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round accrued interest to two decimals for calculating the annual percentage yield earned on the first two monthly statements issued during the quarter. However, on the quarterly statement the interest earned figure must reflect the amount actually paid.

B. Special Formula for Use Where Periodic Statement Is Sent More Often Than the Period for Which Interest Is Compounded

1. *Statements triggered by Regulation E.* Institutions may, but need not, use this formula to calculate the annual percentage yield earned for accounts that receive quarterly statements and are subject to Regulation E's rule calling for monthly statements when an electronic fund transfer has occurred. They may do so even though no monthly statement was issued during a specific quarter. But institutions must use this formula for accounts that compound and credit interest quarterly and receive monthly statements that, while triggered by Regulation E, comply with the provisions of §1030.6.

2. *Days in compounding period.* Institutions using the special annual percentage yield earned formula must use the actual number of days in the compounding period.

Appendix B to Part 1030—Model Clauses and Sample Forms

1. *Modifications.* Institutions that modify the model clauses will be deemed in compliance as long as they do not delete required information or rearrange the format in a way that affects the substance or clarity of the disclosures.

2. *Format.* Institutions may use inserts to a document (see Sample Form B-4) or fill-in blanks (see Sample Forms B-5, B-6 and B-7, which use underlining to indicate terms that have been filled in) to show current rates, fees, or other terms.

3. *Disclosures for opening accounts.* The sample forms illustrate the information that must be provided to consumers when an account is opened, as required by §1030.4(a)(1). (See §1030.4(a)(2), which states the requirements for disclosing the annual percentage yield, the interest rate, and the maturity of a time account in responding to a consumer's request.)

4. *Compliance with Regulation E.* Institutions may satisfy certain requirements under Regulation DD with disclosures that meet the requirements of Regulation E. (See §1030.3(c).) For disclosures covered by both this part and Regulation E (such as the amount of fees for ATM usage, institutions should consult appendix A to Regulation E for appropriate model clauses.

5. *Duplicate disclosures.* If a requirement such as a minimum balance applies to more than one account term (to obtain a bonus and determine the annual percentage yield,

for example), institutions need not repeat the requirement for each term, as long as it is clear which terms the requirement applies to.

6. *Sample forms.* The sample forms (B-4 through B-8) serve a purpose different from the model clauses. They illustrate ways of adapting the model clauses to specific accounts. The clauses shown relate only to the specific transactions described.

B-1 Model Clauses for Account Disclosures

B-1(h) Disclosures Relating to Time Accounts

1. *Maturity.* The disclosure in Clause (h)(i) stating a specific date may be used in all cases. The statement describing a time period is appropriate only when providing disclosures in response to a consumer's request.

B-2 MODEL CLAUSES FOR CHANGE IN TERMS

1. *General.* The second clause, describing a future decrease in the interest rate and annual percentage yield, applies to fixed-rate accounts only.

B-4 Sample Form (Multiple Accounts)

1. *Rate sheet insert.* In the rate sheet insert, the calculations of the annual percentage yield for the three-month and six-month certificates are based on 92 days and 181 days respectively. All calculations in the insert assume daily compounding.

B-6 Sample Form (Tiered-Rate Money Market Account)

1. *General.* Sample Form B-6 uses Tiering Method A (discussed in appendix A and Clause (a)(iv)) to calculate interest. It gives a narrative description of a tiered-rate account; institutions may use different formats (for example, a chart similar to the one in Sample Form B-4), as long as all required information for each tier is clearly presented. The form does not contain a separate disclosure of the minimum balance required to obtain the annual percentage yield; the tiered-rate disclosure provides that information.

[76 FR 79278, Dec. 21, 2011, as amended at 84 FR 31701, July 3, 2019]

PART 1041—PAYDAY, VEHICLE TITLE, AND CERTAIN HIGH-COST INSTALLMENT LOANS

Subpart A—General

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- APPENDIX A TO PART 1041—MODEL FORMS
SUPPLEMENT I TO PART 1041—OFFICIAL INTERPRETATIONS

AUTHORITY: 12 U.S.C. 5511, 5512, 5514(b), 5531(b), (c), and (d), 5532.

SOURCE: 82 FR 54871, Nov. 17, 2017, unless otherwise noted.

Subpart A—General

§ 1041.1 Authority and purpose.

(a) *Authority.* The regulation in this part is issued by the Bureau of Consumer Financial Protection (Bureau) pursuant to Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5481, *et seq.*).

(b) *Purpose.* The purpose of this part is to identify certain unfair and abusive acts or practices in connection with certain consumer credit transactions and to set forth requirements for preventing such acts or practices. This part also prescribes requirements to ensure that the features of those consumer credit transactions are fully, accurately, and effectively disclosed to consumers.

[82 FR 54871, Nov. 17, 2017, as amended at 85 FR 44444, July 22, 2020]

§ 1041.2 Definitions.

(a) *Definitions.* For the purposes of this part, the following definitions apply:

(1) *Account* has the same meaning as in Regulation E, 12 CFR 1005.2(b).

(2) *Affiliate* has the same meaning as in 12 U.S.C. 5481(1).

(3) *Closed-end credit* means an extension of credit to a consumer that is not

open-end credit under paragraph (a)(16) of this section.

(4) *Consumer* has the same meaning as in 12 U.S.C. 5481(4).

(5) *Consummation* means the time that a consumer becomes contractually obligated on a new loan or a modification that increases the amount of an existing loan.

(6) *Cost of credit* means the cost of consumer credit as expressed as a per annum rate and is determined as follows:

(i) *Charges included in the cost of credit.* The cost of credit includes all finance charges as set forth by Regulation Z, 12 CFR 1026.4, but without regard to whether the credit is consumer credit, as that term is defined in 12 CFR 1026.2(a)(12), or is extended to a consumer, as that term is defined in 12 CFR 1026.2(a)(11).

(ii) *Calculation of the cost of credit—*(A) *Closed-end credit.* For closed-end credit, the cost of credit must be calculated according to the requirements of Regulation Z, 12 CFR 1026.22.

(B) *Open-end credit.* For open-end credit, the cost of credit must be calculated according to the rules for calculating the effective annual percentage rate for a billing cycle as set forth in Regulation Z, 12 CFR 1026.14(c) and (d).

(7) *Covered longer-term balloon-payment loan* means a loan described in § 1041.3(b)(2).

(8) *Covered longer-term loan* means a loan described in § 1041.3(b)(3).

(9) [Reserved]

(10) *Covered short-term loan* means a loan described in § 1041.3(b)(1).

(11) *Credit* has the same meaning as in Regulation Z, 12 CFR 1026.2(a)(14).

(12) *Electronic fund transfer* has the same meaning as in Regulation E, 12 CFR 1005.3(b).

(13) *Lender* means a person who regularly extends credit to a consumer primarily for personal, family, or household purposes.

(14) [Reserved]

(15) *Motor vehicle* means any self-propelled vehicle primarily used for on-road transportation. The term does not include motor homes, recreational vehicles, golf carts, and motor scooters.

(16) *Open-end credit* means an extension of credit to a consumer that is an

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open-end credit plan as defined in Regulation Z, 12 CFR 1026.2(a)(20), but without regard to whether the credit is consumer credit, as defined in 12 CFR 1026.2(a)(12), is extended by a creditor, as defined in 12 CFR 1026.2(a)(17), is extended to a consumer, as defined in 12 CFR 1026.2(a)(11), or permits a finance charge to be imposed from time to time on an outstanding balance as defined in 12 CFR 1026.4.

(17) *Outstanding loan* means a loan that the consumer is legally obligated to repay, regardless of whether the loan is delinquent or is subject to a repayment plan or other workout arrangement, except that a loan ceases to be an outstanding loan if the consumer has not made at least one payment on the loan within the previous 180 days.

(18) *Service provider* has the same meaning as in the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5481(26).

(19) [Reserved]

(b) *Rule of construction.* For purposes of this part, where definitions are incorporated from other statutes or regulations, the terms have the meaning and incorporate the embedded definitions, appendices, and commentary from those other laws except to the extent that this part provides a different definition for a parallel term.

[82 FR 54871, Nov. 17, 2017, as amended at 84 FR 27929, June 17, 2019; 85 FR 44444, July 22, 2020]

§ 1041.3 Scope of coverage; exclusions; exemptions.

(a) *General.* This part applies to a lender that extends credit by making covered loans.

(b) *Covered loan.* Covered loan means closed-end or open-end credit that is extended to a consumer primarily for personal, family, or household purposes that is not excluded under paragraph (d) of this section or conditionally exempted under paragraph (e) or (f) of this section; and:

(1) For closed-end credit that does not provide for multiple advances to consumers, the consumer is required to repay substantially the entire amount of the loan within 45 days of consummation, or for all other loans, the consumer is required to repay substan-

tially the entire amount of any advance within 45 days of the advance;

(2) For loans not otherwise covered by paragraph (b)(1) of this section:

(i) For closed-end credit that does not provide for multiple advances to consumers, the consumer is required to repay substantially the entire balance of the loan in a single payment more than 45 days after consummation or to repay such loan through at least one payment that is more than twice as large as any other payment(s).

(ii) For all other loans, either:

(A) The consumer is required to repay substantially the entire amount of an advance in a single payment more than 45 days after the advance is made or is required to make at least one payment on the advance that is more than twice as large as any other payment(s); or

(B) A loan with multiple advances is structured such that paying the required minimum payments may not fully amortize the outstanding balance by a specified date or time, and the amount of the final payment to repay the outstanding balance at such time could be more than twice the amount of other minimum payments under the plan; or

(3) For loans not otherwise covered by paragraph (b)(1) or (2) of this section, if both of the following conditions are satisfied:

(i) The cost of credit for the loan exceeds 36 percent per annum, as measured:

(A) At the time of consummation for closed-end credit; or

(B) At the time of consummation and, if the cost of credit at consummation is not more than 36 percent per annum, again at the end of each billing cycle for open-end credit, except that:

(1) Open-end credit meets the condition set forth in this paragraph (b)(3)(i)(B) in any billing cycle in which a lender imposes a finance charge, and the principal balance is \$0; and

(2) Once open-end credit meets the condition set forth in this paragraph (b)(3)(i)(B), it meets the condition set forth in paragraph (b)(3)(i)(B) for the duration of the plan.

(ii) The lender or service provider obtains a leveraged payment mechanism

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as defined in paragraph (c) of this section.

(c) *Leveraged payment mechanism.* For purposes of paragraph (b) of this section, a lender or service provider obtains a leveraged payment mechanism if it has the right to initiate a transfer of money, through any means, from a consumer's account to satisfy an obligation on a loan, except that the lender or service provider does not obtain a leveraged payment mechanism by initiating a single immediate payment transfer at the consumer's request.

(d) *Exclusions for certain types of credit.* This part does not apply to the following:

(1) *Certain purchase money security interest loans.* Credit extended for the sole and express purpose of financing a consumer's initial purchase of a good when the credit is secured by the property being purchased, whether or not the security interest is perfected or recorded.

(2) *Real estate secured credit.* Credit that is secured by any real property, or by personal property used or expected to be used as a dwelling, and the lender records or otherwise perfects the security interest within the term of the loan.

(3) *Credit cards.* Any credit card account under an open-end (not home-secured) consumer credit plan as defined in Regulation Z, 12 CFR 1026.2(a)(15)(ii).

(4) *Student loans.* Credit made, insured, or guaranteed pursuant to a program authorized by subchapter IV of the Higher Education Act of 1965, 20 U.S.C. 1070 through 1099d, or a private education loan as defined in Regulation Z, 12 CFR 1026.46(b)(5).

(5) *Non-recourse pawn loans.* Credit in which the lender has sole physical possession and use of the property securing the credit for the entire term of the loan and for which the lender's sole recourse if the consumer does not elect to redeem the pawned item and repay the loan is the retention of the property securing the credit.

(6) *Overdraft services and lines of credit.* Overdraft services as defined in 12 CFR 1005.17(a), and overdraft lines of credit otherwise excluded from the definition of overdraft services under 12 CFR 1005.17(a)(1).

(7) *Wage advance programs.* Advances of wages that constitute credit if made

by an employer, as defined in the Fair Labor Standards Act, 29 U.S.C. 203(d), or by the employer's business partner, to the employer's employees, provided that:

(i) The advance is made only against the accrued cash value of any wages the employee has earned up to the date of the advance; and

(ii) Before any amount is advanced, the entity advancing the funds warrants to the consumer as part of the contract between the parties on behalf of itself and any business partners, that it or they, as applicable:

(A) Will not require the consumer to pay any charges or fees in connection with the advance, other than a charge for participating in the wage advance program;

(B) Has no legal or contractual claim or remedy against the consumer based on the consumer's failure to repay in the event the amount advanced is not repaid in full; and

(C) With respect to the amount advanced to the consumer, will not engage in any debt collection activities if the advance is not deducted directly from wages or otherwise repaid on the scheduled date, place the amount advanced as a debt with or sell it to a third party, or report to a consumer reporting agency concerning the amount advanced.

(8) *No-cost advances.* Advances of funds that constitute credit if the consumer is not required to pay any charge or fee to be eligible to receive or in return for receiving the advance, provided that before any amount is advanced, the entity advancing the funds warrants to the consumer as part of the contract between the parties:

(i) That it has no legal or contractual claim or remedy against the consumer based on the consumer's failure to repay in the event the amount advanced is not repaid in full; and

(ii) That, with respect to the amount advanced to the consumer, such entity will not engage in any debt collection activities if the advance is not repaid on the scheduled date, place the amount advanced as a debt with or sell it to a third party, or report to a consumer reporting agency concerning the amount advanced.

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(e) *Alternative loan.* Alternative loans are conditionally exempt from the requirements of this part. *Alternative loan* means a covered loan that satisfies the following conditions and requirements:

(1) *Loan term conditions.* An alternative loan must satisfy the following conditions:

(i) The loan is not structured as open-end credit, as defined in § 1041.2(a)(16);

(ii) The loan has a term of not less than one month and not more than six months;

(iii) The principal of the loan is not less than \$200 and not more than \$1,000;

(iv) The loan is repayable in two or more payments, all of which payments are substantially equal in amount and fall due in substantially equal intervals, and the loan amortizes completely during the term of the loan; and

(v) The lender does not impose any charges other than the rate and application fees permissible for Federal credit unions under regulations issued by the National Credit Union Administration at 12 CFR 701.21(c)(7)(iii).

(2) *Borrowing history condition.* Prior to making an alternative loan under this paragraph (e), the lender must determine from its records that the loan would not result in the consumer being indebted on more than three outstanding loans made under this paragraph (e) from the lender within a period of 180 days. The lender must also make no more than one alternative loan under this paragraph (e) at a time to a consumer.

(3) *Income documentation condition.* In making an alternative loan under this paragraph (e), the lender must maintain and comply with policies and procedures for documenting proof of recurring income.

(4) *Safe harbor.* Loans made by Federal credit unions in compliance with the conditions set forth by the National Credit Union Administration at 12 CFR 701.21(c)(7)(iii) for a Payday Alternative Loan are deemed to be in compliance with the requirements and conditions of paragraphs (e)(1), (2), and (3) of this section.

(f) *Accommodation loans.* Accommodation loans are conditionally exempt from the requirements of this part. *Ac-*

commodation loan means a covered loan if at the time that the loan is consummated:

(1) The lender and its affiliates collectively have made 2,500 or fewer covered loans in the current calendar year, and made 2,500 or fewer such covered loans in the preceding calendar year; and

(2)(i) During the most recent completed tax year in which the lender was in operation, if applicable, the lender and any affiliates that were in operation and used the same tax year derived no more than 10 percent of their receipts from covered loans; or

(ii) If the lender was not in operation in a prior tax year, the lender reasonably anticipates that the lender and any of its affiliates that use the same tax year will derive no more than 10 percent of their receipts from covered loans during the current tax year.

(3) Provided, however, that covered longer-term loans for which all transfers meet the conditions in § 1041.8(a)(1)(ii), and receipts from such loans, are not included for the purpose of determining whether the conditions of paragraphs (f)(1) and (2) of this section have been satisfied.

(g) *Receipts.* For purposes of paragraph (f) of this section, receipts means “total income” (or in the case of a sole proprietorship “gross income”) plus “cost of goods sold” as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; and Form 1040, Schedule C for sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers but excluding taxes levied on the entity or its employees; or amounts collected for another (but fees earned in connection with such collections are receipts). Items such as subcontractor costs, reimbursements for purchases a contractor makes at a customer’s request, and employee-based costs such as payroll taxes are included in receipts.

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(h) *Tax year.* For purposes of paragraph (f) of this section, “tax year” has the meaning attributed to it by the IRS as set forth in IRS Publication 538, which provides that a “tax year” is an annual accounting period for keeping records and reporting income and expenses.

[82 FR 54871, Nov. 17, 2017, as amended at 84 FR 27929, June 17, 2019]

Subpart B [Reserved]

Subpart C—Payments

§ 1041.7 Identification of unfair and abusive practice.

It is an unfair and abusive practice for a lender to make attempts to withdraw payment from consumers’ accounts in connection with a covered loan after the lender’s second consecutive attempts to withdraw payments from the accounts from which the prior attempts were made have failed due to a lack of sufficient funds, unless the lender obtains the consumers’ new and specific authorization to make further withdrawals from the accounts.

§ 1041.8 Prohibited payment transfer attempts.

(a) *Definitions.* For purposes of this section and § 1041.9:

(1) *Payment transfer* means any lender-initiated debit or withdrawal of funds from a consumer’s account for the purpose of collecting any amount due or purported to be due in connection with a covered loan.

(i) *Means of transfer.* A debit or withdrawal meeting the description in paragraph (a)(1) of this section is a payment transfer regardless of the means through which the lender initiates it, including but not limited to a debit or withdrawal initiated through any of the following means:

(A) Electronic fund transfer, including a preauthorized electronic fund transfer as defined in Regulation E, 12 CFR 1005.2(k).

(B) Signature check, regardless of whether the transaction is processed through the check network or another network, such as the automated clearing house (ACH) network.

(C) Remotely created check as defined in Regulation CC, 12 CFR 229.2(ff).

(D) Remotely created payment order as defined in 16 CFR 310.2(cc).

(E) When the lender is also the account-holder, an account-holding institution’s transfer of funds from a consumer’s account held at the same institution, other than such a transfer meeting the description in paragraph (a)(1)(ii) of this section.

(ii) *Conditional exclusion for certain transfers by account-holding institutions.* When the lender is also the account-holder, an account-holding institution’s transfer of funds from a consumer’s account held at the same institution is not a payment transfer if all of the conditions in this paragraph (a)(1)(ii) are met, notwithstanding that the transfer otherwise meets the description in paragraph (a)(1) of this section.

(A) The lender, pursuant to the terms of the loan agreement or account agreement, does not charge the consumer any fee, other than a late fee under the loan agreement, in the event that the lender initiates a transfer of funds from the consumer’s account in connection with the covered loan for an amount that the account lacks sufficient funds to cover.

(B) The lender, pursuant to the terms of the loan agreement or account agreement, does not close the consumer’s account in response to a negative balance that results from a transfer of funds initiated in connection with the covered loan.

(2) *Single immediate payment transfer at the consumer’s request* means:

(i) A payment transfer initiated by a one-time electronic fund transfer within one business day after the lender obtains the consumer’s authorization for the one-time electronic fund transfer.

(ii) A payment transfer initiated by means of processing the consumer’s signature check through the check system or through the ACH system within one business day after the consumer provides the check to the lender.

(b) *Prohibition on initiating payment transfers from a consumer’s account after*

two consecutive failed payment transfers—(1) *General*. A lender must not initiate a payment transfer from a consumer's account in connection with any covered loan that the consumer has with the lender after the lender has attempted to initiate two consecutive failed payment transfers from that account in connection with any covered loan that the consumer has with the lender. For purposes of this paragraph (b), a payment transfer is deemed to have failed when it results in a return indicating that the consumer's account lacks sufficient funds or, if the lender is the consumer's account-holding institution, it is for an amount that the account lacks sufficient funds to cover.

(2) *Consecutive failed payment transfers*. For purposes of the prohibition in this paragraph (b):

(i) *First failed payment transfer*. A failed payment transfer is the first failed payment transfer from the consumer's account if it meets any of the following conditions:

(A) The lender has initiated no other payment transfer from the account in connection with the covered loan or any other covered loan that the consumer has with the lender.

(B) The immediately preceding payment transfer was successful, regardless of whether the lender has previously initiated a first failed payment transfer.

(C) The payment transfer is the first payment transfer to fail after the lender obtains the consumer's authorization for additional payment transfers pursuant to paragraph (c) of this section.

(ii) *Second consecutive failed payment transfer*. A failed payment transfer is the second consecutive failed payment transfer from the consumer's account if the immediately preceding payment transfer was a first failed payment transfer. For purposes of this paragraph (b)(2)(ii), a previous payment transfer includes a payment transfer initiated at the same time or on the same day as the failed payment transfer.

(iii) *Different payment channel*. A failed payment transfer meeting the conditions in paragraph (b)(2)(ii) of this section is the second consecutive failed payment transfer regardless of whether

the first failed payment transfer was initiated through a different payment channel.

(c) *Exception for additional payment transfers authorized by the consumer*—(1) *General*. Notwithstanding the prohibition in paragraph (b) of this section, a lender may initiate additional payment transfers from a consumer's account after two consecutive failed payment transfers if the additional payment transfers are authorized by the consumer in accordance with the requirements and conditions in this paragraph (c) or if the lender executes a single immediate payment transfer at the consumer's request in accordance with paragraph (d) of this section.

(2) *General authorization requirements and conditions*—(i) *Required payment transfer terms*. For purposes of this paragraph (c), the specific date, amount, and payment channel of each additional payment transfer must be authorized by the consumer, except as provided in paragraph (c)(2)(ii) or (iii) of this section.

(ii) *Application of specific date requirement to re-initiating a returned payment transfer*. If a payment transfer authorized by the consumer pursuant to this paragraph (c) is returned for nonsufficient funds, the lender may re-initiate the payment transfer, such as by representing it once through the ACH system, on or after the date authorized by the consumer, provided that the returned payment transfer has not triggered the prohibition in paragraph (b) of this section.

(iii) *Special authorization requirements and conditions for payment transfers to collect a late fee or returned item fee*. A lender may initiate a payment transfer pursuant to this paragraph (c) solely to collect a late fee or returned item fee without obtaining the consumer's authorization for the specific date and amount of the payment transfer only if the consumer has authorized the lender to initiate such payment transfers in advance of the withdrawal attempt. For purposes of this paragraph (c)(2)(iii), the consumer authorizes such payment transfers only if the consumer's authorization obtained under paragraph (c)(3)(iii) of this section includes a statement, in terms that are clear and readily understandable to the

consumer, that payment transfers may be initiated solely to collect a late fee or returned item fee and that specifies the highest amount for such fees that may be charged and the payment channel to be used.

(3) *Requirements and conditions for obtaining the consumer's authorization*—(i) *General*. For purposes of this paragraph (c), the lender must request and obtain the consumer's authorization for additional payment transfers in accordance with the requirements and conditions in this paragraph (c)(3).

(ii) *Provision of payment transfer terms to the consumer*. The lender may request the consumer's authorization for additional payment transfers no earlier than the date on which the lender provides to the consumer the consumer rights notice required by § 1041.9(c). The request must include the payment transfer terms required under paragraph (c)(2)(i) of this section and, if applicable, the statement required by paragraph (c)(2)(iii) of this section. The lender may provide the terms and statement to the consumer by any one of the following means:

(A) In writing, by mail or in person, or in a retainable form by email if the consumer has consented to receive electronic disclosures in this manner under § 1041.9(a)(4) or agrees to receive the terms and statement by email in the course of a communication initiated by the consumer in response to the consumer rights notice required by § 1041.9(c).

(B) By oral telephone communication, if the consumer affirmatively contacts the lender in that manner in response to the consumer rights notice required by § 1041.9(c) and agrees to receive the terms and statement in that manner in the course of, and as part of, the same communication.

(iii) *Signed authorization required*—(A) *General*. For an authorization to be valid under this paragraph (c), it must be signed or otherwise agreed to by the consumer in writing or electronically and in a retainable format that memorializes the payment transfer terms required under paragraph (c)(2)(i) of this section and, if applicable, the statement required by paragraph (c)(2)(iii) of this section. The signed authorization must be obtained from the con-

sumer no earlier than when the consumer receives the consumer rights notice required by § 1041.9(c) in person or electronically, or the date on which the consumer receives the notice by mail. For purposes of this paragraph (c)(3)(iii)(A), the consumer is considered to have received the notice at the time it is provided to the consumer in person or electronically, or, if the notice is provided by mail, the earlier of the third business day after mailing or the date on which the consumer affirmatively responds to the mailed notice.

(B) *Special requirements for authorization obtained by oral telephone communication*. If the authorization is granted in the course of an oral telephone communication, the lender must record the call and retain the recording.

(C) *Memorialization required*. If the authorization is granted in the course of a recorded telephonic conversation or is otherwise not immediately retainable by the consumer at the time of signature, the lender must provide a memorialization in a retainable form to the consumer by no later than the date on which the first payment transfer authorized by the consumer is initiated. A memorialization may be provided to the consumer by email in accordance with the requirements and conditions in paragraph (c)(3)(ii)(A) of this section.

(4) *Expiration of authorization*. An authorization obtained from a consumer pursuant to this paragraph (c) becomes null and void for purposes of the exception in this paragraph (c) if:

(i) The lender subsequently obtains a new authorization from the consumer pursuant to this paragraph (c); or

(ii) Two consecutive payment transfers initiated pursuant to the consumer's authorization fail, as specified in paragraph (b) of this section.

(d) *Exception for initiating a single immediate payment transfer at the consumer's request*. After a lender's second consecutive payment transfer has failed as specified in paragraph (b) of this section, the lender may initiate a payment transfer from the consumer's account without obtaining the consumer's authorization for additional payment transfers pursuant to paragraph (c) of this section if:

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(1) The payment transfer is a single immediate payment transfer at the consumer's request as defined in paragraph (a)(2) of this section; and

(2) The consumer authorizes the underlying one-time electronic fund transfer or provides the underlying signature check to the lender, as applicable, no earlier than the date on which the lender provides to the consumer the consumer rights notice required by § 1041.9(c) or on the date that the consumer affirmatively contacts the lender to discuss repayment options, whichever date is earlier.

(e) *Prohibition against evasion.* A lender must not take any action with the intent of evading the requirements of this section.

§ 1041.9 Disclosure of payment transfer attempts.

(a) *General form of disclosures—*(1) *Clear and conspicuous.* Disclosures required by this section must be clear and conspicuous. Disclosures required by this section may contain commonly accepted or readily understandable abbreviations.

(2) *In writing or electronic delivery.* Disclosures required by this section must be provided in writing or, so long as the requirements of paragraph (a)(4) of this section are satisfied, through electronic delivery. The disclosures must be provided in a form that can be viewed on paper or a screen, as applicable. This paragraph (a)(2) is not satisfied by a disclosure provided orally or through a recorded message.

(3) *Retainable.* Disclosures required by this section must be provided in a retainable form, except for electronic short notices delivered by mobile application or text message under paragraph (b) or (c) of this section.

(4) *Electronic delivery.* Disclosures required by this section may be provided through electronic delivery if the following consent requirements are satisfied:

(i) *Consumer consent—*(A) *General.* Disclosures required by this section may be provided through electronic delivery if the consumer affirmatively consents in writing or electronically to the particular electronic delivery method.

(B) *Email option required.* To obtain valid consumer consent to electronic delivery under this paragraph, a lender must provide the consumer with the option to select email as the method of electronic delivery, separate and apart from any other electronic delivery methods such as mobile application or text message.

(ii) *Subsequent loss of consent.* Notwithstanding paragraph (a)(4)(i) of this section, a lender must not provide disclosures required by this section through a method of electronic delivery if:

(A) The consumer revokes consent to receive disclosures through that delivery method; or

(B) The lender receives notification that the consumer is unable to receive disclosures through that delivery method at the address or number used.

(5) *Segregation requirements for notices.* All notices required by this section must be segregated from all other written or provided materials and contain only the information required by this section, other than information necessary for product identification, branding, and navigation. Segregated additional content that is not required by this section must not be displayed above, below, or around the required content.

(6) *Machine readable text in notices provided through electronic delivery.* If provided through electronic delivery, the payment notice required by paragraph (b) of this section and the consumer rights notice required by paragraph (c) of this section must use machine readable text that is accessible via both web browsers and screen readers.

(7) *Model forms—*(i) *Payment notice.* The content, order, and format of the payment notice required by paragraph (b) of this section must be substantially similar to Model Forms A-3 through A-4 in appendix A to this part.

(ii) *Consumer rights notice.* The content, order, and format of the consumer rights notice required by paragraph (c) of this section must be substantially similar to Model Form A-5 in appendix A to this part.

(iii) *Electronic short notice.* The content, order, and format of the electronic short notice required by paragraph (b) of this section must be substantially similar to Model Clauses A–6 and A–7 in appendix A to this part. The content, order, and format of the electronic short notice required by paragraph (c) of this section must be substantially similar to Model Clause A–8 in appendix A to this part.

(8) *Foreign language disclosures.* Disclosures required under this section may be made in a language other than English, provided that the disclosures are made available in English upon the consumer's request.

(b) *Payment notice*—(1) *General.* Prior to initiating the first payment withdrawal or an unusual withdrawal from a consumer's account, a lender must provide to the consumer a payment notice in accordance with the requirements in this paragraph (b) as applicable.

(i) *First payment withdrawal* means the first payment transfer scheduled to be initiated by a lender for a particular covered loan, not including a single immediate payment transfer initiated at the consumer's request as defined in § 1041.8(a)(2).

(ii) *Unusual withdrawal* means a payment transfer that meets one or more of the conditions described in paragraph (b)(3)(ii)(C) of this section.

(iii) *Exceptions.* The payment notice need not be provided when the lender initiates:

(A) The initial payment transfer from a consumer's account after obtaining consumer authorization pursuant to § 1041.8(c), regardless of whether any of the conditions in paragraph (b)(3)(ii)(C) of this section apply; or

(B) A single immediate payment transfer initiated at the consumer's request in accordance with § 1041.8(a)(2).

(2) *First payment withdrawal notice*—(i) *Timing*—(A) *Mail.* If the lender provides the first payment withdrawal notice by mail, the lender must mail the notice no earlier than when the lender obtains payment authorization and no later than six business days prior to initiating the transfer.

(B) *Electronic delivery.* (1) If the lender provides the first payment withdrawal notice through electronic delivery, the

lender must send the notice no earlier than when the lender obtains payment authorization and no later than three business days prior to initiating the transfer.

(2) If, after providing the first payment withdrawal notice through electronic delivery pursuant to the timing requirements in paragraph (b)(2)(i) of this section, the lender loses the consumer's consent to receive the notice through a particular electronic delivery method according to paragraph (a)(4)(ii) of this section, the lender must provide notice of any future unusual withdrawal, if applicable, through alternate means.

(C) *In person.* If the lender provides the first payment withdrawal notice in person, the lender must provide the notice no earlier than when the lender obtains payment authorization and no later than three business days prior to initiating the transfer.

(ii) *Content requirements.* The notice must contain the following information and statements, as applicable, using language substantially similar to the language set forth in Model Form A–3 in appendix A to this part:

(A) *Identifying statement.* The statement, “Upcoming Withdrawal Notice,” using that phrase, and, in the same statement, the name of the lender providing the notice.

(B) *Transfer terms*—(1) *Date.* Date that the lender will initiate the transfer.

(2) *Amount.* Dollar amount of the transfer.

(3) *Consumer account.* Sufficient information to permit the consumer to identify the account from which the funds will be transferred. The lender must not provide the complete account number of the consumer, but may use a truncated version similar to Model Form A–3 in appendix A to this part.

(4) *Loan identification information.* Sufficient information to permit the consumer to identify the covered loan associated with the transfer.

(5) *Payment channel.* Payment channel of the transfer.

(6) *Check number.* If the transfer will be initiated by a signature or paper check, remotely created check (as defined in Regulation CC, 12 CFR 229.2(fff)), or remotely created payment order (as defined in 16 CFR 310.2(cc)),

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the check number associated with the transfer.

(C) *Payment breakdown.* In a tabular form:

(1) *Payment breakdown heading.* A heading with the statement “Payment Breakdown,” using that phrase.

(2) *Principal.* The amount of the payment that will be applied to principal.

(3) *Interest.* The amount of the payment that will be applied to accrued interest on the loan.

(4) *Fees.* If applicable, the amount of the payment that will be applied to fees.

(5) *Other charges.* If applicable, the amount of the payment that will be applied to other charges.

(6) *Amount.* The statement “Total Payment Amount,” using that phrase, and the total dollar amount of the payment as provided in paragraph (b)(2)(ii)(B)(2) of this section.

(7) *Explanation of interest-only or negatively amortizing payment.* If applicable, a statement explaining that the payment will not reduce principal, using the applicable phrase “When you make this payment, your principal balance will stay the same and you will not be closer to paying off your loan” or “When you make this payment, your principal balance will increase and you will not be closer to paying off your loan.”

(D) *Lender name and contact information.* Name of the lender, the name under which the transfer will be initiated (if different from the consumer-facing name of the lender), and two different forms of lender contact information that may be used by the consumer to obtain information about the consumer’s loan.

(3) *Unusual withdrawal notice*—(i) *Timing*—(A) *Mail.* If the lender provides the unusual withdrawal notice by mail, the lender must mail the notice no earlier than 10 business days and no later than six business days prior to initiating the transfer.

(B) *Electronic delivery.* (1) If the lender provides the unusual withdrawal notice through electronic delivery, the lender must send the notice no earlier than seven business days and no later than three business days prior to initiating the transfer.

(2) If, after providing the unusual withdrawal notice through electronic delivery pursuant to the timing requirements in paragraph (b)(3)(i)(B) of this section, the lender loses the consumer’s consent to receive the notice through a particular electronic delivery method according to paragraph (a)(4)(ii) of this section, the lender must provide notice of any future unusual withdrawal attempt, if applicable, through alternate means.

(C) *In person.* If the lender provides the unusual withdrawal notice in person, the lender must provide the notice no earlier than seven business days and no later than three business days prior to initiating the transfer.

(D) *Exception for open-end credit.* If the unusual withdrawal notice is for open-end credit as defined in §1041.2(a)(16), the lender may provide the unusual withdrawal notice in conjunction with the periodic statement required under Regulation Z, 12 CFR 1026.7(b), in accordance with the timing requirements of that section.

(ii) *Content requirements.* The unusual withdrawal notice must contain the following information and statements, as applicable, using language substantially similar to the language set forth in Model Form A-4 in appendix A to this part:

(A) *Identifying statement.* The statement, “Alert: Unusual Withdrawal,” using that phrase, and, in the same statement, the name of the lender that is providing the notice.

(B) *Basic payment information.* The content required for the first withdrawal notice under paragraphs (b)(2)(ii)(B) through (D) of this section.

(C) *Description of unusual withdrawal.* The following content, as applicable, in a form substantially similar to the form in Model Form A-4 in appendix A to this part:

(1) *Varying amount*—(i) *General.* If the amount of a transfer will vary in amount from the regularly scheduled payment amount, a statement that the transfer will be for a larger or smaller amount than the regularly scheduled payment amount, as applicable.

(ii) *Open-end credit.* If the payment transfer is for open-end credit as defined in §1041.2(a)(16), the varying amount content is required only if the

amount deviates from the scheduled minimum payment due as disclosed in the periodic statement required under Regulation Z, 12 CFR 1026.7(b).

(2) *Date other than date of regularly scheduled payment.* If the payment transfer date is not a date on which a regularly scheduled payment is due under the terms of the loan agreement, a statement that the transfer will be initiated on a date other than the date of a regularly scheduled payment.

(3) *Different payment channel.* If the payment channel will differ from the payment channel of the transfer directly preceding it, a statement that the transfer will be initiated through a different payment channel and a statement of the payment channel used for the prior transfer.

(4) *For purpose of re-initiating returned transfer.* If the transfer is for the purpose of re-initiating a returned transfer, a statement that the lender is re-initiating a returned transfer, a statement of the date and amount of the previous unsuccessful attempt, and a statement of the reason for the return.

(4) *Electronic delivery*—(i) *General.* When the consumer has consented to receive disclosures through electronic delivery, the lender may provide the applicable payment notice required by paragraph (b)(1) of this section through electronic delivery only if it also provides an electronic short notice, except for email delivery as provided in paragraph (b)(4)(iii) of this section.

(ii) *Electronic short notice*—(A) *General content.* The electronic short notice required by this paragraph (b) must contain the following information and statements, as applicable, in a form substantially similar to Model Clause A-6 in appendix A to this part:

(1) *Identifying statement,* as required under paragraphs (b)(2)(ii)(A) and (b)(3)(ii)(A) of this section;

(2) *Transfer terms*—(i) *Date,* as required under paragraphs (b)(2)(ii)(B)(1) and (b)(3)(ii)(B) of this section;

(ii) *Amount,* as required under paragraphs (b)(2)(ii)(B)(2) and (b)(3)(ii)(B) of this section;

(iii) *Consumer account,* as required and limited under paragraphs (b)(2)(ii)(B)(3) and (b)(3)(ii)(B) of this section; and

(3) *Web site URL.* When the full notice is being provided through a linked URL

rather than as a PDF attachment, the unique URL of a Web site that the consumer may use to access the full payment notice required by paragraph (b) of this section.

(B) *Additional content requirements.* If the transfer meets any of the conditions for unusual attempts described in paragraph (b)(3)(ii)(C) of this section, the electronic short notice must also contain the following information and statements, as applicable, using language substantially similar to the language in Model Clause A-7 in appendix A to this part:

(1) *Varying amount,* as defined under paragraph (b)(3)(ii)(C)(1) of this section;

(2) *Date other than due date of regularly scheduled payment,* as defined under paragraph (b)(3)(ii)(C)(2) of this section; and

(3) *Different payment channel,* as defined under paragraph (b)(3)(ii)(C)(3) of this section.

(iii) *Email delivery.* When the consumer has consented to receive disclosures through electronic delivery, and the method of electronic delivery is email, the lender may either deliver the full notice required by paragraph (b)(1) of this section in the body of the email or deliver the full notice as a linked URL Web page or PDF attachment along with the electronic short notice as provided in paragraph (b)(4)(ii) of this section.

(c) *Consumer rights notice*—(1) *General.* After a lender initiates two consecutive failed payment transfers from a consumer's account as described in §1041.8(b), the lender must provide to the consumer a consumer rights notice in accordance with the requirements of paragraphs (c)(2) through (4) of this section.

(2) *Timing.* The lender must send the notice no later than three business days after it receives information that the second consecutive attempt has failed.

(3) *Content requirements.* The notice must contain the following information and statements, using language substantially similar to the language set forth in Model Form A-5 in appendix A to this part:

(i) *Identifying statement.* A statement that the lender, identified by name, is no longer permitted to withdraw loan

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payments from the consumer's account.

(ii) *Last two attempts were returned.* A statement that the lender's last two attempts to withdraw payment from the consumer's account were returned due to non-sufficient funds, or, if applicable to payments initiated by the consumer's account-holding institution, caused the account to go into overdraft status.

(iii) *Consumer account.* Sufficient information to permit the consumer to identify the account from which the unsuccessful payment attempts were made. The lender must not provide the complete account number of the consumer, but may use a truncated version similar to Model Form A-5 in appendix A to this part.

(iv) *Loan identification information.* Sufficient information to permit the consumer to identify any covered loans associated with the unsuccessful payment attempts.

(v) *Statement of Federal law prohibition.* A statement, using that phrase, that in order to protect the consumer's account, Federal law prohibits the lender from initiating further payment transfers without the consumer's permission.

(vi) *Contact about choices.* A statement that the lender may be in contact with the consumer about payment choices going forward.

(vii) *Previous unsuccessful payment attempts.* In a tabular form:

(A) *Previous payment attempts heading.* A heading with the statement "previous payment attempts."

(B) *Payment due date.* The scheduled due date of each previous unsuccessful payment transfer attempted by the lender.

(C) *Date of attempt.* The date of each previous unsuccessful payment transfer initiated by the lender.

(D) *Amount.* The amount of each previous unsuccessful payment transfer initiated by the lender.

(E) *Fees.* The fees charged by the lender for each unsuccessful payment attempt, if applicable, with an indication that these fees were charged by the lender.

(viii) *CFPB information.* A statement, using that phrase, that the Consumer Financial Protection Bureau created

this notice, a statement that the CFPB is a Federal government agency, and the URL to www.cfpb.gov/payday. This statement must be the last piece of information provided in the notice.

(4) *Electronic delivery*—(i) *General.* When the consumer has consented to receive disclosures through electronic delivery, the lender may provide the consumer rights notice required by paragraph (c) of this section through electronic delivery only if it also provides an electronic short notice, except for email delivery as provided in paragraph (c)(4)(iii) of this section.

(ii) *Electronic short notice*—(A) *Content.* The notice must contain the following information and statements, as applicable, using language substantially similar to the language set forth in Model Clause A-8 in appendix A to this part:

(1) *Identifying statement.* As required under paragraph (c)(3)(i) of this section;

(2) *Last two attempts were returned.* As required under paragraph (c)(3)(ii) of this section;

(3) *Consumer account.* As required and limited under paragraph (c)(3)(iii) of this section;

(4) *Statement of Federal law prohibition.* As required under paragraph (c)(3)(v) of this section; and

(5) *Web site URL.* When the full notice is being provided through a linked URL rather than as a PDF attachment, the unique URL of a Web site that the consumer may use to access the full consumer rights notice required by paragraph (c) of this section.

(B) [Reserved]

(iii) *Email delivery.* When the consumer has consented to receive disclosures through electronic delivery, and the method of electronic delivery is email, the lender may either deliver the full notice required by paragraph (c)(1) of this section in the body of the email or deliver the full notice as a linked URL Web page or PDF attachment along with the electronic short notice as provided in paragraph (c)(4)(ii) of this section.

[82 FR 54871, Nov. 17, 2017, as amended at 84 FR 27929, June 17, 2019]

Subpart D—Recordkeeping, Anti-Evasion, Severability, and Dates

§§ 1041.10–1041.11 [Reserved]

§ 1041.12 Compliance program and record retention.

(a) *Compliance program.* A lender making a covered loan must develop and follow written policies and procedures that are reasonably designed to ensure compliance with the requirements in this part. These written policies and procedures must be appropriate to the size and complexity of the lender and its affiliates, and the nature and scope of the covered loan lending activities of the lender and its affiliates.

(b) *Record retention.* A lender must retain evidence of compliance with this part for 36 months after the date on which a covered loan ceases to be an outstanding loan.

(1) *Retention of loan agreement for covered loans.* To comply with the requirements in this paragraph (b), a lender must retain or be able to reproduce an image of the loan agreement for each covered loan that the lender originates.

(2)–(3) [Reserved]

(4) *Retention of records relating to payment practices for covered loans.* To comply with the requirements in this paragraph (b), a lender must retain or be able to reproduce an image of the following documentation, as applicable, in connection with a covered loan:

(i) Leveraged payment mechanism(s) obtained by the lender from the consumer;

(ii) Authorization of additional payment transfer, as described in § 1041.8(c)(3)(iii); and

(iii) Underlying one-time electronic transfer authorization or underlying signature check, as described in § 1041.8(d)(2).

(5) *Electronic records in tabular format regarding payment practices for covered loans.* To comply with the requirements in this paragraph (b), a lender must retain electronic records in tab-

ular format that include the following information for covered loans:

(i) History of payments received and attempted payment transfers, as defined in § 1041.8(a)(1), including:

(A) Date of receipt of payment or attempted payment transfer;

(B) Amount of payment due;

(C) Amount of attempted payment transfer;

(D) Amount of payment received or transferred; and

(E) Payment channel used for attempted payment transfer.

(ii) If an attempt to transfer funds from a consumer's account is subject to the prohibition in § 1041.8(b)(1), whether the lender or service provider obtained authorization to initiate a payment transfer from the consumer in accordance with the requirements in § 1041.8(c) or (d).

[82 FR 54871, Nov. 17, 2017, as amended at 85 FR 44444, July 22, 2020]

§ 1041.13 Prohibition against evasion.

A lender must not take any action with the intent of evading the requirements of this part.

§ 1041.14 Severability.

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect.

§ 1041.15 Effective and compliance dates.

(a) *Effective date.* The effective date of this part is January 16, 2018.

(b) *April 16, 2018 application deadline.* The deadline to submit an application for preliminary approval for registration pursuant to § 1041.11(c)(1) is April 16, 2018.

(c) *August 19, 2019 compliance date.* The compliance date for §§ 1041.2, 1041.3, 1041.7 through 1041.9, 1041.12(a), (b) introductory text and (b)(4) and (5), and 1041.13 is August 19, 2019.

[84 FR 27929, June 17, 2019, as amended at 85 FR 44445, July 22, 2020]

APPENDIX A TO PART 1041—MODEL FORMS

A-1 AND A-2 MODEL FORMS [RESERVED]

A-3 MODEL FORM FOR FIRST PAYMENT WITHDRAWAL NOTICE UNDER § 1041.9(b)(2)

A-3 Model Form for First Payment Withdrawal Notice under § 1041.9(b)(2)

WILLOW LENDING

800-555-5555

willowlending.com

Upcoming Withdrawal Notice from Willow Lending

On November 12, 2016, Willow Lending will attempt to withdraw a payment of \$80 from your account ending in 0022. The payment will be withdrawn by check, using check #999.

If this payment is not successful, we will add a \$10 returned payment fee to your balance on loan #5432.

Contact Willow Lending at 1-800-555-5555 if you have questions or need to stop this withdrawal. The institution where you have your account also may be able to assist you.

Payment breakdown

Principal now	\$0
Interest	\$80
Total payment amount	\$80

When you make this payment, your principal balance will stay the same and you will not be closer to paying off your loan.

A-4 MODEL FORM FOR UNUSUAL WITHDRAWAL NOTICE UNDER § 1041.9(b)(3)

A-4 Model Form for Unusual Withdrawal Notice under § 1041.9(b)(3)

WILLOW LENDING

800-555-5555

willowlending.com

Alert: Unusual Withdrawal from Willow Lending

On November 12, 2016, Willow Lending will attempt to withdraw a payment of \$80 from your account ending in 0022. This electronic withdrawal will be made by ACH transfer.

This payment is unusual because it is larger than your originally scheduled payment. The previous withdrawal was initiated on November 2, 2016, for \$60.

If this payment is not successful, we will add a \$10 returned payment fee to your balance on loan #5432.

Contact Willow Lending at 1-800-555-5555 if you have questions or need to stop this withdrawal. The institution where you have your account also may be able to assist you.

Payment breakdown

Principal	\$50
Interest	\$20
Fees	\$10
Total payment amount	\$80

WILLOW LENDING

800-555-5555

willowlending.com

Notice: Willow Lending is no longer permitted to withdraw loan payments from your account

Our last two attempts to withdraw payment on your loan #5432 from your account ending in 0022 were returned because your account did not contain enough funds to cover the payment. To protect your account, federal law prohibits us from trying to withdraw payment again without your permission.

We may contact you to talk about your payment choices going forward.

Previous payment attempts

Payment due date	Date of attempt	Amount	Fees charged by Willow Lending
November 7, 2016	November 7, 2016	\$80	\$10 returned payment fee
November 7, 2016	November 10, 2016	\$80	\$10 returned payment fee

The Consumer Financial Protection Bureau (CFPB) created this notice to inform you of your rights under federal law. The CFPB is a federal government agency built to protect consumers. To learn more about your rights as a borrower, visit www.cfpb.gov/payday.

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A–6 MODEL CLAUSE FOR FIRST PAYMENT WITHDRAWAL ELECTRONIC SHORT NOTICE UNDER
§ 1041.9(b)(4)

A-6 Model Clause for First Payment Withdrawal Electronic Short Notice under § 1041.9(b)(4)

Subject (applicable to email only)

Upcoming Withdrawal Notice from Willow Lending

Body

Upcoming Withdrawal Notice from Willow Lending

On Nov 12, 2016, we will attempt to withdraw a payment of \$80
from your account ending in 0022.

View the details at willowlending.com/xox302ksw.

A–7 MODEL CLAUSE FOR UNUSUAL WITHDRAWAL ELECTRONIC SHORT NOTICE UNDER § 1041.9(c)(4)(
ii)(B)

A-7 Model Clause for Unusual Withdrawal Electronic Short Notice under § 1041.9(b)(4)(ii)(B)

Subject (applicable to email only)

Alert: Unusual Withdrawal from Willow Lending

Body

Alert: Unusual Withdrawal from Willow Lending

On Nov 12, 2016, we will attempt to withdraw a payment of \$80
from your account ending in 0022. This payment is unusual
because it is larger than your originally scheduled payment.

View the details at willowlending.com/xox302ksw.

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A-8 MODEL CLAUSE FOR CONSUMER RIGHTS ELECTRONIC SHORT NOTICE UNDER §1041.9(c)(4)

A-8 Model Clause for Consumer Rights Electronic Short Notice under § 1041.9(c)(4)

Subject (applicable to email only)

Notice: Willow Lending is no longer permitted to withdraw loan payments from your account

Body

Notice: Willow Lending is no longer permitted to withdraw loan payments from your account

Our last two attempts to withdraw payment from your account ending in 0022 were returned. To protect your account, federal law prohibits us from trying to withdraw payment again without your permission.

View the details at willowlending.com/xox302ksw.

[82 FR 54871, Nov. 17, 2017, as amended at 84 FR 27929, June 17, 2019; 85 FR 44445, July 22, 2020]

**SUPPLEMENT I TO PART 1041—OFFICIAL
INTERPRETATIONS**

Section 1041.2—Definitions

2(a)(3) Closed-End Credit

1. *In general.* Institutions may rely on 12 CFR 1026.2(a)(10) and its related commentary in determining the meaning of closed-end credit, but without regard to whether the credit is consumer credit, as that term is defined in 12 CFR 1026.2(a)(12), or is extended to a consumer, as that term is defined in 12 CFR 1026.2(a)(11).

2(a)(5) Consummation

1. *New loan.* When a contractual obligation on the consumer's part is created is a matter to be determined under applicable law. A contractual commitment agreement, for example, that under applicable law binds the consumer to the loan terms would be consummation. Consummation, however, does not occur merely because the consumer has made some financial investment in the transaction (for example, by paying a non-refundable fee) unless applicable law holds otherwise.

2(a)(11) Credit

1. *In general.* Institutions may rely on 12 CFR 1026.2(a)(14) and its related commentary in determining the meaning of credit.

2(a)(12) Electronic Fund Transfer

1. *In general.* Institutions may rely on 12 CFR 1005.3(b) and its related commentary in determining the meaning of electronic fund transfer.

2(a)(13) Lender

1. *Regularly extends credit.* The test for determining whether a person regularly extends credit for personal, family, or household purposes is explained in Regulation Z, 12 CFR 1026.2(a)(17)(v). Any loan to a consumer primarily for personal, family, or household purposes, whether or not the loan is a covered loan under this part, counts toward the numeric threshold for determining whether a person regularly extends credit.

2(a)(16) Open-End Credit

1. *In general.* Institutions may rely on 12 CFR 1026.2(a)(20) and its related commentary in determining the meaning of open-end credit, but without regard to whether the credit permits a finance charge to be imposed from time to time on an outstanding balance as defined in 12 CFR 1026.4. Also, for the purposes of defining open-end credit under this part, the term credit, as defined in §1041.2(a)(11), is substituted for the term consumer credit, as defined in 12 CFR 1026.2(a)(12); the term lender, as defined in §1041.2(a)(13), is substituted for the term creditor, as defined in 12 CFR 1026.2(a)(17); and the term consumer, as defined in

§1041.2(a)(4), is substituted for the term consumer, as defined in 12 CFR 1026.2(a)(11). See generally §1041.2(b).

2(a)(17) Outstanding Loan

1. *Payments owed to third parties.* A loan is an outstanding loan if it meets all the criteria set forth in §1041.2(a)(17), regardless of whether the consumer is required to pay the lender, an affiliate of the lender, or a service provider. A lender selling the loan or the loan servicing rights to a third party does not affect whether a loan is an outstanding loan under §1041.2(a)(17).

2. *Stale loans.* A loan is generally an outstanding loan if the consumer has a legal obligation to repay the loan, even if the consumer is delinquent or if the consumer is in a repayment plan or workout arrangement. However, a loan that the consumer otherwise has a legal obligation to repay is not an outstanding loan for purposes of this part if the consumer has not made any payment on the loan within the previous 180-day period. A loan ceases to be an outstanding loan as of: The earliest of the date the consumer repays the loan in full, the date the consumer is released from the legal obligation to repay, the date the loan is otherwise legally discharged, or the date that is 180 days following the last payment that the consumer has made on the loan, even if the payment is not a regularly scheduled payment in a scheduled amount. If the consumer does not make any payments on a loan and none of these other events occur, the loan ceases to be outstanding 180 days after consummation. A loan cannot become an outstanding loan due to any events that occur after the consumer repays the loan in full, the consumer is released from the legal obligation to repay, the loan is otherwise legally discharged, 180 days following the last payment that the consumer has made on the loan, or 180 days after consummation of a loan on which the consumer makes no payments.

2(a)(18) Service Provider

1. *Credit access businesses and credit services organizations.* Persons who provide a material service to lenders in connection with the lenders' offering or provision of covered loans are service providers, subject to the specific limitations in section 1002(26) of the Dodd-Frank Act. Accordingly, credit access businesses and credit service organizations that provide a material service to lenders during the course of obtaining for consumers, or assisting consumers in obtaining, loans from lenders, are service providers, subject to the specific limitations in section 1002(26) of the Dodd-Frank Act.

2(b) Rule of Construction

1. *Incorporation of terms from underlying statutes and regulations.* For purposes of this

part, where definitions are incorporated from other statutes or regulations, users may as applicable rely on embedded definitions, appendices, and commentary for those other laws. For example, 12 CFR 1005.2(b) and its related commentary determine the meaning of account under §1041.2(a)(1). However, where this part defines the same term or a parallel term in a way that creates a substantive distinction, the definition in this part shall control. See, for example, the definition of open-end credit in §1041.2(a)(16), which is generally determined according to 12 CFR 1026.2(a)(20) and its related commentary but without regard to whether the credit is consumer credit, as that term is defined in 12 CFR 1026.2(a)(12), or is extended to a consumer, as that term is defined in 12 CFR 1026.2(a)(11), because this part provides a different and arguably broader definition of consumer in §1041.2(a)(4).

Section 1041.3—Scope of Coverage; Exclusions; Exemptions

3(b) Covered Loans

1. *Credit structure.* The term covered loan includes open-end credit and closed-end credit, regardless of the form or structure of the credit.

2. *Primary purpose.* Under §1041.3(b), a loan is not a covered loan unless it is extended primarily for personal, family, or household purposes. Institutions may rely on 12 CFR 1026.3(a) and its related commentary in determining the primary purpose of a loan.

Paragraph 3(b)(1)

1. *Closed-end credit that does not provide for multiple advances to consumers.* A loan does not provide for multiple advances to a consumer if the loan provides for full disbursement of the loan proceeds only through disbursement on a single specific date.

2. *Loans that provide for multiple advances to consumers.* Both open-end credit and closed-end credit may provide for multiple advances to consumers. Open-end credit can have a fixed expiration date, as long as during the plan's existence the consumer may use credit, repay, and reuse the credit. Likewise, closed-end credit may consist of a series of advances. For example:

i. Under a closed-end commitment, the lender might agree to lend a total of \$1,000 in a series of advances as needed by the consumer. When a consumer has borrowed the full \$1,000, no more is advanced under that particular agreement, even if there has been repayment of a portion of the debt.

3. *Facts and circumstances test for determining whether loan is substantially repayable within 45 days.* Substantially repayable means that the substantial majority of the loan or advance is required to be repaid within 45 days of consummation or advance, as the case may be. Application of the standard

depends on the specific facts and circumstances of each loan, including the timing and size of the scheduled payments. A loan or advance is not substantially repayable within 45 days of consummation or advance merely because a consumer chooses to repay within 45 days when the loan terms do not require the consumer to do so.

4. *Deposit advance products.* A loan or advance is substantially repayable within 45 days of consummation or advance if the lender has the right to be repaid through a sweep or withdrawal of any qualifying electronic deposit made into the consumer's account within 45 days of consummation or advance. A loan or advance described in this paragraph is substantially repayable within 45 days of consummation or advance even if no qualifying electronic deposit is actually made into or withdrawn by the lender from the consumer's account.

5. *Loans with alternative, ambiguous, or unusual payment schedules.* If a consumer, under any applicable law, would breach the terms of the agreement between the consumer and the lender or service provider by not substantially repaying the entire amount of the loan or advance within 45 days of consummation or advance, as the case may be, the loan is a covered short-term loan under §1041.3(b)(1). For loans or advances that are not required to be repaid within 45 days of consummation or advance, if the consumer, under applicable law, would not breach the terms of the agreement between the consumer and the lender by not substantially repaying the loan or advance in full within 45 days, the loan is a covered longer-term balloon-payment loan under §1041.3(b)(2) or a covered longer-term loan under §1041.3(b)(3) if the loan otherwise satisfies the criteria specified in §1041.3(b)(2) or (3), respectively.

Paragraph 3(b)(2)

1. *Closed-end credit that does not provide for multiple advances to consumers.* See comments 3(b)(1)-1 and 3(b)(1)-2.

2. *Payments more than twice as large as other payments.* For purposes of §1041.3(b)(2)(i) and (ii), all required payments of principal and any charges (or charges only, depending on the loan features) due under the loan are used to determine whether a particular payment is more than twice as large as another payment, regardless of whether the payments have changed during the loan term due to rate adjustments or other payment changes permitted or required under the loan.

3. *Charges excluded.* Charges for actual unanticipated late payments, for exceeding a credit limit, or for delinquency, default, or a similar occurrence that may be added to a payment are excluded from the determination of whether the loan is repayable in a single payment or a particular payment is more than twice as large as another pay-

ment. Likewise, sums that are accelerated and due upon default are excluded from the determination of whether the loan is repayable in a single payment or a particular payment is more than twice as large as another payment.

4. *Multiple-advance structures.* Loans that provide for more than one advance are considered to be a covered longer-term balloon-payment loan under §1041.3(b)(2)(ii) if either:

i. The consumer is required to repay substantially the entire amount of an advance more than 45 days after the advance is made or is required to make at least one payment on the advance that is more than twice as large as any other payment; or

ii. A loan with multiple advances is structured such that paying the required minimum payment may not fully amortize the outstanding balance by a specified date or time, and the amount of the final payment to repay the outstanding balance at such time could be more than twice the amount of other minimum payments under the plan. For example, the lender extends an open-end credit plan with a \$500 credit limit, monthly billing cycles, and a minimum payment due each billing cycle that is equal to 10% of the outstanding principal. Fees or interest on the plan are equal to 10% of the outstanding principal per month, so that if a consumer pays nothing other than the minimum payment amount, the outstanding principal remains the same. All outstanding amounts must be repaid within six months of the advance. The credit plan is a covered loan under §1041.3(b)(2)(ii) because if the consumer drew the entire amount at one time and then made only minimum payments, the sixth payment would be more than twice the amount of the minimum payment required (\$50).

Paragraph 3(b)(3)

1. *Conditions for coverage of a longer-term loan.* A loan that is not a covered short-term loan or a covered longer-term balloon-payment loan is a covered longer-term loan only if it satisfies both the cost of credit requirement of §1041.3(b)(3)(i) and leveraged payment mechanism requirement of §1041.3(b)(3)(ii). If the requirements of §1041.3(b)(3) are met, and the loan is not otherwise excluded or conditionally exempted from coverage by §1041.3(d), (e), or (f), the loan is a covered longer-term loan. For example, a 60-day loan that is not a covered longer-term balloon-payment loan is not a covered longer-term loan if the cost of credit as measured pursuant to §1041.2(a)(6) is less than or equal to a rate of 36 percent per annum even if the lender or service provider obtains a leveraged payment mechanism.

2. *No balance during a billing cycle.* Under §1041.2(a)(6)(ii)(B), the cost of credit for open-end credit must be calculated according

to the rules for calculating the effective annual percentage rate for a billing cycle as set forth in Regulation Z, 12 CFR 1026.14(c) and (d), which provide that the annual percentage rate cannot be calculated for billing cycles in which there is a finance charge but no other balance. Accordingly, pursuant to §1041.2(a)(6)(ii)(B), the cost of credit could not be calculated for such billing cycles. Section 1041.3(b)(3)(i)(B)(I) provides that, for such billing cycles, an open-end credit plan is determined to have exceeded the threshold set forth in that paragraph if there is no balance other than a finance charge imposed by the lender.

3. *Timing for coverage determination.* A loan may become a covered longer-term loan at any such time as both of the requirements of §1041.3(b)(3)(i) and (ii) are met. For example:

i. A lender originates a closed-end loan that is not a longer-term balloon-payment loan to be repaid within six months of consummation with a cost of credit equal to 60 percent. At the time of consummation, the loan is not a covered longer-term loan because it does not have a leveraged payment mechanism. After two weeks, the lender obtains a leveraged payment mechanism. The loan is now a covered longer-term loan because it meets both of the requirements of §1041.3(b)(3)(i) and (ii).

ii. A lender extends an open-end credit plan with monthly billing cycles and a leveraged payment mechanism. At consummation and again at the end of the first billing cycle, the plan is not a covered longer-term loan because its cost of credit is below 36 percent. In the second billing cycle, the plan's cost of credit is 45 percent because several fees are triggered in addition to interest on the principal balance. The plan is now a covered longer-term loan because it meets both of the requirements of §1041.3(b)(3)(i) and (ii). Beginning on the first day of the third billing cycle, and thereafter for the duration of the plan, the lender must therefore comply with the requirements of this part including by, for example, providing a first withdrawal notice before initiating the first payment transfer on or after the first day of the third billing cycle. The requirements to provide certain payment withdrawal notices under §1041.9 have been structured so that the notices can be provided in the same mailing as the periodic statements that are required by Regulation Z, 12 CFR 1026.7(b). *See, e.g.,* §1041.9(b)(3)(i)(D).

Paragraph 3(b)(3)(ii)

1. *Timing.* The condition in §1041.3(b)(3)(ii) is satisfied if a lender or service provider obtains a leveraged payment mechanism before, at the same time as, or after the consumer receives the entire amount of funds that the consumer is entitled to receive under the loan, regardless of the means by

which the lender or service provider obtains a leveraged payment mechanism.

2. *Leveraged payment mechanism in contract.* The condition in §1041.3(b)(3)(ii) is satisfied if a loan agreement authorizes the lender to elect to obtain a leveraged payment mechanism, regardless of the time at which the lender actually obtains a leveraged payment mechanism. The following are examples of situations in which a lender obtains a leveraged payment mechanism under §1041.3(b)(3)(ii):

i. *Future authorization.* A loan agreement provides that the consumer, at some future date, must authorize the lender or service provider to debit the consumer's account on a recurring basis.

ii. *Delinquency or default provisions.* A loan agreement provides that the consumer must authorize the lender or service provider to debit the consumer's account on a one-time or a recurring basis if the consumer becomes delinquent or defaults on the loan.

Paragraph 3(c)

1. *Initiating a transfer of money from a consumer's account.* A lender or service provider obtains the ability to initiate a transfer of money when that person can collect payment, or otherwise withdraw funds, from a consumer's account, either on a single occasion or on a recurring basis, without the consumer taking further action. Generally, when a lender or service provider has the ability to "pull" funds or initiate a transfer from the consumer's account, that person has a leveraged payment mechanism. However, a "push" transaction from the consumer to the lender or service provider does not in itself give the lender or service provider a leveraged payment mechanism.

2. *Lender-initiated transfers.* The following are examples of situations in which a lender or service provider has the ability to initiate a transfer of money from a consumer's account:

i. *Check.* A lender or service provider obtains a check, draft, or similar paper instrument written by the consumer, other than a single immediate payment transfer at the consumer's request as described in §1041.3(c) and comment 3(c)-3.

ii. *Electronic fund transfer authorization.* The consumer authorizes a lender or service provider to initiate an electronic fund transfer from the consumer's account in advance of the transfer, other than a single immediate payment transfer at the consumer's request as described in §1041.3(c) and comment 3(c)-3.

iii. *Remotely created checks and remotely created payment orders.* A lender or service provider has authorization to create or present a remotely created check (as defined by Regulation CC, 12 CFR 229.2(ff)), remotely created payment order (as defined in 16 CFR

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310.2(cc)), or similar instrument drafted on the consumer's account.

iv. *Transfer by account-holding institution.* A lender or service provider that is an account-holding institution has a right to initiate a transfer of funds between the consumer's account and an account of the lender or affiliate, including, but not limited to, an account-holding institution's right of set-off.

3. *Single immediate payment transfer at the consumer's request excluded.* A single immediate payment transfer at the consumer's request, as defined in §1041.8(a)(2), is excluded from the definition of leveraged payment mechanism. Accordingly, if the loan or other agreement between the consumer and the lender or service provider does not otherwise provide for the lender or service provider to initiate a transfer without further consumer action, the lender or service provider can initiate a single immediate payment transfer at the consumer's request without causing the loan to become a covered loan under §1041.3(b)(3). See §1041.8(a)(2) and related commentary for guidance on what constitutes a single immediate payment transfer at the consumer's request.

4. *Transfers not initiated by the lender.* A lender or service provider does not initiate a transfer of money from a consumer's account if the consumer authorizes a third party, such as a bank's automatic bill pay service, to initiate a transfer of money from the consumer's account to a lender or service provider.

3(d) Exclusions

3(d)(1) Certain Purchase Money Security Interest Loans

1. *"Sole purpose" test.* The requirements of this part do not apply to loans made solely and expressly to finance the consumer's initial purchase of a good in which the lender takes a security interest as a condition of the credit. For example, the requirements of this part would not apply to a transaction in which a lender makes a loan to a consumer for the express purpose of initially purchasing a motor vehicle, television, household appliance, or furniture in which the lender takes a security interest and the amount financed is approximately equal to, or less than, the cost of acquiring the good, even if the cost of credit exceeds 36 percent per annum and the lender also obtains a leveraged payment mechanism. A loan is made solely and expressly to finance the consumer's initial purchase of a good even if the amount financed under the loan includes Federal, State, or local taxes or amounts required to be paid under applicable State and Federal licensing and registration requirements. This exclusion does not apply to refinances of credit extended for the purchase of a good.

3(d)(2) Real Estate Secured Credit

1. *Real estate and dwellings.* The requirements of this part do not apply to credit secured by any real property, or by any personal property, such as a mobile home, used or expected to be used as a dwelling if the lender records or otherwise perfects the security interest within the term of the loan, even if the cost of credit exceeds 36 percent per annum and the lender or servicer provider also obtains a leveraged payment mechanism. If the lender does not record or perfect the security interest during the term of the loan, however, the credit is not excluded from the requirements of this part under §1041.3(d)(2).

3(d)(5) Non-Recourse Pawn Loans

1. *Lender possession required and no recourse permitted.* A pawn loan must satisfy two conditions to be excluded from the requirements of this part under §1041.3(d)(5). First, the lender must have sole physical possession and use of the property securing the pawned property at all times during the entire term of the loan. If the consumer retains either possession or use of the property, however limited the consumer's possession or use of the property might be, the loan is not excluded from the requirements of this part under §1041.3(d)(5). Second, the lender must have no recourse if the consumer does not elect to redeem the pawned item and repay the loan other than retaining the pawned property to dispose of according to State or local law. If any consumer, or if any co-signor, guarantor, or similar person, is personally liable for the difference between the outstanding balance on the loan and the value of the pawned property, the loan is not excluded from the requirements of this part under §1041.3(d)(5).

3(d)(6) Overdraft Services

1. *Definitions.* Institutions may rely on 12 CFR 1005.17(a) and its related commentary in determining whether credit is an overdraft service or an overdraft line of credit that is excluded from the requirements of this part under §1041.3(d)(6).

3(d)(7) Wage Advance Programs

1. Advances of wages under §1041.3(d)(7) must be offered by an employer, as defined in the Fair Labor Standards Act, 29 U.S.C. 203(d), or by the employer's business partner to the employer's employees pursuant to a wage advance program. For example, an advance program might be offered by a company that provides payroll card services or accounting services to the employer, or by the employer with the assistance of such a company. Similarly, an advance program might be offered by a company that provides consumer financial products and services as

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part of the employer's benefits program, such that the company would have information regarding the wages accrued by the employee.

Paragraph 3(d)(7)(i)

1. Under the exclusion in §1041.3(d)(7)(i), the advance must be made only against accrued wages. To qualify for that exclusion, the amount advanced must not exceed the amount of the employee's accrued wages. Accrued wages are wages that the employee is entitled to receive under State law in the event of separation from the employer for work performed for the employer, but for which the employee has yet to be paid.

Paragraph 3(d)(7)(ii)(B)

1. Under §1041.3(d)(7)(ii)(B), the entity advancing the funds is required to warrant that it has no legal or contractual claim or remedy against the consumer based on the consumer's failure to repay in the event the amount advanced is not repaid in full. This provision does not prevent the entity from obtaining a one-time authorization to seek repayment from the consumer's transaction account.

3(d)(8) No-Cost Advances

1. Under §1041.3(d)(8)(i), the entity advancing the funds is required to warrant that it has no legal or contractual claim or remedy against the consumer based on the consumer's failure to repay in the event the amount advanced is not repaid in full. This provision does not prevent the entity from obtaining a one-time authorization to seek repayment from the consumer's transaction account.

3(e) Alternative Loans

1. *General.* Section 1041.3(e) conditionally exempts from this part alternative covered loans that satisfy the conditions and requirements set forth in §1041.3(e). Nothing in §1041.3(e) provides lenders with an exemption from the requirements of other applicable laws, including State laws. The conditions for an alternative loan made under §1041.3(e) largely track the conditions set forth by the National Credit Union Administration at 12 CFR 701.21(c)(7)(iii) for a Payday Alternative Loan made by a Federal credit union. All lenders, including Federal credit unions and persons that are not Federal credit unions, are permitted to make loans under §1041.3(e), provided that such loans are permissible under other applicable laws, including State laws.

3(e)(1) Loan Term Conditions

Paragraph 3(e)(1)(iv)

1. *Substantially equal payments.* Under §1041.3(e)(1)(iv), payments are substantially

equal in amount if the amount of each scheduled payment on the loan is equal to or within a small variation of the others. For example, if a loan is repayable in six biweekly payments and the amount of each scheduled payment is within 1 percent of the amount of the other payments, the loan is repayable in substantially equal payments. In determining whether a loan is repayable in substantially equal payments, a lender may disregard the effects of collecting the payments in whole cents.

2. *Substantially equal intervals.* The intervals for scheduled payments are substantially equal if the payment schedule requires repayment on the same date each month or in the same number of days of the prior scheduled payment. For example, a loan for which payment is due every 15 days has payments due in substantially equal intervals. A loan for which payment is due on the 15th day of each month also has payments due in substantially equal intervals. In determining whether payments fall due in substantially equal intervals, a lender may disregard that dates of scheduled payments may be slightly changed because the scheduled date is not a business day, that months have different numbers of days, and the occurrence of leap years. Section 1041.3(e)(1)(iv) does not prevent a lender from accepting prepayment on a loan made under §1041.3(e).

3. *Amortization.* Section 1041.3(e)(1)(iv) requires that the scheduled payments fully amortize the loan over the contractual period and prohibits lenders from making loans under §1041.3(e) with interest-only payments or with a payment schedule that front-loads payments of interest and fees. While under §1041.3(e)(1)(iv) the payment amount must be substantially equal for each scheduled payment, the amount of the payment that goes to principal and to interest will vary. The amount of payment applied to interest will be greater for earlier payments when there is a larger principal outstanding.

Paragraph 3(e)(1)(v)

1. *Cost of credit.* Under §1041.3(e)(1)(v), the lender must not impose any charges other than the rate and application fees permissible for Federal credit unions to charge under 12 CFR 701.21(c)(7)(iii). Under 12 CFR 701.21(c)(7)(iii), application fees must reflect the actual costs associated with processing the application and must not exceed \$20.

3(e)(2) Borrowing History Condition

1. *Relevant records.* A lender may make an alternative covered loan under §1041.3(e) only if the lender determines from its records that the consumer's borrowing history on alternative covered loans made under §1041.3(e) meets the criteria set forth in §1041.3(e)(2). The lender is not required to

obtain information about a consumer's borrowing history from other persons, such as by obtaining a consumer report.

2. *Determining 180-day period.* For purposes of counting the number of loans made under § 1041.3(e)(2), the 180-day period begins on the date that is 180 days prior to the consummation date of the loan to be made under § 1041.3(e) and ends on the consummation date of such loan.

3. *Total number of loans made under § 1041.3(e)(2).* Section 1041.3(e)(2) excludes loans from the conditional exemption in § 1041.3(e) if the loan would result in the consumer being indebted on more than three outstanding loans made under § 1041.3(e) from the lender in any consecutive 180-day period. See § 1041.2(a)(17) for the definition of outstanding loan. Under § 1041.3(e)(2), the lender is required to determine from its records the consumer's borrowing history on alternative covered loans made under § 1041.3(e) by the lender. The lender must use this information about borrowing history to determine whether the loan would result in the consumer being indebted on more than three outstanding loans made under § 1041.3(e) from the lender in a consecutive 180-day period, determined in the manner described in comment 3(e)(2)-2. Section 1041.3(e) does not prevent lenders from making a covered loan subject to the requirements of this part.

4. *Example.* For example, assume that a lender seeks to make an alternative loan under § 1041.3(e) to a consumer and the loan does not qualify for the safe harbor under § 1041.3(e)(4). The lender checks its own records and determines that during the 180 days preceding the consummation date of the prospective loan, the consumer was indebted on two outstanding loans made under § 1041.3(e) from the lender. The loan, if made, would be the third loan made under § 1041.3(e) on which the consumer would be indebted during the 180-day period and, therefore, would be exempt from this part under § 1041.3(e). If, however, the lender determined that the consumer was indebted on three outstanding loans under § 1041.3(e) from the lender during the 180 days preceding the consummation date of the prospective loan, the condition in § 1041.3(e)(2) would not be satisfied and the loan would not be an alternative loan subject to the exemption under § 1041.3(e) but would instead be a covered loan subject to the requirements of this part.

3(e)(3) Income Documentation Condition

1. *General.* Section 1041.3(e)(3) requires lenders to maintain policies and procedures for documenting proof of recurring income and to comply with those policies and procedures when making alternative loans under § 1041.3(e). For the purposes of § 1041.3(e)(3), lenders may establish any procedure for documenting recurring income that satisfies the lender's own underwriting obligations. For

example, lenders may choose to use the procedure contained in the National Credit Union Administration's guidance at 12 CFR 701.21(c)(7)(iii) on Payday Alternative Loan programs recommending that Federal credit unions document consumer income by obtaining two recent paycheck stubs.

3(f) Accommodation Lending

1. *General.* Section 1041.3(f) provides a conditional exemption for covered loans if, at the time of origination: (1) The lender and its affiliates collectively have made 2,500 or fewer covered loans in the current calendar year and made 2,500 or fewer covered loans in the preceding calendar year; and (2) during the most recent completed tax year in which the lender was in operation, if applicable, the lender and any affiliates that were in operation and used the same tax year derived no more than 10 percent of their receipts from covered loans, or if the lender was not in operation in a prior tax year, the lender reasonably anticipates that the lender and any of its affiliates that use the same tax year will, during the current tax year, derive no more than 10 percent of their combined receipts from covered loans. For example, assume a lender begins operation in January 2019, uses the calendar year as its tax year, and has no affiliates. In 2019, the lender could originate up to 2,500 covered loans that are not subject to the requirements of this part if at the time of each origination it reasonably anticipates that no more than 10 percent of its receipts during the current tax year will derive from covered loans. In 2020, the lender could originate up to 2,500 covered loans that are not subject to the requirements of this part if the lender made 2,500 or fewer covered loans in 2019 and the lender derived no more than 10 percent of its receipts in the 2019 tax year from covered loans. Section 1041.3(f) provides that covered longer-term loans for which all transfers meet the conditions in § 1041.8(a)(1)(ii), and receipts from such loans, are not included for the purpose of determining whether the conditions of § 1041.3(f)(1) and (2) have been satisfied. For example, a bank that makes a covered longer-term loan using a loan agreement that includes the conditions in § 1041.8(a)(1)(ii) does not need to include that loan, or the receipts from that loan, in determining whether it is below the 2,500 loan threshold or the 10 percent of receipts threshold in § 1041.3(f)(1) and (2).

2. *Reasonable anticipation of receipts for current tax year.* A lender and its affiliates can look to receipts to date in forecasting their total receipts for the current tax year, but are expected to make reasonable adjustments to account for an upcoming substantial change in business plans or other relevant and known factors.

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Section 1041.7—Identification of Unfair and Abusive Practice

1. *General.* A lender who complies with §1041.8 with regard to a covered loan has not committed the unfair and abusive practice under §1041.7.

Section 1041.8—Prohibited Payment Transfer Attempts

8(a) Definitions

8(a)(1) Payment Transfer

1. *Lender-initiated.* A lender-initiated debit or withdrawal includes a debit or withdrawal initiated by the lender's agent, such as a payment processor.

2. *Any amount due.* The following are examples of funds transfers that are for the purpose of collecting any amount due in connection with a covered loan:

i. A transfer for the amount of a scheduled payment due under a loan agreement for a covered loan.

ii. A transfer for an amount smaller than the amount of a scheduled payment due under a loan agreement for a covered loan.

iii. A transfer for the amount of the entire unpaid loan balance collected pursuant to an acceleration clause in a loan agreement for a covered loan.

iv. A transfer for the amount of a late fee or other penalty assessed pursuant to a loan agreement for a covered loan.

3. *Amount purported to be due.* A transfer for an amount that the consumer disputes or does not legally owe is a payment transfer if it otherwise meets the definition set forth in §1041.8(a)(1).

4. *Transfers of funds not initiated by the lender.* A lender does not initiate a payment transfer when:

i. A consumer, on her own initiative or in response to a request or demand from the lender, makes a payment to the lender in cash withdrawn by the consumer from the consumer's account.

ii. A consumer makes a payment via an online or mobile bill payment service offered by the consumer's account-holding institution.

iii. The lender seeks repayment of a covered loan pursuant to a valid court order authorizing the lender to garnish a consumer's account.

Paragraph 8(a)(1)(i)(A)

1. *Electronic fund transfer.* Any electronic fund transfer meeting the general definition in §1041.8(a)(1) is a payment transfer, including but not limited to an electronic fund transfer initiated by a debit card or a prepaid card.

Paragraph 8(a)(1)(i)(B)

1. *Signature check.* A transfer of funds by signature check meeting the general definition in §1041.8(a)(1) is a payment transfer regardless of whether the transaction is processed through the check network or through another network, such as the ACH network. The following example illustrates this concept: A lender processes a consumer's signature check through the check system to collect a scheduled payment due under a loan agreement for a covered loan. The check is returned for nonsufficient funds. The lender then converts and processes the check through the ACH system, resulting in a successful payment. Both transfers are payment transfers, because both were initiated by the lender for purposes of collecting an amount due in connection with a covered loan.

Paragraph 8(a)(1)(i)(E)

1. *Transfer by account-holding institution.* Under §1041.8(a)(1)(i)(E), when the lender is the account holder, a transfer of funds by the account-holding institution from a consumer's account held at the same institution is a payment transfer if it meets the general definition in §1041.8(a)(1)(i), unless the transfer of funds meets the conditions in §1041.8(a)(1)(ii) and is therefore excluded from the definition. See §1041.8(a)(1)(ii) and related commentary.

2. *Examples.* Payment transfers initiated by an account-holding institution from a consumer's account include, but are not limited to, the following:

i. Initiating an internal transfer from a consumer's account to collect a scheduled payment on a covered loan.

ii. Sweeping the consumer's account in response to a delinquency on a covered loan.

iii. Exercising a right of offset to collect against an outstanding balance on a covered loan.

Paragraph 8(a)(1)(ii) Conditional Exclusion for Certain Transfers by Account-Holding Institutions

1. *General.* The exclusion in §1041.8(a)(1)(ii) applies only to a lender that is also the consumer's account-holding institution. The exclusion applies only if the conditions in both §1041.8(a)(1)(ii)(A) and (B) are met with respect to a particular transfer of funds. A lender whose transfer meets the exclusion has not committed the unfair and abusive practice under §1041.7 and is not subject to §1041.8 or §1041.9 in connection with that transaction, but is subject to subpart C for any transfers that do not meet the exclusion in §1041.8(a)(1)(ii) and are therefore payment transfers under §1041.8(a)(1).

Paragraph 8(a)(1)(ii)(A)

1. *Terms of loan agreement or account agreement.* The condition in §1041.8(a)(1)(ii)(A) is

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met only if the terms of the loan agreement or account agreement setting forth the restrictions on charging fees are in effect at the time the covered loan is made and remain in effect for the duration of the loan.

2. *Fees prohibited.* Examples of the types of fees restricted under §1041.8(a)(1)(ii)(A) include, but are not limited to, nonsufficient fund fees, overdraft fees, and returned-item fees. A lender seeking to initiate transfers of funds pursuant to the exclusion in §1041.8(a)(1)(ii) may still charge the consumer a late fee for failure to make a timely payment, as permitted under the terms of the loan agreement and other applicable law, notwithstanding that the lender has initiated a transfer of funds meeting the description in §1041.8(a)(1)(ii)(A) in an attempt to collect the payment.

Paragraph 8(a)(1)(ii)(B)

1. *General.* Under §1041.8(a)(1)(ii)(B), to be eligible for the exclusion in §1041.8(a)(1)(ii), a lender may not close the consumer's account in response to a negative balance that results from a lender-initiated transfer of funds in connection with the covered loan. A lender is not restricted from closing the consumer's account in response to another event, even if the event occurs after a lender-initiated transfer of funds has brought the account to a negative balance. For example, a lender may close the account at the consumer's request, for purposes of complying with other regulatory requirements, or to protect the account from suspected fraudulent use or unauthorized access, and still meet the condition in §1041.8(a)(1)(ii)(B).

2. *Terms of loan agreement or account agreement.* The condition in §1041.8(a)(1)(ii)(B) is met only if the terms of the loan agreement or account agreement providing that the lender will not close the account in the specified circumstances are in effect at the time the covered loan is made and remain in effect for the duration of the loan.

8(a)(2) Single Immediate Payment Transfer at the Consumer's Request

Paragraph 8(a)(2)(i)

1. *Time of initiation.* A one-time electronic fund transfer is initiated at the time that the transfer is sent out of the lender's control. Thus, the electronic fund transfer is initiated at the time that the lender or its agent sends the transfer to be processed by a third party, such as the lender's bank. The following example illustrates this concept: A lender obtains a consumer's authorization for a one-time electronic fund transfer at 2 p.m. and sends the payment entry to its agent, a payment processor, at 5 p.m. on the same day. The agent then sends the payment entry to the lender's bank for further processing the next business day at 8 a.m. The timing condition in §1041.8(a)(2)(ii) is satisfied,

because the lender's agent sent the transfer out of its control within one business day after the lender obtained the consumer's authorization.

Paragraph 8(a)(2)(ii)

1. *Time of processing.* A signature check is processed at the time that the check is sent out of the lender's control. Thus, the check is processed at the time that the lender or its agent sends the check to be processed by a third party, such as the lender's bank. For an example illustrating this concept within the context of initiating a one-time electronic fund transfer, see comment 8(a)(2)(i)-1.

2. *Check provided by mail.* For purposes of §1041.8(a)(2)(ii), if the consumer provides the check by mail, the check is deemed to be provided on the date that the lender receives it.

8(b) Prohibition on Initiating Payment Transfers From a Consumer's Account After Two Consecutive Failed Payment Transfers

1. *General.* When the prohibition in §1041.8(b) applies, a lender is generally restricted from initiating any further payment transfers from the consumer's account in connection with any covered loan that the consumer has with the lender at the time the prohibition is triggered, unless the requirements and conditions in either §1041.8(c) or (d) are satisfied for each such covered loan for which the lender seeks to initiate further payment transfers. The prohibition applies, for example, to payment transfers that might otherwise be initiated to collect payments that later fall due under a loan agreement for a covered loan and to transfers to collect late fees or returned item fees as permitted under the terms of such a loan agreement. In addition, the prohibition applies regardless of whether the lender holds an otherwise valid authorization or instrument from the consumer, including but not limited to an authorization to collect payments by preauthorized electronic fund transfers or a post-dated check. See §1041.8(c) and (d) and accompanying commentary for guidance on the requirements and conditions that a lender must satisfy to initiate a payment transfer from a consumer's account after the prohibition applies.

2. *Account.* The prohibition in §1041.8(b) applies only to the account from which the lender attempted to initiate the two consecutive failed payment transfers.

3. *More than one covered loan.* The prohibition in §1041.8(b) is triggered after the lender has attempted to initiate two consecutive failed payment transfers in connection with any covered loan or covered loans that the consumer has with the lender. Thus, when a consumer has more than one covered loan

with the lender, the two consecutive failed payment transfers need not be initiated in connection with the same loan in order for the prohibition to be triggered, but rather can be initiated in connection with two different loans. For example, the prohibition is triggered if the lender initiates the first failed payment transfer to collect payment on one covered loan and the second consecutive failed payment transfer to collect payment on a different covered loan, assuming that the conditions for a first failed payment transfer, in §1041.8(b)(2)(i), and second consecutive failed transfer, in §1041.8(b)(2)(ii), are met.

4. *Application to bona fide subsequent loan.* If a lender triggers the prohibition in §1041.8(b), the lender is not prohibited under §1041.8(b) from initiating a payment transfer in connection with a bona fide subsequent covered loan that was originated after the prohibition was triggered, provided that the lender has not attempted to initiate two consecutive failed payment transfers from the consumer's account in connection with the bona fide subsequent covered loan. For purposes of §1041.8(b) only, a bona fide subsequent covered loan does not include a covered loan that refinances or rolls over any covered loan that the consumer has with the lender at the time the prohibition is triggered.

8(b)(1) General

1. *Failed payment transfer.* A payment transfer results in a return indicating that the consumer's account lacks sufficient funds when it is returned unpaid, or is declined, due to nonsufficient funds in the consumer's account.

2. *Date received.* The prohibition in §1041.8(b) applies as of the date on which the lender or its agent, such as a payment processor, receives the return of the second consecutive failed transfer or, if the lender is the consumer's account-holding institution, the date on which the second consecutive failed payment transfer is initiated.

3. *Return for other reason.* A transfer that results in a return for a reason other than a lack of sufficient funds, such as a return made due to an incorrectly entered account number, is not a failed transfer for purposes of §1041.8(b).

4. *Failed payment transfer initiated by a lender that is the consumer's account-holding institution.* When a lender that is the consumer's account-holding institution initiates a payment transfer for an amount that the account lacks sufficient funds to cover, the payment transfer is a failed payment transfer for purposes of the prohibition in §1041.8(b), regardless of whether the result is classified or coded in the lender's internal procedures, processes, or systems as a return for nonsufficient funds or, if applicable, regardless of whether the full amount of the

payment transfer is paid out of overdraft. Such a lender does not initiate a failed payment transfer for purposes of the prohibition if the lender merely defers or foregoes debiting or withdrawing payment from an account based on the lender's observation that the account lacks sufficient funds.

8(b)(2) Consecutive Failed Payment Transfers

8(b)(2)(i) First Failed Payment Transfer

1. *Examples.* The following examples illustrate concepts of first failed payment transfers under §1041.8(b)(2)(i). All of the examples assume that the consumer has only one covered loan with the lender:

i. A lender, having made no other attempts, initiates an electronic fund transfer to collect the first scheduled payment due under a loan agreement for a covered loan, which results in a return for nonsufficient funds. The failed transfer is the first failed payment transfer. The lender, having made no attempts in the interim, re-presents the electronic fund transfer and the re-presentation results in the collection of the full payment. Because the subsequent attempt did not result in a return for nonsufficient funds, the number of consecutive failed payment transfers resets to zero. The following month, the lender initiates an electronic fund transfer to collect the second scheduled payment due under the covered loan agreement, which results in a return for nonsufficient funds. That failed transfer is a first failed payment transfer.

ii. A storefront lender, having made no prior attempts, processes a consumer's signature check through the check system to collect the first scheduled payment due under a loan agreement for a covered loan. The check is returned for nonsufficient funds. This constitutes the first failed payment transfer. The lender does not thereafter convert and process the check through the ACH system, or initiate any other type of payment transfer, but instead contacts the consumer. At the lender's request, the consumer comes into the store and makes the full payment in cash withdrawn from the consumer's account. The number of consecutive failed payment transfers remains at one, because the consumer's cash payment was not a payment transfer as defined in §1041.8(a)(2).

8(b)(2)(ii) Second Consecutive Failed Payment Transfer

1. *General.* Under §1041.8(b)(2)(ii), a failed payment transfer is the second consecutive failed transfer if the previous payment transfer was a first failed payment transfer. The following examples illustrate this concept:

i. Assume that a consumer has only one covered loan with a lender. The lender, having initiated no other payment transfer in

connection with the covered loan, initiates an electronic fund transfer to collect the first scheduled payment due under the loan agreement. The transfer is returned for nonsufficient funds. The returned transfer is the first failed payment transfer. The lender next initiates an electronic fund transfer for the following scheduled payment due under the loan agreement for the covered loan, which is also returned for nonsufficient funds. The second returned transfer is the second consecutive failed payment transfer.

ii. Assume that a consumer has two covered loans, Loan A and Loan B, with a lender. Further assume that the lender has initiated no failed payment transfers in connection with either covered loan. On the first of the month, the lender initiates an electronic fund transfer to collect a regularly scheduled payment on Loan A, resulting in a return for nonsufficient funds. The returned transfer is the first failed payment transfer. Two weeks later, the lender, having initiated no further payment transfers in connection with either covered loan, initiates an electronic fund transfer to collect a regularly scheduled payment on Loan B, also resulting in a return for nonsufficient funds. The second returned transfer is the second consecutive failed payment transfer, and the lender is thus prohibited under §1041.8(b) from initiating further payment transfers in connection with either covered loan.

2. *Previous payment transfer.* Section 1041.8(b)(2)(ii) provides that a previous payment transfer includes a payment transfer initiated at the same time or on the same day as the first failed payment transfer. The following example illustrates how this concept applies in determining whether the prohibition in §1041.8(b) is triggered: Assume that a consumer has only one covered loan with a lender. The lender has made no other payment transfers in connection with the covered loan. On Monday at 9 a.m., the lender initiates two electronic fund transfers to collect the first scheduled payment under the loan agreement, each for half of the total amount due. Both transfers are returned for nonsufficient funds. Because each transfer is one of two failed transfers initiated at the same time, the lender has initiated a second consecutive failed payment transfer under §1041.8(b)(2)(ii), and the prohibition in §1041.8(b) is therefore triggered.

3. *Application to exception in §1041.8(d).* When, after a second consecutive failed payment transfer, a lender initiates a single immediate payment transfer at the consumer's request pursuant to the exception in §1041.8(d), the failed transfer count remains at two, regardless of whether the transfer succeeds or fails. Further, the exception is limited to a single payment transfer. Accordingly, if a payment transfer initiated pursuant to the exception fails, the lender is not permitted to re-initiate the transfer, such as

by re-presenting it through the ACH system, unless the lender obtains a new authorization under §1041.8(c) or (d).

8(b)(2)(iii) Different Payment Channel

1. *General.* Section 8(b)(2)(iii) provides that if a failed payment transfer meets the descriptions set forth in §1041.8(b)(2)(ii), it is the second consecutive failed transfer regardless of whether the first failed transfer was made through a different payment channel. The following example illustrates this concept: A lender initiates an electronic funds transfer through the ACH system for the purpose of collecting the first payment due under a loan agreement for a covered loan. The transfer results in a return for nonsufficient funds. This constitutes the first failed payment transfer. The lender next processes a remotely created check through the check system for the purpose of collecting the same first payment due. The remotely created check is returned for nonsufficient funds. The second failed attempt is the second consecutive failed attempt because it meets the description set forth in §1041.8(b)(2)(ii).

8(c) Exception for Additional Payment Transfers Authorized by the Consumer

1. *General.* Section 1041.8(c) sets forth one of two exceptions to the prohibition in §1041.8(b). Under the exception in §1041.8(c), a lender is permitted to initiate additional payment transfers from a consumer's account after the lender's second consecutive transfer has failed if the additional transfers are authorized by the consumer in accordance with certain requirements and conditions as specified in the rule. In addition to the exception under §1041.8(c), a lender is permitted to execute a single immediate payment transfers at the consumer's request under §1041.8(d), if certain requirements and conditions are satisfied.

8(c)(1) General

1. *Consumer's underlying payment authorization or instrument still required.* The consumer's authorization required by §1041.8(c) is in addition to, and not in lieu of, any separate payment authorization or instrument required to be obtained from the consumer under applicable laws.

8(c)(2) General Authorization Requirements and Conditions

8(c)(2)(i) Required Payment Transfer Terms

1. *General.* Section 1041.8(c)(2)(i) sets forth the general requirement that, for purposes of the exception in §1041.8(c), the specific date, amount, and payment channel of each additional payment transfer must be authorized by the consumer, subject to a limited exception in §1041.8(c)(2)(iii) for payment transfers

solely to collect a late fee or returned item fee. Accordingly, for the exception to apply to an additional payment transfer, the transfer's specific date, amount, and payment channel must be included in the signed authorization obtained from the consumer under §1041.8(c)(3)(iii). For guidance on the requirements and conditions that apply when obtaining the consumer's signed authorization, see §1041.8(c)(3)(iii) and accompanying commentary.

2. *Specific date.* The requirement that the specific date of each additional payment transfer be authorized by the consumer is satisfied if the consumer authorizes the month, day, and year of each transfer.

3. *Amount larger than specific amount.* The exception in §1041.8(c)(2) does not apply if the lender initiates a payment transfer for an amount larger than the specific amount authorized by the consumer. Accordingly, such a transfer would violate the prohibition on additional payment transfers under §1041.8(b).

4. *Smaller amount.* A payment transfer initiated pursuant to §1041.8(c) is initiated for the specific amount authorized by the consumer if its amount is equal to or smaller than the authorized amount.

8(c)(2)(iii) Special Authorization Requirements and Conditions for Payment Transfers To Collect a Late Fee or Returned Item Fee

1. *General.* If a lender obtains the consumer's authorization to initiate a payment transfer solely to collect a late fee or returned item fee in accordance with the requirements and conditions under §1041.8(c)(2)(iii), the general requirement in §1041.8(c)(2) that the consumer authorize the specific date and amount of each additional payment transfer need not be satisfied.

2. *Highest amount.* The requirement that the consumer's signed authorization include a statement that specifies the highest amount that may be charged for a late fee or returned item fee is satisfied, for example, if the statement specifies the maximum amount permitted under the loan agreement for a covered loan.

3. *Varying fee amounts.* If a fee amount may vary due to the remaining loan balance or other factors, the rule requires the lender to assume the factors that result in the highest amount possible in calculating the specified amount.

8(c)(3) Requirements and Conditions for Obtaining the Consumer's Authorization

8(c)(3)(ii) Provision of Payment Transfer Terms to the Consumer

1. *General.* A lender is permitted under §1041.8(c)(3)(ii) to request a consumer's authorization on or after the day that the lender provides the consumer rights notice re-

quired by §1041.9(c). For the exception in §1041.8(c) to apply, however, the consumer's signed authorization must be obtained no earlier than the date on which the consumer is considered to have received the consumer rights notice, as specified in §1041.8(c)(3)(iii).

2. *Different options.* Nothing in §1041.8(c)(3)(ii) prohibits a lender from providing different options for the consumer to consider with respect to the date, amount, or payment channel of each additional payment transfer for which the lender is requesting authorization. In addition, if a consumer declines a request, nothing in §1041.8(c)(3)(ii) prohibits a lender from making a follow-up request by providing a different set of terms for the consumer to consider. For example, if the consumer declines an initial request to authorize two recurring payment transfers for a particular amount, the lender may make a follow-up request for the consumer to authorize three recurring payment transfers for a smaller amount.

Paragraph 8(c)(3)(ii)(A)

1. *Request by email.* Under §1041.8(c)(3)(ii)(A), a lender is permitted to provide the required terms and statement to the consumer in writing or in a retainable form by email if the consumer has consented to receive electronic disclosures in that manner under §1041.9(a)(4) or agrees to receive the terms and statement by email in the course of a communication initiated by the consumer in response to the consumer rights notice required by §1041.9(c). The following example illustrates a situation in which the consumer agrees to receive the required terms and statement by email after affirmatively responding to the notice:

i. After a lender provides the consumer rights notice in §1041.9(c) by mail to a consumer who has not consented to receive electronic disclosures under §1041.9(a)(4), the consumer calls the lender to discuss her options for repaying the loan, including the option of authorizing additional payment transfers pursuant to §1041.8(c). In the course of the call, the consumer asks the lender to provide the request for the consumer's authorization via email. Because the consumer has agreed to receive the request via email in the course of a communication initiated by the consumer in response to the consumer rights notice, the lender is permitted under §1041.8(c)(3)(ii)(A) to provide the request to the consumer by that method.

2. *E-Sign Act does not apply to provision of terms and statement.* The required terms and statement may be provided to the consumer electronically in accordance with the requirements for requesting the consumer's authorization in §1041.8(c)(3) without regard to the E-Sign Act. However, under §1041.8(c)(3)(iii)(A), an authorization obtained electronically is valid only if it is

signed or otherwise agreed to by the consumer in accordance with the signature requirements in the E-Sign Act. See § 1041.8(c)(3)(iii)(A) and comment 8(c)(3)(iii)(A)-1.

3. *Same communication.* Nothing in § 1041.8(c)(3)(ii) prohibits a lender from requesting the consumer's authorization for additional payment transfers and providing the consumer rights notice in the same communication, such as a single written mailing or a single email to the consumer. Nonetheless, the consumer rights notice may be provided to the consumer only in accordance with the requirements and conditions in § 1041.9, including but not limited to the segregation requirements that apply to the notice. Thus, for example, if a lender mails the request for authorization and the notice to the consumer in the same envelope, the lender must provide the notice on a separate piece of paper, as required under § 1041.9. Similarly, a lender could provide the notice to a consumer in the body of an email and attach a document containing the request for authorization. In such cases, it would be permissible for the lender to add language after the text of the notice explaining that the other document is a request for a new authorization.

Paragraph 8(c)(3)(ii)(B)

1. *Request by oral telephone communication.* Nothing in § 1041.8(c)(3)(ii) prohibits a lender from contacting the consumer by telephone to discuss repayment options, including the option of authorizing additional payment transfers. However, under § 1041.8(c)(3)(ii)(B), a lender is permitted to provide the required terms and statement to the consumer by oral telephone communication for purposes of requesting authorization only if the consumer affirmatively contacts the lender in that manner in response to the consumer rights notice required by § 1041.9(c) and agrees to receive the terms and statement by that method of delivery in the course of, and as part of, the same communication.

8(c)(3)(iii) Signed Authorization Required

8(c)(3)(iii)(A) General

1. *E-Sign Act signature requirements.* For authorizations obtained electronically, the requirement that the authorization be signed or otherwise agreed to by the consumer is satisfied if the E-Sign Act requirements for electronic records and signatures are met. Thus, for example, the requirement is satisfied by an email from the consumer or by a code entered by the consumer into the consumer's telephone keypad, assuming that in each case the signature requirements in the E-Sign Act are complied with.

2. *Consumer's affirmative response to the notice.* A consumer affirmatively responds to the consumer rights notice that was pro-

vided by mail when, for example, the consumer calls the lender on the telephone to discuss repayment options after receiving the notice.

8(c)(3)(iii)(C) Memorialization Required

1. *Timing.* The memorialization is deemed to be provided to the consumer on the date it is mailed or transmitted.

2. *Form of memorialization.* The requirement that the memorialization be provided in a retainable form is not satisfied by a copy of a recorded telephone call, notwithstanding that the authorization was obtained in that manner.

3. *Electronic delivery.* A lender is permitted under § 1041.8(c)(3)(iii)(C) to provide the memorialization to the consumer by email in accordance with the requirements and conditions for requesting authorization in § 1041.8(c)(3)(ii)(A), regardless of whether the lender requested the consumer's authorization in that manner. For example, if the lender requested the consumer's authorization by telephone but also has obtained the consumer's consent to receive electronic disclosures by email under § 1041.9(a)(4), the lender may provide the memorialization to the consumer by email, as specified in § 1041.8(c)(3)(ii)(A).

8(d) Exception for Initiating a Single Immediate Payment Transfer at the Consumer's Request

1. *General.* For guidance on the requirements and conditions that must be satisfied for a payment transfer to meet the definition of a single immediate payment transfer at the consumer's request, see § 1041.8(a)(2) and accompanying commentary.

2. *Application of prohibition.* A lender is permitted under the exception in § 1041.8(d) to initiate a single payment transfer requested by the consumer only once and thus is prohibited under § 1041.8(b) from re-initiating the payment transfer if it fails, unless the lender subsequently obtains the consumer's authorization to re-initiate the payment transfer under § 1041.8(c) or (d). However, a lender is permitted to initiate any number of payment transfers from a consumer's account pursuant to the exception in § 1041.8(d), provided that the requirements and conditions are satisfied for each such transfer. See comment 8(b)(2)(ii)-3 for further guidance on how the prohibition in § 1041.8(b) applies to the exception in § 1041.8(d).

3. *Timing.* A consumer affirmatively contacts the lender when, for example, the consumer calls the lender after noticing on her bank statement that the lender's last two payment withdrawal attempts have been returned for nonsufficient funds.

8(e) Prohibition Against Evasion

1. *General.* Section 1041.8(e) provides that a lender must not take any action with the intent of evading the requirements of §1041.8. In determining whether a lender has taken action with the intent of evading the requirements of §1041.8, the form, characterization, label, structure, or written documentation of the lender's action shall not be dispositive. Rather, the actual substance of the lender's action as well as other relevant facts and circumstances will determine whether the lender's action was taken with the intent of evading the requirements of §1041.8. If the lender's action is taken solely for legitimate business purposes, it is not taken with the intent of evading the requirements of §1041.8. By contrast, if a consideration of all relevant facts and circumstances reveals a purpose that is not a legitimate business purpose, the lender's action may have been taken with the intent of evading the requirements of §1041.8. A lender action that is taken with the intent of evading the requirements of this part may be knowing or reckless. Fraud, deceit, or other unlawful or illegitimate activity may be one fact or circumstance that is relevant to the determination of whether a lender's action was taken with the intent of evading the requirements of §1041.8, but fraud, deceit, or other unlawful or illegitimate activity is not a prerequisite to such a finding.

2. *Illustrative example.* A lender collects payment on its covered loans primarily through recurring electronic fund transfers authorized by consumers at consummation. As a matter of lender policy and practice, after a first attempt to initiate an ACH payment transfer from a consumer's account for the full payment amount is returned for nonsufficient funds, the lender initiates a second payment transfer from the account on the following day for \$1.00. If the second payment transfer succeeds, the lender immediately splits the amount of the full payment into two separate payment transfers and initiates both payment transfers from the account at the same time, resulting in two returns for nonsufficient funds in the vast majority of cases. The lender developed the policy and began the practice shortly prior to August 19, 2019. The lender's prior policy and practice when re-presenting the first failed payment transfer was to re-present for the payment's full amount. Depending on the relevant facts and circumstances, the lender's actions may have been taken with the intent of evading the requirements of §1041.8. Specifically, by initiating a second payment transfer for \$1.00 from the consumer's account the day after a first transfer for the full payment amount fails and, if that payment transfer succeeds, initiating two simultaneous payment transfers from the account for the split amount of the full payment, re-

sulting in two returns for nonsufficient funds in the vast majority of cases, the lender avoided the prohibition in §1041.8(b) on initiating payment transfers from a consumer's account after two consecutive payment transfers have failed.

Section 1041.9—Disclosure of Payment Transfer Attempts

1. *General.* Section 1041.9 sets forth two main disclosure requirements related to collecting payments from a consumer's account in connection with a covered loan. The first, set forth in §1041.9(b), is a payment notice required to be provided to a consumer in advance of a initiating the first payment withdrawal or an unusual withdrawal from the consumer's account, subject to certain exceptions. The second, set forth in §1041.9(c), is a consumer rights notice required to be provided to a consumer after a lender receives notice of a second consecutive failed payment transfer from the consumer's account, as described in §1041.8(b). In addition, §1041.9 requires lenders to provide an electronic short notice in two situations when they are providing the disclosures required by this section through certain forms of electronic delivery. The first, set forth in §1041.9(b)(4), is an electronic short notice that must be provided along with the payment notice. This provision allows an exception for when the method of electronic delivery is email; for that method, the lender may use the electronic short notice under §1041.9(b)(4)(ii) or may provide the full notice within the body of the email. The second, set forth in §1041.9(c)(4), is an electronic short notice that must be provided along with the consumer rights notice. As with the payment notices, this consumer rights notice provision also allows an exception for when the method of electronic delivery is email; for that method, the lender may use the electronic short notice under §1041.9(c)(4)(ii) or may provide the full notice within the body of the email.

9(a) General Form of Disclosures

9(a)(1) Clear and Conspicuous

1. *Clear and conspicuous standard.* Disclosures are clear and conspicuous for purposes of §1041.9 if they are readily understandable and their location and type size are readily noticeable to consumers.

9(a)(2) In Writing or Electronic Delivery

1. *Electronic delivery.* Section 1041.9(a)(2) allows the disclosures required by §1041.9 to be provided through electronic delivery as long as the requirements of §1041.9(a)(4) are satisfied, without regard to the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*).

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9(a)(3) Retainable

1. *General.* Electronic disclosures, to the extent permitted by §1041.9(a)(4), are retainable for purposes of §1041.9 if they are in a format that is capable of being printed, saved, or emailed by the consumer. The general requirement to provide disclosures in a retainable form does not apply when the electronic short notices are provided in via mobile application or text message. For example, the requirement does not apply to an electronic short notice that is provided to the consumer's mobile telephone as a text message. In contrast, if the access is provided to the consumer via email, the notice must be in a retainable form, regardless of whether the consumer uses a mobile telephone to access the notice.

9(a)(4) Electronic Delivery

1. *General.* Section 1041.9(a)(4) permits disclosures required by §1041.9 to be provided through electronic delivery if the consumer consent requirements under §1041.9(a)(4) are satisfied.

9(a)(4)(i) Consumer Consent

9(a)(4)(i)(A) General

1. *General.* Section 1041.9(a)(4)(i) permits disclosures required by §1041.9 to be provided through electronic delivery if the lender obtains the consumer's affirmative consent to receive the disclosures through a particular electronic delivery method. This affirmative consent requires lenders to provide consumers with an option to select a particular electronic delivery method. The consent must clearly show the method of electronic delivery that will be used, such as email, text message, or mobile application. Consent provided by checking a box during the origination process may qualify as being in writing. Consent can be obtained for multiple methods of electronic delivery, but the consumer must have affirmatively selected and provided consent for each method.

9(a)(4)(i)(B) Email Option Required

1. *General.* Section §1041.9(a)(4)(i)(B) provides that when obtaining consumer consent to electronic delivery under §1041.9(a)(4), a lender must provide the consumer with an option to receive the disclosures through email. The lender may choose to offer email as the only method of electronic delivery under §1041.9(a)(4).

9(a)(4)(ii) Subsequent Loss of Consent

1. *General.* The prohibition on electronic delivery of disclosures in §1041.9(a)(4)(ii) applies to the particular electronic method for which consent is lost. When a lender loses a consumer's consent to receive disclosures via text message, for example, but has not lost the consumer's consent to receive disclo-

tures via email, the lender may continue to provide disclosures via email, assuming that all of the requirements in §1041.9(a)(4) are satisfied.

2. *Loss of consent applies to all notices.* The loss of consent applies to all notices required by §1041.9. For example, if a consumer revokes consent in response to the electronic short notice text message delivered along with the payment notice under §1041.9(b)(4)(ii), that revocation also applies to text delivery of the electronic short notice that would be delivered with the consumer rights notice under §1041.9(c)(4)(ii).

Paragraph 9(a)(4)(ii)(A)

1. *Revocation.* For purposes of §1041.9(a)(4)(ii)(A), a consumer may revoke consent for any reason and by any reasonable means of communication. Reasonable means of communication may include calling the lender and revoking consent orally, mailing a revocation to an address provided by the lender on its consumer correspondence, sending an email response or clicking on a revocation link provided in an email from the lender, and responding by text message to a text message sent by the lender.

Paragraph 9(a)(4)(ii)(B)

1. *Notice.* A lender receives notification for purposes of §1041.9(a)(4)(ii)(B) when the lender receives any information indicating that the consumer did not receive or is unable to receive disclosures in a particular electronic manner. Examples of notice include but are not limited to the following:

- i. An email returned with a notification that the consumer's account is no longer active or does not exist.
- ii. A text message returned with a notification that the consumer's mobile telephone number is no longer in service.
- iii. A statement from the consumer that the consumer is unable to access or review disclosures through a particular electronic delivery method.

9(a)(5) Segregation Requirements for Notices

1. *Segregated additional content.* Although segregated additional content that is not required by §1041.9 may not appear above, below, or around the required content, additional content may be delivered through a separate form, such as a separate piece of paper or Web page.

9(a)(7) Model Forms

1. *Safe harbor provided by use of model forms.* Although the use of the model forms and clauses is not required, lenders using them will be deemed to be in compliance with the disclosure requirement with respect to such model forms.

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9(b) Payment Notice

payment notice if the transfer meets one of the conditions in §1041.9(b)(3)(ii)(C).

9(b)(1)(i) First Payment Withdrawal

9(b)(1)(iii) Exceptions

1. *First payment withdrawal.* Depending on when the payment authorization granted by the consumer is obtained on a covered loan and whether the exception for a single immediate payment transfer made at the consumer's request applies, the first payment withdrawal may or may not be the first payment made on a covered loan. When a lender obtains payment authorization during the origination process, the lender may provide the first payment withdrawal notice at that time. A lender that obtains payment authorization after a payment has been made by the consumer in cash, or after initiating a single immediate payment transfer at the consumer's request, would deliver the notice later in the loan term. If a consumer provides one payment authorization that the lender uses to initiate a first payment withdrawal after a notice as required by §1041.9(b)(1)(i), but the consumer later changes the authorization or provides an additional authorization, the lender's exercise of that new authorization would not be the first payment withdrawal; however, it may be an unusual withdrawal under §1041.9(b)(1)(ii).

1. *Exception for initial payment transfer applies even if the transfer is unusual.* The exception in §1041.9(b)(1)(iii)(A) applies even if the situation would otherwise trigger the additional disclosure requirements for unusual attempts under §1041.9(b)(3). For example, if the payment channel of the initial payment transfer after obtaining the consumer's consent is different than the payment channel used before the prohibition under §1041.8 was triggered, the exception in §1041.9(b)(1)(iii)(A) applies.

2. *Multiple transfers in advance.* If a consumer has affirmatively consented to multiple transfers in advance, the exception in §1041.9(b)(1)(iii)(A) applies only to the first initial payment transfer of that series.

9(b)(2) First Payment Withdrawal Notice

9(b)(2)(i) Timing

1. *When the lender obtains payment authorization.* For all methods of delivery, the earliest point that the lender may provide the first payment withdrawal notice is when the lender obtains the payment authorization. For example, the notice can be provided simultaneously when the lender provides a consumer with a copy of a completed payment authorization, or after providing the authorization copy. The provision allows the lender to provide consumers with the notice at a convenient time because the lender and consumer are already communicating about the loan, but also allows flexibility for lenders that prefer to provide the notice closer to the payment transfer date. For example, the lender could obtain consumer consent to electronic delivery and deliver the notice through email 4 days before initiating the transfer, or the lender could hand deliver it to the consumer at the end of the loan origination process.

9(b)(2)(i)(A) Mail

1. *General.* The six business-day period begins when the lender places the notice in the mail, not when the consumer receives the notice. For example, if a lender places the notice in the mail on Monday, June 1, the lender may initiate the transfer of funds on Tuesday, June 9, if it is the 6th business day following mailing of the notice.

9(b)(2)(i)(B) Electronic Delivery

Paragraph 9(b)(2)(i)(B)(1)

1. *General.* The three-business-day period begins when the lender sends the notice, not when the consumer receives or is deemed to have received the notice. For example, if a lender sends the notice by email on Monday,

2. *First payment withdrawal is determined when the loan is in covered status.* As discussed in comment 3(b)(3)-3, there may be situations where a longer-term loan is not covered at the time of origination but becomes covered at a later date. The lender's first attempt to execute a payment transfer after a loan becomes a covered loan under this part is the first payment withdrawal. For example, consider a loan that is not considered covered at the time of origination. If the lender initiates a payment withdrawal during the first and second billing cycles and the loan becomes covered at the end of the second cycle, any lender initiated payment during the third billing cycle is considered a first payment withdrawal under this section.

3. *Intervening payments.* Unscheduled intervening payments do not change the determination of first payment withdrawal for purposes of the notice requirement. For example, a lender originates a loan on April 1, with a payment scheduled to be withdrawn on May 1. At origination, the lender provides the consumer with a first payment withdrawal notice for May 1. On April 28, the consumer makes the payment due on May 1 in cash. The lender does not initiate a withdrawal on May 1. The lender initiates a withdrawal for the next scheduled payment June 1. The lender satisfied its notice obligation with the notice provided at origination, so it is not required to send a first payment notice in connection with the June 1 payment although it may have to send an unusual

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June 1, the lender may initiate the transfer of funds on Thursday, June 4, the third business day following transmitting the notice.

Paragraph 9(b)(2)(i)(B)(2)

1. *General.* In some circumstances, a lender may lose a consumer's consent to receive disclosures through a particular electronic delivery method after the lender has provided the notice. In such circumstances, the lender may initiate the transfer for the payment currently due as scheduled. If the lender is scheduled to make a future unusual withdrawal attempt following the one that was disclosed in the previously provided first withdrawal notice, the lender must provide notice for that unusual withdrawal through alternate means, in accordance with the applicable timing requirements in §1041.9(b)(3)(i).

2. *Alternate Means.* The alternate means may include a different electronic delivery method that the consumer has consented to, in person, or by mail, in accordance with the applicable timing requirements in §1041.9(b)(3)(i).

9(b)(2)(ii) Content Requirements

9(b)(2)(ii)(B) Transfer Terms

Paragraph 9(b)(2)(ii)(B)(1) Date

1. *Date.* The initiation date is the date that the payment transfer is sent outside of the lender's control. Accordingly, the initiation date of the transfer is the date that the lender or its agent sends the payment to be processed by a third party. For example, if a lender sends its ACH payments to a payment processor working on the lender's behalf on Monday, June 1, but the processor does not submit them to its bank and the ACH network until Tuesday, June 2, the date of the payment transfer is Tuesday the 2nd.

Paragraph 9(b)(2)(ii)(B)(2) Amount

1. *Amount.* The amount of the transfer is the total amount of money that will be transferred from the consumer's account, regardless of whether the total corresponds to the amount of a regularly scheduled payment. For example, if a single transfer will be initiated for the purpose of collecting a regularly scheduled payment of \$50.00 and a late fee of \$30.00, the amount that must be disclosed under §1041.9(b)(2)(ii)(B)(2) is \$80.00.

Paragraph 9(b)(2)(ii)(B)(5) Payment Channel

1. *General.* Payment channel refers to the specific payment method, including the network that the transfer will travel through and the form of the transfer. For example, a lender that uses the consumer's paper check information to initiate a payment transfer through the ACH network would use the ACH payment channel under

§1041.9(b)(2)(ii)(B)(5). A lender that uses consumer account and routing information to initiate a remotely created check over the check network would use the remotely created check payment channel. A lender that uses a post-dated signature check to initiate a transfer over the check network would use the signature check payment channel. A lender that initiates a payment from a consumer's prepaid card would specify whether that payment is processed as an ACH transfer, a PIN debit card network payment, or a signature debit card network payment.

2. *Illustrative examples.* In describing the payment channel in the disclosure, the most common payment channel descriptions include, but are not limited to, ACH transfers, checks, remotely created checks, remotely created payment orders, internal transfers, PIN debit card payments, and signature debit card network payments.

9(b)(2)(ii)(C) Payment Breakdown

9(b)(2)(ii)(C)(2) Principal

1. *General.* The amount of the payment that is applied to principal must always be included in the payment breakdown table, even if the amount applied is \$0.

9(b)(2)(ii)(C)(4) Fees

1. *General.* This field must only be provided if some of the payment amount will be applied to fees. In situations where more than one fee applies, fees may be disclosed separately or aggregated. A lender may use its own term to describe the fee, such as "late payment fee."

9(b)(2)(ii)(C)(5) Other Charges

1. *General.* This field must only be provided if some of the payment amount will be applied to other charges. In situations when more than one other charge applies, other charges may be disclosed separately or aggregated. A lender may use its own term to describe the charge, such as "insurance charge."

9(b)(3) Unusual Withdrawal Notice

9(b)(3)(i) Timing

1. *General.* See comments on 9(b)(2) regarding the first payment withdrawal notice.

9(b)(3)(ii) Content Requirements

1. *General.* If the payment transfer is unusual according to the circumstances described in §1041.9(b)(3)(ii)(C), the payment notice must contain both the basic payment information required by §1041.9(b)(2)(ii)(B) through (D) and the description of unusual withdrawal required by §1041.9(b)(3)(ii)(C).

9(b)(3)(ii)(C) Description of Unusual Withdrawal

1. *General.* An unusual withdrawal notice is required under §1041.9(b)(3) if one or more conditions are present. The description of an unusual withdrawal informs the consumer of the condition that makes the pending payment transfer unusual.

2. *Illustrative example.* The lender provides a first payment withdrawal notice at origination. The first payment withdrawal initiated by the lender occurs on March 1, for \$75, as a paper check. The second payment is scheduled for April 1, for \$75, as an ACH transfer. Before the second payment, the lender provides an unusual withdrawal notice. The notice contains the basic payment information along with an explanation that the withdrawal is unusual because the payment channel has changed from paper check to ACH. Because the amount did not vary, the payment is taking place on the regularly scheduled date, and this is not a re-initiated payment, the only applicable content under §1041.9(b)(3)(ii)(C) is the different payment channel information.

3. *Varying amount.* The information about varying amount for closed-end loans in §1041.9(b)(3)(ii)(C)(1)(i) applies in two circumstances. First, the requirement applies when a transfer is for the purpose of collecting a payment that is not specified by amount on the payment schedule, including, for example, a one-time electronic payment transfer to collect a late fee. Second, the requirement applies when the transfer is for the purpose of collecting a regularly scheduled payment for an amount different from the regularly scheduled payment amount according to the payment schedule. Given existing requirements for open-end credit, circumstances that trigger an unusual withdrawal for open-end credit are more limited according to §1041.9(b)(3)(ii)(C)(1)(ii). Because the outstanding balance on open-end credit may change over time, the minimum payment due on the scheduled payment date may also fluctuate. However, the minimum payment amount due for open-end credit would be disclosed to the consumer according to the periodic statement requirement in Regulation Z. The payment transfer amount would not be considered unusual with regards to open-end credit unless the amount deviates from the minimum payment due as disclosed in the periodic statement. The requirement for a first payment withdrawal notice under §1041.9(b)(2) and the other circumstances that could trigger an unusual withdrawal notice under §1041.9(b)(3)(ii)(C)(2) through (4), continue to apply.

4. *Date other than due date of regularly scheduled payment.* The changed date information in §1041.9(b)(3)(ii)(C)(2) applies in two circumstances. First, the requirement applies when a transfer is for the purpose of

collecting a payment that is not specified by date on the payment schedule, including, for example, a one-time electronic payment transfer to collect a late fee. Second, the requirement applies when the transfer is for the purpose of collecting a regularly scheduled payment on a date that differs from the regularly scheduled payment date according to the payment schedule.

9(b)(4) Electronic Delivery

1. *General.* If the lender is using a method of electronic delivery other than email, such as text or mobile application, the lender must provide the notice with the electronic short notice as provided in §1041.9(b)(4)(ii). If the lender is using email as the method of electronic delivery, §1041.9(b)(4)(iii) allows the lender to determine whether to use the electronic short notice approach or to include the full text of the notice in the body of the email.

9(b)(4)(ii) Electronic Short Notice

9(b)(4)(ii)(A) General Content

1. *Identifying statement.* If the lender is using email as the method of electronic delivery, the identifying statement required in §1041.9(b)(2)(ii)(A) and (b)(3)(ii)(A) must be provided in both the email subject line and the body of the email.

9(c) Consumer Rights Notice

9(c)(2) Timing

1. *General.* Any information provided to the lender or its agent that the payment transfer has failed would trigger the timing requirement provided in §1041.9(c)(2). For example, if the lender's agent, a payment processor, learns on Monday, June 1 that an ACH payment transfer initiated by the processor on the lender's behalf has been returned for non-sufficient funds, the lender would be required to send the consumer rights notice by Thursday, June 4.

9(c)(3) Content Requirements

1. *Identifying statement.* If the lender is using email as the method of electronic delivery, the identifying statement required in §1041.9(c)(3)(i) must be provided in both the email subject line and the body of the email.

2. *Fees.* If the lender is also the consumer's account-holding institution, this includes all fees charged in relation to the transfer, including any returned payment fees charged to outstanding loan balance and any fees, such as overdraft or insufficient fund fees, charged to the consumer's account.

9(c)(4) Electronic Delivery

1. *General.* See comments 9(b)(4)–1 and 9(b)(4)(ii)(A)–1.

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Section 1041.12—Compliance Program and Record Retention

12(a) Compliance Program

1. *General.* Section 1041.12(a) requires a lender making a covered loan to develop and follow written policies and procedures that are reasonably designed to ensure compliance with the applicable requirements in this part. These written policies and procedures must provide guidance to a lender's employees on how to comply with the requirements in this part. In particular, under §1041.12(a), a lender must develop and follow detailed written policies and procedures reasonably designed to achieve compliance, as applicable, with the payments requirements in §§1041.8 and 1041.9. The provisions and commentary in each section listed above provide guidance on what specific directions and other information a lender must include in its written policies and procedures.

12(b) Record Retention

1. *General.* Section 1041.12(b) requires a lender to retain various categories of documentation and information concerning payment practices in connection with covered loans. The items listed are non-exhaustive as to the records that may need to be retained as evidence of compliance with this part.

12(b)(4) Retention of Records Relating to Payment Practices for Covered Loans

1. *Methods of retaining documentation.* Section 1041.12(b)(4) requires a lender either to retain certain payment-related information in connection with covered loans in original form or to be able to reproduce an image of such documents accurately. For example, §1041.12(b)(4) requires the lender to either retain a paper copy of the leveraged payment mechanism obtained in connection with a covered longer-term loan or to be able to reproduce an image of the mechanism. For documentation that the lender receives electronically, the lender may retain either the electronic version or a printout.

12(b)(5) Electronic Records in Tabular Format Regarding Payment Practices for Covered Loans

1. *Electronic records in tabular format.* Section 1041.12(b)(5) requires a lender to retain records regarding payment practices in electronic, tabular format. Tabular format means a format in which the individual data elements comprising the record can be transmitted, analyzed, and processed by a computer program, such as a widely used spreadsheet or database program. Data formats for image reproductions, such as PDF, and document formats used by word processing programs are not tabular formats.

Section 1041.13—Prohibition Against Evasion

1. *Lender action taken with the intent of evading the requirements of the rule.* Section 1041.13 provides that a lender must not take any action with the intent of evading the requirements of this part. In determining whether a lender has taken action with the intent of evading the requirements of this part, the form, characterization, label, structure, or written documentation of the lender's action shall not be dispositive. Rather, the actual substance of the lender's action as well as other relevant facts and circumstances will determine whether the lender's action was taken with the intent of evading the requirements of this part. If the lender's action is taken solely for legitimate business purposes, it is not taken with the intent of evading the requirements of this part. By contrast, if a consideration of all relevant facts and circumstances reveals the presence of a purpose that is not a legitimate business purpose, the lender's action may have been taken with the intent of evading the requirements of this part. A lender action that is taken with the intent of evading the requirements of this part may be knowing or reckless. Fraud, deceit, or other unlawful or illegitimate activity may be one fact or circumstance that is relevant to the determination of whether a lender's action was taken with the intent of evading the requirements of this part, but fraud, deceit, or other unlawful or illegitimate activity is not a prerequisite to such a finding.

[82 FR 54871, Nov. 17, 2017, as amended at 84 FR 27929, June 17, 2019; 85 FR 44445, July 22, 2020]

PART 1070—DISCLOSURE OF RECORDS AND INFORMATION

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