or covered overdraft credit account, respectively.)

iii. Purchases made by use of a check guarantee card in conjunction with a cash advance check (or by cash advance checks alone). (*See* comment 12(c)–3.) A cash advance check is a check that, when written, does not draw on an asset account; instead, it is charged entirely to an open-end credit account.

iv. Purchases effected by use of either a check guarantee card or a debit card (other

than a hybrid debit-credit card) when used to draw on overdraft credit plans. (*See* comment 12(c)–3.) The debit card exemption applies whether the card accesses an asset account via point of sale terminals, automated teller machines, or in any other way, and whether the card qualifies as an ''access device'' under Regulation E or is only a paper based debit card. If a card serves both as an ordinary credit card and also as a check guarantee or debit card, a transaction will be subject to this rule on asserting claims and defenses when used as an ordinary credit card (including when used as a hybrid debit-credit card to access a covered overdraft credit account), but not when used as a check guarantee or debit card. For purchases effected by use of a hybrid debit-credit card where the transaction is partially paid with funds from the asset account, and partially paid with covered overdraft credit, the provisions of § 1026.12(c) apply only to the credit portion of the purchase transaction.

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Section 1026.55—Limitations on Increasing Annual Percentage Rates, Fees, and Charges

55(a) General Rule

1. *Increase in rate, fee, or charge.* Section 1026.55(a) prohibits card issuers from increasing an annual percentage rate or any fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) on a credit card account unless specifically permitted by one of the exceptions in § 1026.55(b). Except as specifically provided in § 1026.55(b), this prohibition applies even if the circumstances under which an increase will occur are disclosed in advance. The following examples illustrate the general application of § 1026.55(a) and (b). Additional examples illustrating specific aspects of the exceptions in § 1026.55(b) are provided in the commentary to those exceptions.

i. *Account-opening disclosure of non-variable rate for six months, then variable rate.* Assume that, at account opening on January 1 of year one, a card issuer discloses that the annual percentage rate for purchases is a non-variable rate of 15% and will apply for six months. The card issuer also discloses that, after six months, the annual percentage rate for purchases will be a variable rate that is currently 18% and will be adjusted quarterly by adding a margin of 8 percentage points to a publicly-available index not under the card issuer's control. Furthermore, the card issuer discloses that the annual percentage rate for cash advances is the same variable rate that will apply to purchases after six months. Finally, the card issuer discloses that, to the extent consistent with § 1026.55 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer makes a late payment. The payment due date for the account is the twenty-fifth day of the month and the required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase and cash advance balances.

A. *Change-in-terms rate increase for new transactions after first year.* On January 15 of year one, the consumer uses the account to make a $2,000 purchase and a $500 cash advance. No other transactions are made on the account. At the start of each quarter, the card issuer may adjust the variable rate that applies to the $500 cash advance consistent with changes in the index (pursuant to § 1026.55(b)(2)). All required minimum periodic payments are received on or before the payment due date until May of year one, when the payment due on May 25 is received by the creditor on May 28. At this time, the card issuer is prohibited by § 1026.55 from increasing the rates that apply to the $2,000 purchase, the $500 cash advance, or future purchases and cash advances. Six months after account opening (July 1), the card issuer may begin to accrue interest on the $2,000 purchase at the previously-disclosed variable rate determined using an 8-point margin (pursuant to § 1026.55(b)(1)). Because no other increases in rate were disclosed at account opening, the card issuer may not subsequently increase the variable rate that applies to the $2,000 purchase and the $500 cash advance (except due to increases in the index pursuant to § 1026.55(b)(2)). On November 16, the card issuer provides a notice pursuant to § 1026.9(c) informing the consumer of a new variable rate that will apply on January 1 of year two (calculated using the same index and an increased margin of 12 percentage points). On December 15, the consumer makes a $100 purchase. On January 1 of year two, the card issuer may increase the margin used to determine the variable rate that applies to new purchases to 12 percentage points (pursuant to § 1026.55(b)(3)). However, § 1026.55(b)(3)(ii) does not permit the card issuer to apply the variable rate determined using the 12-point margin to the $2,000 purchase balance. Furthermore, although the $100 purchase occurred more than 14 days after provision of the § 1026.9(c) notice, § 1026.55(b)(3)(iii) does not permit the card issuer to apply the variable rate determined using the 12-point margin to that purchase because it occurred during the first year after account opening. On January 15 of year two, the consumer makes a $300 purchase. The card issuer may apply the variable rate determined using the 12-point margin to the $300 purchase.

B. *Account becomes more than 60 days delinquent during first year.* Same facts as above except that the required minimum periodic payment due on May 25 of year one is not received by the card issuer until July 30 of year one. Because the card issuer received the required minimum periodic payment more than 60 days after the payment due date, § 1026.55(b)(4) permits the card issuer to increase the annual percentage rate applicable to the $2,000 purchase, the $500 cash advance, and future purchases and cash advances. However, § 1026.55(b)(4)(i) requires the card issuer to first comply with the notice requirements in § 1026.9(g). Thus, if the card issuer provided a § 1026.9(g) notice on July 25 stating that all rates on the account would be increased to the 30% penalty rate, the card issuer could apply that rate beginning on September 8 to all balances and to future transactions.

ii. *Account-opening disclosure of non-variable rate for six months, then increased non-variable rate for six months, then variable rate; change-in-terms rate increase for new transactions after first year.* Assume that, at account opening on January 1 of year one, a card issuer discloses that the annual percentage rate for purchases will increase as follows: A non-variable rate of 5% for six months; a non-variable rate of 10% for an additional six months; and thereafter a variable rate that is currently 15% and will be adjusted monthly by adding a margin of 5 percentage points to a publicly-available index not under the card issuer's control. The payment due date for the account is the fifteenth day of the month and the required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase balance. On January 15 of year one, the consumer uses the account to make a $1,500 purchase. Six months after account opening (July 1), the card issuer may begin to accrue interest on the $1,500 purchase at the previously-disclosed 10% non-variable rate (pursuant to § 1026.55(b)(1)). On September 15, the consumer uses the account for a $700 purchase. On November 16, the card issuer provides a notice pursuant to § 1026.9(c) informing the consumer of a new variable rate that will apply on January 1 of year two (calculated using the same index and an increased margin of 8 percentage points). One year after account opening (January 1 of year two), the card issuer may begin accruing interest on the $2,200 purchase balance at the previously-disclosed variable rate determined using a 5-point margin (pursuant to § 1026.55(b)(1)). Section 1026.55 does not permit the card issuer to apply the variable rate determined using the 8-point margin to the $2,200 purchase balance. Furthermore, § 1026.55 does not permit the card issuer to subsequently increase the variable rate determined using the 5-point margin that applies to the $2,200 purchase balance (except due to increases in the index pursuant to § 1026.55(b)(2)). The card issuer may, however, apply the variable rate determined using the 8-point margin to purchases made on or after January 1 of year two (pursuant to § 1026.55(b)(3)).

iii. *Change-in-terms rate increase for new transactions after first year; penalty rate increase after first year.* Assume that, at account opening on January 1 of year one, a card issuer discloses that the annual percentage rate for purchases is a variable rate determined by adding a margin of 6 percentage points to a publicly-available index outside of the card issuer's control. The card issuer also discloses that, to the extent consistent with § 1026.55 and other applicable law, a non-variable penalty rate of 28% may apply if the consumer makes a late payment. The due date for the account is the fifteenth of the month. On May 30 of year two, the account has a purchase balance of $1,000. On May 31, the card issuer provides a notice pursuant to § 1026.9(c) informing the consumer of a new variable rate that will apply on July 16 for all purchases made on or after June 15 (calculated by using the same index and an increased margin of 8 percentage points). On June 14, the consumer makes a $500 purchase. On June 15, the consumer makes a $200 purchase. On July 1, the card issuer has not received the payment

due on June 15 and provides the consumer with a notice pursuant to § 1026.9(g) stating that the 28% penalty rate will apply as of August 15 to all transactions made on or after July 16 and that, if the consumer becomes more than 60 days late, the penalty rate will apply to all balances on the account. On July 17, the consumer makes a $300 purchase.

A. *Account does not become more than 60 days delinquent.* The payment due on June 15 of year two is received on July 2. On July 16, § 1026.55(b)(3)(ii) permits the card issuer to apply the variable rate determined using the 8-point margin disclosed in the § 1026.9(c) notice to the $200 purchase made on June 15 but does not permit the card issuer to apply this rate to the $1,500 purchase balance. On August 15, § 1026.55(b)(3)(ii) permits the card issuer to apply the 28% penalty rate disclosed at account opening and in the § 1026.9(g) notice to the $300 purchase made on July 17 but does not permit the card issuer to apply this rate to the $1,500 purchase balance (which remains at the variable rate determined using the 6-point margin) or the $200 purchase (which remains at the variable rate determined using the 8-point margin).

B. *Account becomes more than 60 days delinquent after provision of § 1026.9(g) notice.* Same facts as above except the payment due on June 15 of year two has not been received by August 15. Section 1026.55(b)(4) permits the card issuer to apply the 28% penalty rate to the $1,500 purchase balance and the $200 purchase because it has not received the June 15 payment within 60 days after the due date. However, in order to do so, § 1026.55(b)(4)(i) requires the card issuer to first provide an additional notice pursuant to § 1026.9(g). This notice must be sent no earlier than August 15, which is the first day the account became more than 60 days' delinquent. If the notice is sent on August 15, the card issuer may begin accruing interest on the $1,500 purchase balance and the $200 purchase at the 28% penalty rate beginning on September 29.

2. *Relationship to grace period.* Nothing in § 1026.55 prohibits a card issuer from assessing interest due to the loss of a grace period to the extent consistent with § 1026.5(b)(2)(ii)(B) and § 1026.54. In addition, a card issuer has not reduced an annual percentage rate on a credit card account for purposes of § 1026.55 if the card issuer does not charge interest on a balance or a portion thereof based on a payment received prior to the expiration of a grace period. For example, if the annual percentage rate for purchases on an account is 15% but the card issuer does not charge any interest on a $500 purchase balance because that balance was paid in full prior to the expiration of the grace period, the card issuer has not reduced the 15% purchase rate to 0% for purposes of § 1026.55.

3. *Fees in connection with covered separate credit features accessible by hybrid prepaid-credit cards.* With regard to a covered separate credit feature and an asset feature on a prepaid account that are both accessible by a hybrid prepaid-credit card as defined in § 1026.61 where the credit feature is a credit card account under an open-end (not home-secured) consumer credit plan, § 1026.55(a) prohibits card issuers from increasing an annual percentage rate or any fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (iii), or (xii) on a credit card account unless specifically permitted by one of the exceptions in § 1026.55(b). This is true regardless of whether these fees or annual percentage rates are imposed on the asset feature of the prepaid account or on the credit feature.

4. *Fees imposed on the asset feature of a prepaid account that are not charges imposed as part of the plan.* Section 1026.55(a) does not apply to any fee or charge imposed on the asset feature of the prepaid account that is not a charge imposed as part of the plan under § 1026.6(b)(3). See § 1026.6(b)(3)(iii)(D) and (E) and related commentary regarding fees imposed on the asset feature of the prepaid account that are not charges imposed as part of the plan under § 1026.6(b)(3) with respect to covered separate credit features accessible by hybrid prepaid-credit cards and non-covered separate credit features as those terms are defined in § 1026.61.

5. *Fees in connection with covered overdraft credit.* With regard to covered overdraft credit accessible by a hybrid debit-credit card, § 1026.55(a) prohibits card issuers from increasing an annual percentage rate or any fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (iii), or (xii) on a credit card account unless specifically permitted by one of the exceptions in § 1026.55(b). This is true regardless of whether these fees or annual percentage rates are imposed on the covered asset account associated with the covered overdraft credit or on the covered overdraft credit account.

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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 covered overdraft credit accounts as defined in 1026.62 offered by a creditor other than a very large financial institution as defined in 1026.62 that is accessed by a debit card or account number. 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 between 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.

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