

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

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

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. This part also prescribes processes and criteria for registration of information systems.

§ 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 § 1041.2(a)(16).
 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).

- (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.
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. *Modification of existing loan that triggers underwriting requirements*. A modification of an existing loan that increases the amount of an existing loan triggers underwriting requirements under § 1041.5 in certain circumstances. If the outstanding amount of an existing loan is increased, or if the total amount available under an open-end credit plan is increased, the modification is consummated as of the time that the consumer becomes contractually obligated on such a modification or increase. In those cases, the modification must comply with the requirements of § 1041.5(b). A loan modification does not trigger underwriting requirements under § 1041.5 if the modification reduces the outstanding amount or the total amount available under an open-end credit plan, or if the modification results only in the consumer receiving additional time in which to repay the loan. For example, providing a cost-free "off-ramp" or repayment plan to a consumer who cannot repay a loan during the allotted term of the loan is a modification of an existing loan—not a new loan—that results only in the consumer receiving additional time in which to repay the loan. Thus, providing a no-cost repayment plan does not constitute 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) *Covered person* has the same meaning as in the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5481(6).
- (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).

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

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

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

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

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 part 1041, counts toward the numeric threshold for determining whether a person regularly extends credit.

(14) *Loan sequence or sequence* means a series of consecutive or concurrent covered short-term loans or covered longer-term balloon-payment loans, or a combination thereof, in which each of the loans (other than the first loan) is made during the period in which the consumer has a covered short-term loan or covered longer-term balloon-payment loan outstanding and for 30 days thereafter. For the purpose of determining where a loan is located within a loan sequence:

- (i) A covered short-term loan or covered longer-term balloon-payment loan is the first loan in a sequence if the loan is extended to a consumer who had no covered short-term loan or covered longer-term balloon-payment loan outstanding within the immediately preceding 30 days;
- (ii) A covered short-term or covered longer-term balloon-payment loan is the second loan in the sequence if the consumer has a currently outstanding covered short-term loan or covered longer-term balloon-payment loan that is the first loan in a sequence, or if the consummation date of the second loan is within 30 days following the last day on which the consumer's first loan in the sequence was outstanding;
- (iii) A covered short-term or covered longer-term balloon-payment loan is the third loan in the sequence if the consumer has a currently outstanding covered short-term loan or covered longer-term balloon-payment loan that is the second loan in the sequence, or if the consummation date of the third loan is within 30 days following the last day on which the consumer's second loan in the sequence was outstanding; and
- (iv) A covered short-term or covered longer-term balloon-payment loan would be the fourth loan in the sequence if the consumer has a currently outstanding covered short-term loan or covered longer-term balloon-payment loan that is the third loan in the sequence, or if the consummation date of the fourth loan would be within 30 days following the last day on which the consumer's third loan in the sequence was outstanding.

(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 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.

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 part 1041, the term credit, as 1572 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).

(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.

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 part 1041 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.

(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).

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.

(19) ***Vehicle security*** means an interest in a consumer's motor vehicle obtained by the lender or service provider as a condition of the credit, regardless of how the transaction is characterized by State law, including:

- (i) Any security interest in the motor vehicle, motor vehicle title, or motor vehicle registration whether or not the security interest is perfected or recorded; or
- (ii) A pawn transaction in which the consumer's motor vehicle is the pledged good and the consumer retains use of the motor vehicle during the period of the pawn agreement.

1. *An interest in a consumer's motor vehicle as a condition of credit.* Subject to the exclusion described in § 1041.3(d)(1), a lender's or service provider's interest in a consumer's motor vehicle constitutes vehicle security only to the extent that the security interest is obtained in connection with the credit. If a party obtains such a security interest in a consumer's motor vehicle for a reason that is unrelated to an extension of credit, the security interest does not constitute vehicle security. For example, if a mechanic performs work on a consumer's motor vehicle and a mechanic's lien attaches to the consumer's motor vehicle by operation of law because the consumer did not timely pay the mechanic's bill, the mechanic does not obtain vehicle security for the purposes of § 1041.2(a)(19).

- (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.

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 1574 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 part 1041 defines the same term or a parallel term in a way that creates a substantive distinction, the part 1041 definition 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 part 1041 provides a different and arguably broader definition of consumer in § 1041.2(a)(4).

§ 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 paragraphs (e) or (f) of this section; and:
 - 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.
- (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 substantially the entire amount of any advance within 45 days of the advance;

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 1041.3(b)(3), respectively.

(2) For loans not otherwise covered by (1):

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 payment. 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).

(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 (1) or (2), if both of the following conditions are satisfied:

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), 1578 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)(1) 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).

- (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) 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), it meets the condition set forth in paragraph (B) for the duration of the plan.
- (ii) The lender or service provider obtains a leveraged payment mechanism as defined in paragraph (c) of this section.

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.

(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.

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

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

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

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

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

(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.

1. *"Sole purpose" test.* The requirements of part 1041 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.

(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.

1. *Real estate and dwellings.* The requirements of part 1041 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 part 1041 under § 1041.3(d)(2).

(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.

1. *Lender possession required and no recourse permitted.* A pawn loan must satisfy two conditions to be excluded from the requirements of part 1041 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 part 1041 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 part 1041 under § 1041.3(d)(5).

- (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).

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 part 1041 under § 1041.3(d)(6).

- (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:

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

- (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:

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

(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
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.

(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:

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.

(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.

(e) *Alternative loan.* Alternative loans are conditionally exempt from § 1041.

Alternative loan means a covered loan that satisfies the following conditions and requirements:

1. *General.* Section 1041.3(e) conditionally exempts from part 1041 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.

(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

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.

(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).

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.

(2) *Borrowing history condition.* Prior to making an alternative loan under § 1041.3(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 section from the lender within a period of 180 days. The lender must also make no more than one alternative loan under § 1041.3(e) at a time to a consumer.

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 from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or is registered with the Bureau pursuant to § 1041.11(d)(2).

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 part 1041.

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 part 1041.

(3) *Income documentation condition.* In making an alternative loan under § 1041.3(e), the lender must maintain and comply with policies and procedures for documenting proof of recurring income.

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). Section 1041.3(e)(3) does not require lenders to undertake the same income documentation procedures required by § 1041.5(c)(2). 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.

(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), (e)(2), and (e)(3) of this section.

(f) *Accommodation loans.* Accommodation loans are conditionally exempt from § 1041. An accommodation loan is a covered loan if at the time that the loan is consummated:

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 (f)(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 (f)(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.

(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 (f)(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.

(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.

Subpart B—Underwriting

§ 1041.4 Identification of unfair and abusive practice.

It is an unfair and abusive practice for a lender to make covered short-term loans or covered longer-term balloon-payment loans without reasonably determining that the consumers will have the ability to repay the loans according to their terms.

1. *General*. A lender who complies with § 1041.5 in making a covered short-term loan or a covered longer-term balloon-payment loan has not engaged in the unfair and abusive practice under § 1041.4. A lender who complies with § 1041.6 in making a covered short-term loan has not committed the unfair and abusive practice under § 1041.4 and is not subject to § 1041.5

§ 1041.5 Ability-to-repay determination required.

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

(1) *Basic living expenses* means expenditures, other than payments for major financial obligations, that a consumer makes for goods and services that are necessary to maintain the consumer’s health, welfare, and ability to produce income, and the health and welfare of the members of the consumer’s household who are financially dependent on the consumer.

1. *General*. Under § 1041.5(b), a lender must make a reasonable determination that the consumer has the ability to repay a covered short-term loan or covered longer-term balloon-payment loan according to its terms. The consumer’s ability to meet basic living expenses is part of the broader ability-to-repay determination under § 1041.5(b). See comment 5(b)-1 for additional clarification. The lender’s estimate of basic living expenses must be reasonable. The lender may make a reasonable estimate of basic living expenses without making an individualized determination. See comment 5(b)-2.i.C for additional clarification.

2. *Expenditures included in basic living expenses*. Section 1041.5(a)(1) defines basic living expenses as expenditures, other than payments for major financial obligations, that the consumer makes for goods and services necessary to maintain the consumer’s health, welfare,

and ability to produce income, and the health and welfare of the members of the consumer's household who are financially dependent on the consumer. Examples of basic living expenses include food, utilities not paid as part of rental housing expenses, transportation, out-of-pocket medical expenses, phone and Internet services, and childcare. Basic living expenses do not include expenditures for discretionary personal and household goods or services, such as newspaper subscriptions, or vacation activities. If the consumer is responsible for payment of household goods and services on behalf of the consumer's dependents, those expenditures are included in basic living expenses. As part of its reasonable ability-to-repay determination, the lender may reasonably consider whether another person (e.g., a spouse or adult family member living with the consumer) is regularly contributing toward the consumer's payment of basic living expenses (see comment 5(b)-2.i.C.2).

- (2) *Debt-to-income ratio* means the ratio, expressed as a percentage, of the sum of the amounts that the lender projects will be payable by the consumer for major financial obligations during the relevant monthly period and the payments under the covered short-term loan or covered longer-term balloon-payment loan during the relevant monthly period, to the net income that the lender projects the consumer will receive during the relevant monthly period, all of which projected amounts are determined in accordance with paragraph (c).

1. *General.* Section 1041.5(a)(2) defines debt-to-income ratio as the ratio, expressed as a percentage, of the sum of the amounts that the lender projects will be payable by the consumer for major financial obligations during the relevant monthly period and the payments under the covered short-term loan or covered longer-term balloon-payment loan during the relevant monthly period, to the monthly net income that the lender projects the consumer will receive during the relevant monthly period, all of which projected amounts are determined in accordance with § 1041.5(c). See § 1041.5(b)(2)(i) and associated commentary for further clarification on the use of debt-to-income methodology to determine ability to repay. For covered longer-term balloon-payment loans, where the relevant monthly period may fall well into the future relative to the consummation of the loan, the lender must calculate the debt-to-income ratio using the projections made under § 1041.5(c) and in so doing must make reasonable assumptions about the consumer's net income and major financial obligations during the relevant monthly period compared to the period covered by the verification evidence. For example, the lender cannot assume, absent a reasonable basis, that there will be a substantial increase in net income or decrease in major financial obligations between consummation and the relevant monthly period. For further clarification, see comment 5(c)(1)-1 regarding the consistency between the consumer's written statement and verification evidence and comment 5(c)(2)(ii)(A)-2 regarding what constitutes sufficient history of net income for purposes of verification evidence.

- (3) *Major financial obligations* means a consumer's housing expense, required payments under debt obligations (including, without limitation, outstanding covered loans), child support obligations, and alimony obligations.

1. *General.* Section 1041.5(a)(3) defines major financial obligations as a consumer's housing expense, required payments due under debt obligations (including, without limitation, outstanding covered loans), child support obligations, and alimony obligations. Housing expense includes the total periodic amount that the consumer pays for housing during the relevant

monthly period, such as the amount the consumer pays to a landlord for rent or to a creditor for a mortgage (including principal, interest, and any escrowed amounts if required). Debt obligations for purposes of § 1041.5(a)(3) do not include amounts due or past due for medical bills, utilities, and other items that are generally defined as basic living expenses under § 1041.5(a)(1). The amount of a payment required under a debt obligation includes the amount the consumer must pay when due to avoid delinquency under the debt obligation in the absence of any affirmative act by the consumer to extend, delay, or restructure the repayment schedule. Thus, this would include periodic or lump-sum payments for automobile loans, student loans, and other covered and non-covered loans, and minimum monthly credit card payments due during the relevant monthly period. It also includes any delinquent amounts on such obligations that are due as of the relevant monthly period, except where an obligation on a covered short-term loan or a covered longer-term balloon-payment loan is no longer outstanding or where the obligation is listed as charged off on a national consumer report. For example, if the consumer has a periodic automobile loan payment from a prior period that is past due and the automobile finance company adds the past due payment to the next regularly scheduled periodic payment which falls during the relevant monthly period, then the past due periodic payment is a major financial obligation.

2. Motor vehicle leases. For purposes of this rule, motor vehicle leases shall be treated as a debt obligation.

- (4) *National consumer report* means a consumer report, as defined in section 603(d) of the Fair Credit Reporting Act, 15 U.S.C. 1681a(d), obtained from a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis, as defined in section 603(p) of the Fair Credit Reporting Act, 15 U.S.C. 1681a(p).
- (5) *Net income* means the total amount that a consumer receives after the payer deducts amounts for taxes, other obligations, and voluntary contributions (but before deductions of any amounts for payments under a prospective covered short-term loan or covered longer-term balloon-payment loan or for any major financial obligation); provided that, the lender may include in the consumer's net income the amount of any income of another person to which the consumer has a reasonable expectation of access.

1. *General.* Section 1041.5(a)(5) defines a consumer's net income to mean the total amount that a consumer receives after the payer has deducted amounts for taxes withheld by the consumer, other obligations, and voluntary contributions (but before deductions of any amounts for payments under a prospective covered short-term loan or covered longer-term balloon-payment loan or for any major financial obligation); provided that, a lender may elect to include in the consumer's net income the amount of any income of another person to which a consumer has a reasonable expectation of access (see comment 5(a)(5)-3). Net income includes income that is regularly received by the consumer as take-home pay, whether the consumer is treated as an employee or independent contractor. Net income also includes income regularly received by the consumer from other sources, such as child support or alimony received by the consumer and any payments received by the consumer from retirement, social security, disability, or other government benefits, or annuity plans. Lenders may include in net income irregular or seasonal income, such as tips, bonuses, and overtime pay. Net income does not include one-time payments anticipated to be received in the future from non-standard sources, such as legal settlements, tax refunds, jury prizes, or remittances, unless there is verification

evidence of the amount and expected timing of such income. If the consumer receives a traditional pay check but the verification evidence obtained under § 1041.5(c)(2) shows payment of gross income or otherwise is unclear about whether deductions for the consumer's taxes, other obligations, or voluntary contributions have been made, or if the consumer is not paid via a traditional pay check, then the lender may draw reasonable conclusions from the information provided and is not required to inquire further about deductions for the consumer's taxes, other obligations, or voluntary contributions.

2. *Other obligations and voluntary contributions.* An example of other obligations is a consumer's portion of payments for premiums for employer-sponsored health insurance plans. An example of a voluntary contribution is a consumer's contribution to a defined contribution plan meeting the requirements of Internal Revenue Code section 401(a), 26 U.S.C. 401(a). The lender may inquire about and reasonably consider whether voluntary contributions will be discontinued prior to the relevant monthly period, in which case they would not be deducted from the amount of net income that is projected.

3. Reasonable expectation of access to another person's income. Under § 1041.5(a)(5), a lender may elect to include in the consumer's net income the amount of any income of another person to which the consumer has a reasonable expectation of access. The income of any other person is considered net income to which the consumer has a reasonable expectation of access if the consumer has direct access to those funds on a regular basis through a transaction account in which the consumer is an accountholder or cardholder. If the lender elects to include any income of another person to which the consumer has a reasonable expectation of access, then as part of the lender's obligation to make a reasonable projection of the consumer's net income during the applicable period, the lender must obtain verification evidence demonstrating that the consumer has a reasonable expectation of access to the portion of the other person's income that the lender includes within its net income projection. See § 1041.5(c)(2)(ii)(A) and associated commentary. The following examples illustrate when a consumer has reasonable expectation of access to the income of another person for purposes of § 1041.5(a)(5):

i. The consumer's spouse has a salary or income that is deposited regularly into a joint account the spouse shares with the consumer. The consumer has a reasonable expectation of access to the spouse's income.

ii. The consumer shares a household with a sibling. The sibling's salary or other income is deposited into an account in which the consumer does not have access. However, the sibling regularly transfers a portion of that income from the sibling's deposit account into the consumer's deposit account. The consumer has a reasonable expectation of access to that portion of the sibling's income.

iii. The consumer's spouse has a salary or other income that is deposited into an account to which the consumer does not have access, and the spouse does not regularly transfer a portion of that income into the consumer's account. The consumer does not have a reasonable expectation of access to the spouse's income.

iv. The consumer does not have a joint bank account with his spouse, nor does the spouse make regular deposits into the consumer's individual deposit account. However, the spouse regularly pays for a portion of the consumer's basic living expenses. The consumer does not have a reasonable expectation of access to the spouse's income. However, regular contributions toward payment of the consumer's basic living expenses may be considered by the lender as a

consumer-specific factor that is relevant if the lender makes an individualized estimate of basic living expenses (see comment 5(b)-2.i.C.2 for further clarification).

(6) Payment under the covered short-term loan or covered longer-term balloon-payment loan:

(i) Means the combined dollar amount payable by the consumer at a particular time following consummation in connection with the covered short-term loan or covered longer-term balloon-payment loan, assuming that the consumer has made preceding required payments and in the absence of any affirmative act by the consumer to extend or restructure the repayment schedule or to suspend, cancel, or delay payment for any product, service, or membership provided in connection with the loan;

(ii) Includes all principal, interest, charges, and fees; and

1. *General.* Section 1041.5(a)(6)(i) defines payment under a covered short-term loan or covered longer-term balloon-payment loan as the combined dollar amount payable by the consumer at a particular time following consummation in connection with the loan, assuming that the consumer has made preceding required payments and in the absence of any affirmative act by the consumer to extend or restructure the repayment schedule or to suspend, cancel, or delay payment for any product, service, or membership provided in connection with the covered short-term loan or covered longer-term balloon-payment loan. Section 1041.5(a)(6)(ii) clarifies that it includes all principal, interest, charges, and fees. A lender may not exclude a portion of the payment simply because a consumer could avoid or delay paying a portion of the payment, such as by requesting forbearance for that portion or by cancelling a service provided in exchange for that portion. For example:

i. Assume that in connection with a covered longer-term balloon-payment loan, a consumer would owe a periodic payment on a particular date of \$100 to the lender, which consists of \$15 in finance charges, \$80 in principal, and a \$5 service fee, and the consumer also owes \$10 as a credit insurance premium to a separate insurance company. Assume further that under the terms of the loan or other agreements entered into in connection with the loan, the consumer has the right to cancel the credit insurance at any time and avoid paying the \$10 credit insurance premium. The payment under the loan is \$110.

ii. Assume that in connection with a covered short-term loan, a consumer would owe on a particular date \$25 in finance charges to the lender. Under the terms of the loan, the consumer has the option of paying \$50 in principal on that date, in which case the lender would charge \$20 in finance charges instead. The payment under the loan is \$25.

iii. Assume that in connection with a covered short-term loan, a consumer would owe on a particular date \$25 in finance charges to the lender and \$70 in principal. Under the terms of the loan, the consumer has the option of logging into her account on the lender's website and selecting an option to defer the due date of the \$70 payment toward principal. The payment under the covered loan is \$95.

(iii) For a line of credit is calculated assuming that:

1. *General.* Section 1041.5(a)(6)(iii) provides assumptions that a lender must make in calculating the payment under § 1041.5(a)(6) for a covered short-term loan or covered longer-term balloon-payment loan that is a line of credit (regardless of the extent to which available credit will be replenished as the consumer repays earlier advances). For a line of credit, the amount and timing of the consumer's actual payments after consummation may depend on the consumer's utilization of the credit or on amounts that the consumer has

repaid prior to the payments in question. Section 1041.5(a)(6)(iii) requires the lender to calculate the total loan payment assuming that the consumer will utilize the full amount of credit under the loan as soon as the credit is available and that the consumer will make only minimum required payments for as long as permitted under the loan agreement. Lenders should use the same test with the same assumptions when they make a new ability-to-repay determination under § 1041.5(b)(1)(ii) prior to an advance under the line of credit that is more than 90 days after the date of a prior ability-to-repay determination for the line of credit, in order to determine whether the consumer still has the ability to repay the current credit line.

- (A) The consumer will utilize the full amount of credit under the covered short-term loan or covered longer-term balloon-payment loan as soon as the credit is available to the consumer; and
 - (B) The consumer will make only minimum required payments under the covered short-term loan or covered longer-term balloon-payment loan for as long as permitted under the loan agreement.
- (7) Relevant monthly period means the calendar month in which the highest sum of payments is due under the covered short-term or covered longer-term balloon-payment loan.
- (8) Residual income means the sum of net income that the lender projects the consumer will receive during the relevant monthly period, minus the sum of the amounts that the lender projects will be payable by the consumer for major financial obligations during the relevant monthly period and payments under the covered short-term loan or covered longer-term balloon payment loan during the relevant monthly period, all of which projected amounts are determined in accordance with paragraph (c).

1. *General.* Under § 1041.5(a)(8), residual income is defined as the sum of net income that the lender projects the consumer will receive during the relevant monthly period, minus the 1598 sum of amounts that the lender projects will be payable by the consumer for major financial obligations during the relevant monthly period and payments under the covered short-term loan or covered longer-term balloon-payment loan during the relevant monthly period, all of which projected amounts are determined in accordance with § 1041.5(c). See § 1041.5(b)(2)(ii) and associated commentary for further clarification on the use of residual income methodology to determine ability to repay. For covered longer-term balloon-payment loans, where the relevant monthly period may fall well into the future relative to the consummation of the loan, the lender must calculate the residual income using the projections made under § 1041.5(c) and in so doing must make reasonable assumptions about the consumer's net income and major financial obligations during the relevant monthly period compared to the period covered by the verification evidence. For example, the lender cannot assume, absent a reasonable basis, that there will be a substantial increase in net income or decrease in major financial obligations between consummation and the relevant monthly period. For further clarification, see comment 5(c)(1)-1 regarding the consistency between the consumer's written statement and verification evidence and comment 5(c)(2)(ii)(A)-2 regarding what constitutes sufficient history of net income for purposes of verification evidence.

(b) Reasonable determination required.

(1)

1. *Overview.* Section 1041.5(b) prohibits a lender from making a covered short-term loan (other than a covered short-term loan described in § 1041.6) or a covered longer-term balloon-payment loan or increasing the amount of credit available on such loan unless it first makes a reasonable determination that the consumer will have the ability to repay the loan according to its terms. For discussion of loan modifications, see comment 2(a)(5)-2. Section 1041.5(b) provides minimum standards that the lender's determination must meet to constitute a reasonable determination. Section 1041.5(b)(2) provides that a lender's ability-to-repay determination for a covered short-term loan is reasonable only if the lender reasonably concludes that, based on the estimates of the consumer's basic living expenses for the relevant monthly period and the calculation of the consumer's residual income or the debt-to-income ratio for the relevant monthly period, as applicable, the consumer can pay for major financial obligations, make any payments under the loan, and meet basic living expenses during the periods specified in § 1041.5(b)(2). For covered short-term loans, the periods are the shorter of the term of the loan or the period ending 45 days after consummation of the loan, and 30 days after having made the highest payment on the loan. For covered longer-term balloon-payment loans, the periods are the relevant monthly period, and 30 days after having made the highest payment on the loan. Thus, the rule requires lenders to make a debt-to-income ratio or residual income calculation for the relevant monthly period—the calendar month in which the highest payments are due on the covered short-term loan or covered longer-term balloon payment loan—and to use the results of the calculation to make reasonable inferences and draw a reasonable conclusion about whether the consumer can make loan payments, pay for major financial obligations, and meet basic living expenses during the periods specified in § 1041.5(b)(2). This analysis is designed to determine whether the consumer has the ability to repay the loan according to its terms. See § 1041.5(b)(2)(i) and 1041.5(b)(2)(ii) and corresponding commentary.

2. *Reasonable determination.* To comply with the requirements of § 1041.5(b), a lender's determination that a consumer will have the ability to repay a covered short-term loan or covered longer-term balloon-payment loan must be reasonable in all respects.

i. To be reasonable, a lender's determination of a consumer's ability to repay a covered short-term loan or covered longer-term balloon-payment loan must:

A. Include the reasonable conclusions required in § 1041.5(b)(2), using either the debt-to-income ratio methodology under § 1041.5(b)(2)(i) or the residual income methodology under § 1041.5(b)(2)(ii) as applied to the relevant monthly period;

B. Be based on reasonable projections of a consumer's net income and major financial obligations during the relevant monthly period in accordance with § 1041.5(c);

C. Be based on reasonable estimates of basic living expenses during the relevant monthly period. The following provides additional clarification on what constitutes reasonable estimates of basic living expenses: 1. Section 1041.5(a)(1) and (b) do not specify a particular method that a lender must use to determine a consumer's basic living expenses. A lender is not required to itemize the basic living expenses of each consumer, but may instead arrive at estimates for the amount needed to cover the costs of food, utilities not paid as part of rental housing expenses, transportation, out-of-pocket medical expenses, phone and Internet services, and childcare. A lender may reasonably estimate the dollar amount or percentage of net income the consumer will need to meet these basic living expenses based upon such sources as the lender's own

experience in making covered short-term or longer-term balloon-payment loans to similarly-situated consumers, reasonably reliable information available from government surveys or other publications about the basic living expenses of similarly-situated consumers, or some combination thereof. For example, it would be reasonable for the lender to use data about relevant categories of expenses from the Consumer Expenditure Survey of the Bureau of Labor Statistics or the Internal Revenue Code's Collection Financial Standards, or a combination of the two data sources, to develop non-individualized estimates of food, utilities not paid as part of rental housing expenses, transportation, out-of-pocket medical expenses, phone and internet services, and childcare for consumers seeking covered short-term or longer-term balloon-payment loans. In using the data from those sources to estimate the amount spent on a particular category, the lender may make reasonable adjustments to arrive at an estimate of basic living expenses, for instance where a data source's information on a particular type of basic living expenses overlaps with a type of major financial obligation as defined in § 1041.5(a)(3) or where a data source groups expenses into different categories than comment 5(a)(1)-2. 2. If the lender is conducting an individualized estimate by itemizing the consumer's costs of food, utilities not paid as part of rental housing expenses, transportation, out-of-pocket medical expenses, phone and Internet services, and childcare, the lender may reasonably consider other factors specific to the consumer that are not required to be projected under § 1041.5(c). Such consumer-specific factors could include whether other persons are regularly contributing toward the consumer's payment of basic living expenses. The lender may consider such consumer-specific factors only when it is reasonable to do so. It is not reasonable for the lender to consider whether other persons are regularly contributing toward the consumer's payment of basic living expenses if the lender is separately including in its projection of net income any income of another person to which the consumer has a reasonable expectation of access; and

D. Be consistent with a lender's written policies and procedures required under § 1041.12 and grounded in reasonable inferences and conclusions as to a consumer's ability to repay a covered short-term loan or covered longer-term balloon-payment loan according to its terms in light of information the lender is required to obtain or consider as part of its determination under § 1041.5(b). ii. A determination of ability to repay is not reasonable if it:

A. Relies on an implicit or explicit assumption that the consumer will obtain additional consumer credit to be able to make payments under the covered short-term loan or covered longer-term balloon-payment loan, to make payments under major financial obligations, or to meet basic living expenses;

B. Assumes that a consumer needs implausibly low amounts of funds to meet basic living expenses under the residual income methodology or an implausibly low percentage of net income to meet basic living expenses if a lender uses the debt-to-income methodology. For example, assume a consumer seeks a covered short-term loan. The lender uses a debt-to-income methodology to make an ability-to-repay determination. Based on the lender's projections of the consumer's net income and major financial obligations under § 1041.5(c), the lender calculates that the consumer's debt-to-income ratio would be 90 percent, which means that only 10 percent of the consumer's net income will be remaining to pay for basic living expenses. It is not reasonable for the lender to conclude under § 1041.5(b)(2) that a consumer with a 90 percent debt-to-income ratio would have the ability to repay the loan. See comment

5(b)(2)(i)-3 for additional examples of ability-to-repay determinations using the debt-to-income methodology; or

C. For covered longer-term balloon-payment loans, if the lender relies on an assumption that a consumer will accumulate savings while making one or more payments under a covered longer-term balloon-payment loan and that, because of such assumed savings, the consumer will be able to make a subsequent loan payment under the loan.

iii. Evidence that a lender's determinations of ability to repay are not reasonable may include, without limitation, the factors described under paragraphs (A) through (E) of comment 5(b)-2.iii. These factors may be evaluated across a lender's entire portfolio of covered short-term loans or covered longer-term balloon-payment loans or with respect to particular products, geographic regions, particular periods during which the loans were made, or other relevant categorizations. Other relevant categorizations would include, without limitation, loans made in reliance on consumer statements of income in the absence of verification evidence (see comment 5(c)(2)(ii)(A)-4). The factors described under paragraphs (A) through (E) of comment 5(b)-2.iii may be considered either individually or in combination with one another. These factors also are not absolute in their application; instead, they exist on a continuum and may apply to varying degrees. Each of these factors is viewed in the context of the facts and circumstances relevant to whether the lender's ability-to-repay determinations are reasonable. Relevant evidence may also include a comparison of the following factors on the part of the lender to that of other lenders making covered short-term loans or covered longer-term balloon-payment loans to similarly situated consumers; however, such evidence about comparative performance is not dispositive as to the evaluation of a lender's ability-to-repay determinations.

A. Default rates. This evidence includes defaults during and at the expiration of covered loan sequences as calculated on a per sequence or per consumer basis;

B. Re-borrowing rates. This evidence includes the frequency with which the lender makes consumers multiple covered short-term loans or covered longer-term balloon-payment loans within a loan sequence as defined in § 1041.2(a)(14) (i.e., consecutive or concurrent loans taken out within 30 days of a prior loan being outstanding);

C. Patterns of lending across loan sequences. This evidence includes the frequency with which the lender makes multiple sequences of covered short-term loans or covered longer-term balloon-payment loans to consumers. This evidence also includes the frequency with which the lender makes consumers new covered short-term loans or covered longer-term balloon-payment 1604 loans immediately or soon after the expiration of a cooling-off period under § 1041.5(d)(2) or the 30-day period that separates one loan sequence from another (see § 1041.2(a)(14));

D. Evidence of delinquencies and collateral impacts. This evidence includes the proportion of consumers who incur late fees, failed presentments, delinquencies, and repossessions of motor vehicles for loans involving vehicle security; and

E. Patterns of non-covered lending. This evidence includes the frequency with which the lender makes non-covered loans shortly before or shortly after consumers repay a covered short-term loan or covered longer-term balloon-payment loan, and the non-covered loan bridges all or a substantial part of either the period between two loans that otherwise would be part of a loan sequence or of a cooling-off period. An example would be where the lender, its affiliate, or a service provider frequently makes 30-day non-recourse pawn loans to consumers shortly before

or soon after repayment of covered short-term loans made by the lender, and where the lender then makes additional covered short-term loans to the same consumers soon after repayment of the pawn loans (see § 1041.5(e) and associated commentary).

iv. Examples of evidence of the reasonableness of ability-to-repay determinations. The following examples illustrate how the factors described in comment 5(b)-2.iii may constitute evidence about whether lenders' determinations of ability to repay are reasonable under § 1041.5(b):

A. A significant percentage of consumers who obtain covered short-term loans from a lender under § 1041.5 re-borrow within 30 days of repaying their initial loan, re-borrow within 30 days of repaying their second loan, and re-borrow shortly after the end of the cooling-off period that follows the initial loan sequence of three loans. Based on the combination of these factors, this evidence suggests that the lender's ability-to-repay determinations are not reasonable.

B. A lender frequently makes at or near the maximum number of loans permitted under § 1041.6 to consumers early within a 12-month period (i.e., the loans do not require ability-to-repay determinations) and then makes a large number of additional covered short-term loans to those same consumers under § 1041.5 (i.e., the loans require ability-to-repay determinations) later within the 12-month period. Assume that the loans made under § 1041.5 are part of multiple loan sequences of two or three loans each and the sequences begin soon after the expiration of applicable cooling-off periods or 30-day periods that separate one loan sequence from another. This evidence suggests that the lender's ability-to-repay determinations for the covered short-term loans made under § 1041.5 are not reasonable. The fact that some of the loans in the observed pattern were made under § 1041.6 and thus are conditionally exempted from the ability-to-repay requirements does not mitigate the potential unreasonableness of the ability-to-repay determinations for the covered short-term loans that were made under § 1041.5.

C. A lender frequently makes at or near the maximum number of loans permitted under § 1041.6 to consumers early within a 12-month period (i.e., the loans do not require ability-to-repay determinations) and then only occasionally makes additional covered short-term loans to those same consumers under § 1041.5 (i.e., the loans require ability-to-repay determinations) later within the 12-month period. Very few of those additional loans are part of loans sequences longer than one loan. Absent other evidence that the ability-to-repay determination is unreasonable (see comment 5(b)-2.iii.A through E), this evidence suggests that the lender's ability-to-repay determinations for the loans made under § 1041.5 are reasonable.

D. Within a lender's portfolio of covered short-term loans, a small percentage of loans result in default, consumers generally have short loan sequences (fewer than three loans), and the consumers who take out multiple loan sequences typically do not begin a new loan sequence until several months after the end of a prior loan sequence. There is no evidence of the lender or an affiliate making non-covered loans to consumers to bridge cooling-off periods or the periods between loan sequences. This evidence suggests that the lender's ability-to-repay determinations are reasonable.

3. Payments under the covered short-term loan or longer-term balloon-payment loan. Under the ability-to-repay requirements in § 1041.5(b)(2)(i) and (ii), a lender must determine the amount of the payments due in connection with the covered short-term loan or covered longer-term balloon-payment loan during the relevant monthly period. See § 1041.5(a)(6) for the definition of payment under a covered short-term loan or covered longer-term balloon-payment

loan, including assumptions that the lender must make in calculating the amount of payments under a loan that is a line of credit.

- (i) Except as provided in § 1041.6, a lender must not make a covered short-term loan or covered longer-term balloon-payment loan or increase the credit available under a covered short-term loan or covered longer-term balloon-payment loan, unless the lender first makes a reasonable determination that the consumer will have the ability to repay the loan according to its terms.
 - (ii) For a covered short-term loan or covered longer-term balloon-payment loan that is a line of credit, a lender must not permit a consumer to obtain an advance under the line of credit more than 90 days after the date of a required determination under this paragraph (b), unless the lender first makes a new determination that the consumer will have the ability to repay the covered short-term loan or covered longer-term balloon-payment loan according to its terms.
- (2) A lender's determination of a consumer's ability to repay a covered short-term loan or covered longer-term balloon-payment loan is reasonable only if either:
1. *General.* For a covered short-term loan, § 1041.5(b)(2) requires the lender to reasonably conclude that, based on the estimates of the consumer's basic living expenses for the relevant monthly period and the lender's calculation of the consumer's debt-to-income ratio or residual income for the relevant monthly period, as applicable, the consumer can pay major financial obligations, make any payments on the loan, and meet basic living expenses during the shorter of the term of the loan or the period ending 45 days after consummation of the loan, and for 30 days after having made the highest payment on the loan. See § 1041.5(b)(2)(i)(A) (the debt-to-income methodology) and § 1041.5(b)(2)(ii)(A) (the residual income methodology) and corresponding commentary. For a covered longer-term balloon-payment loan, § 1041.5(b)(2) requires the lender to reasonably conclude that, based on the estimates of the consumer's basic living expenses for the relevant monthly period and the lender's calculation of the consumer's debt-to-income ratio or residual income, as applicable, the consumer can pay major financial obligations, make any payments on the loan, and meet basic living expenses during the relevant monthly period, and for 30 days after having made the highest payment on the loan. See § 1041.5(b)(2)(i)(B) (the debt-to-income methodology) and § 1041.5(b)(2)(ii)(B) (the residual income methodology) and corresponding commentary. If the loan has two or more payments that are equal to each other in amount and higher than all other payments, the date of the highest payment under the loan is considered the later in time of the two or more highest payments. Under § 1041.5(b)(2), lenders must comply with either § 1041.5(b)(2)(i) or (ii) depending on whether they utilize the residual income or debt-to-income ratio methodology.
 - (i) **Based on the calculation of the consumer's debt-to-income ratio for the relevant monthly period and the estimates of the consumer's basic living expenses for the relevant monthly period, the lender reasonably concludes that:**
 1. *Relation of periods under § 1041.5(b)(2)(i) to relevant monthly period.* Section 1041.5(a)(2) defines debt-to-income ratio as the ratio, expressed as a percentage, of the sum of net income that the lender projects the consumer will receive during the relevant monthly period, minus the sum of amounts that the lender projects will be payable by the consumer for major financial obligations during the relevant monthly period and the payments under the covered short-term loan or covered longer-term balloon-payment loan

during the relevant monthly period, all of which projected amounts are determined in accordance with § 1041.5(c). Comment 5(a)(2)-1 clarifies that the relevant monthly period is the calendar month during which the highest sum of payments on the loan is due. The relevant monthly period is not the same period as the periods set forth in § 1041.5(b)(2)(i), which for covered short-term loans are the shorter of the loan term or 45 days following consummation, and 30 days following the date of the highest payment under the loan, and for covered longer-term balloon-payment loans are the relevant monthly period, and 30 days following the date of the highest payment under the loan. There may be overlap between the relevant monthly period and the periods set forth in § 1041.5(b)(2)(i), but the degree of overlap will depend on the contractual duration of the loan and the consummation and contractual due dates. For example, assume a consumer takes a covered short-term loan of 30 days in duration that is consummated on June 15 and with a single payment due on July 14. The relevant monthly period is the calendar month in which the sum of the highest payments on the loan is due, which is the calendar month of July. This means that a portion of both the loan term (i.e., June 15 to June 30) and the 30-day period following the date of the highest payment on the loan (i.e., August 1 to August 13) are outside of the relevant monthly period.

2. Use of projections for relevant monthly period to comply with § 1041.5(b)(2)(i). The lender is not required under § 1041.5(b)(2)(i) to estimate the consumer's basic living expenses, make a projection under § 1041.5(c) of the consumer's net income and major financial obligations, or calculate the consumer's debt-to-income ratio for any period other than the relevant monthly period. The lender may use the estimates of the consumer's basic living expenses for the relevant monthly period, the projections about the consumer's net income and major financial obligations during the relevant monthly period, and the calculation of the consumer's debt-to-income ratio as a baseline of information from which to make reasonable inferences and draw a reasonable conclusion about whether the consumer will pay major financial obligations, make the payments on the loan, and meet basic living expenses during the periods specified in § 1041.5(b)(2)(i). To make reasonable inferences and draw a reasonable conclusion, the lender cannot, for example, assume that the consumer will defer payment of major financial obligations and basic living expenses until after the 30-day period that follows the date of the highest payment on the loan, or assume that obligations and expenses (other than payments on the covered loan itself) during the 30-day period will be less than during the relevant monthly period. Nor can the lender assume the consumer will be able to obtain additional credit during the loan term or during the 30-day period that follows the highest payment on the loan.

3. Examples. The following examples illustrate § 1041.5(b)(2)(i):

i. Assume a lender considers making a covered short-term loan to a consumer on March 1. The prospective loan would be repayable in a single payment of \$385 on March 17. The lender calculates that, based on its projections of the consumer's net income and major financial obligations during March (i.e., the relevant monthly period), the consumer will have a debt-to-income ratio of 55 percent. The lender complies with the requirement in § 1041.5(b)(2) if, using that debt-to-income ratio, the lender reasonably concludes that the consumer can pay for major financial obligations, make the loan payment, and meet basic living expenses during the loan term and to pay for major financial obligations and meet basic living expenses for 30 days following the contractual due date (i.e., from March 18 to

April 16). The lender would not make a reasonable conclusion if the lender were to assume, for example, that the consumer would defer payment of major financial obligations until after April 16 or that the consumer would obtain an additional extension of credit on April 1.

ii. Assume a lender considers making a covered longer-term balloon-payment loan to a consumer on March 1. The prospective loan would be repayable in six biweekly payments. The first five of which would be for \$100, and the last of which would be for \$275, due on May 20. 1610 The highest sum of these payments that would be due within a monthly period would be \$375, during the month of May. The lender further calculates that, based on its projections of net income and major financial obligations during the relevant monthly period, the consumer will have a debt-to-income ratio of 50 percent. The lender complies with the requirement in § 1041.5(b)(2)(i) if, applying that debt-to-income ratio, the lender reasonably concludes that the consumer can pay for major financial obligations, make the payments under the loan, and meet basic living expenses during the month in which the highest sum of payments on the loan are due (i.e., during the month of May) and for 30 days following the highest payment on the loan (i.e., from May 21 to June 19). The lender would not make a reasonable conclusion if the lender were to assume, for example, that the consumer would defer payment of major financial obligations until after June 19 or that the consumer would obtain an additional extension of credit on June 1.

- (A) For a covered short-term loan, the consumer can make payments for major financial obligations, make all payments under the loan, and meet basic living expenses during the shorter of the term of the loan or the period ending 45 days after consummation of the loan, and for 30 days after having made the highest payment under the loan; and
 - (B) For a covered longer-term balloon-payment loan, the consumer can make payments for major financial obligations, make all payments under the loan, and meet basic living expenses during the relevant monthly period, and for 30 days after having made the highest payment under the loan; or
- (ii) Based on the calculation of the consumer's residual income for the relevant monthly period and the estimates of the consumer's basic living expenses for the relevant monthly period, the lender reasonably concludes that:
1. *Relation of periods under § 1041.5(b)(2)(ii) to relevant monthly period.* Section 1041.5(a)(8) defines residual income as the sum of net income that the lender projects the consumer will receive during the relevant monthly period, minus the sum of the amounts that the lender projects will be payable by the consumer for major financial obligations during the relevant monthly period and payments under the covered short-term loan or covered longer-term balloon-payment loan during the relevant monthly period, all of which projected amounts are determined in accordance with paragraph (c). The relevant monthly period is the calendar month in which the highest sum of payments on the loan is due. The relevant monthly period is not the same period as the periods set forth in § 1041.5(b)(2)(ii), although there may be some overlap. See comment 5(b)(2)(i)-1 for further clarification and an analogous example.
 2. *Use of projections for relevant monthly period to comply with § 1041.5(b)(2)(ii).* The lender is not required under § 1041.5(b)(2)(ii) to estimate the consumer's basic living expenses, make a projection under § 1041.5(c) of the consumer's net income and major financial obligations, or calculate the consumer's residual income for any period other than

the relevant monthly period. The lender may use the estimates of the consumer's basic living expenses for the relevant monthly period, projections about the consumer's net income and major financial obligations during the relevant monthly period and the calculation of the consumer's residual income as a baseline of information on which to make reasonable inferences and draw a reasonable conclusion about whether the consumer will pay major financial obligations, make the payments on the loan, and meet basic living expenses during the periods specified in § 1041.5(b)(2)(ii). See comment 5(b)(2)(i)-2 for further clarification.

3. Examples. The following examples illustrate § 1041.5(b)(2)(ii):

i. Assume a lender considers making a covered short-term loan to a consumer on March 1. The prospective loan would be repayable in a single payment of \$385 on March 17. The lender calculates that, based on its projections of the consumer's net income and major financial obligations during March (i.e., the relevant monthly period), the consumer will have \$1,000 in residual income for the month. The lender complies with the requirement in § 1041.5(b)(2)(ii) if, based on the calculation of residual income, it reasonably concludes that the consumer will be able to pay major financial obligations, make the loan payment, and meet basic living expenses during the loan term and for 30 days following the contractual due date (i.e., from March 18 to April 16). The lender would not make a reasonable conclusion if the lender were to assume, for example, that the consumer would defer payment of major financial obligations until after April 16, that the consumer would obtain an additional extension of credit on April 1, or that the consumer's net income will increase in April relative to the relevant monthly period (i.e., March).

ii. Assume a lender considers making a covered longer-term balloon-payment loan to a consumer on March 1. The prospective loan would be repayable in six biweekly payments. The first five payments would be for \$100, and the last payment would be for \$275, on May 20. The highest sum of these payments that would be due within a monthly period would be \$375, during the month of May. The lender further calculates that, based on its projections of net income and major financial obligations during the relevant monthly period (i.e., May), and accounting for the \$375 amount, which is the highest sum of loan payments due within a monthly period, the consumer will have \$1,200 in residual income. The lender complies with the requirement in § 1041.5(b)(2)(ii) if, based on the calculation of residual income, it reasonably concludes that the consumer will be able to pay major financial obligations, make the loan payments, and meet basic living expenses during the relevant monthly period (i.e., May) and to pay for basic living expenses and major financial obligations for 30 days following the highest payment on the loan (i.e., from May 21 to June 19). The lender would not make a reasonable conclusion if the lender were to assume, for example, that the consumer would be able to defer payment of major financial obligations until after June 19 or that the consumer would obtain an additional extension of credit on June 1, or that the consumer's net income will increase in June relative to the relevant monthly period (i.e., May).

(A) For a covered short-term loan, the consumer can make payments for major financial obligations, make all payments under the loan, and meet basic living expenses during the shorter of the term of the loan or the period ending 45 days after consummation of the loan, and for 30 days after having made the highest payment under the loan; and

(B) For a covered longer-term balloon-payment loan, the consumer can make payments for major financial obligations, make all payments under the loan, and meet basic living expenses during the relevant monthly period, and for 30 days after having made the highest payment under the loan.

(c) *Projecting consumer net income and payments for major financial obligations—*

1. *General.* Section 1041.5(c)(1) requires lenders to consider major financial obligations that are listed in a consumer's written statement described in § 1041.5(c)(2)(i)(B) even if the obligations do not appear in the national credit report or other verification documentation that lenders are required to compile under § 1041.5(c)(2)(ii)(B). To be reasonable, § 1041.5(c)(1) provides that a projection of the amount of net income or payments for major financial obligations may be based on a consumer's written statement of amounts under § 1041.5(c)(2)(i) only as specifically permitted by § 1041.5(c)(2)(ii) or (iii) or to the extent the stated amounts are consistent with the verification evidence that is obtained in accordance with § 1041.5(c)(2)(ii). Section 1041.5(c)(1) further provides that, in determining whether the stated amounts are consistent with the verification evidence, the lender may reasonably consider other reliable evidence the lender obtains from or about the consumer, including any explanations the lender obtains from the consumer. For example:

i. Assume that a consumer states that her net income is \$900 every two weeks, pursuant to § 1041.5(c)(2)(i)(A). The consumer pay stub the lender obtains as reasonably available verification evidence pursuant to § 1041.5(c)(2)(ii)(A) shows that the consumer received \$900 during the preceding pay period. The lender complies with § 1041.5(c)(1) if it makes the determination required under § 1041.5(b) based on a projection of \$1,800 in net income for the relevant monthly period because the reasonably available verification evidence supports a projection of \$900 in net income every two weeks.

ii. Assume that a consumer states that net income is \$1,000 every two weeks, pursuant to § 1041.5(c)(2)(i)(A). The lender obtains a copy of the consumer's recent deposit account transaction records as verification evidence pursuant to § 1041.5(c)(2)(ii)(A). The account transaction records show biweekly take-home pay of \$800 during the preceding two-week period. The lender does not comply with § 1041.5(c)(1) if it makes the determination required under § 1041.5(b) based on a net income projection of a \$2,000 for the relevant monthly period because this projection is not consistent with the reasonably available verification evidence (which, rather, is consistent with a total of \$1,600 net income for the relevant monthly period). The lender may request additional deposit account transaction records for prior recent pay cycles and may reasonably project \$2,000 in net income for the relevant monthly period if such additional evidence is consistent with the consumer's statement.

iii. Assume that a consumer states that net income is \$1,000 every two weeks, pursuant to § 1041.5(c)(2)(i)(A). The lender obtains a copy of the consumer's recent deposit account transaction records as verification evidence pursuant to § 1041.5(c)(2)(ii)(A). The account transaction records show biweekly take-home pay of \$800 during the preceding two-week period. Assume also, however, that the consumer states that the consumer supplements his regular payroll income with cash income from a second job, for which verification evidence is not reasonably available because the consumer is paid in cash and does not deposit the cash into the consumer's bank account, and that the consumer earns between \$100 and \$300 every two weeks from this job. In this instance, the lender complies with § 1041.5(c)(1) if it makes the determination required under § 1041.5(b) based on a net income projection of \$2,000 for the relevant monthly period. The lender's projection

includes both the payroll income from the first job for which verification evidence is reasonably available and the cash income from the second job for which verification evidence is not reasonably available (see comment 5(c)(2)(ii)(A)-3). In such circumstances, the lender may reasonably consider the additional income reflected in the consumer's written statement pursuant to § 1041.5(c)(2)(ii)(A)(1).

iv. Assume that a consumer states that her net income is \$1,000 every two weeks, pursuant to § 1041.5(c)(2)(i)(A). The lender obtains electronic records of the consumer's deposit account transactions as verification evidence pursuant to § 1041.5(c)(2)(ii)(A) showing a biweekly direct deposit \$800 during the preceding two-week period and a biweekly direct 1615 deposit of \$1,000 during the prior two-week period. The consumer explains that the most recent income was lower than her usual income of \$1,000 because she missed two days of work due to illness. The lender complies with § 1041.5(c)(1) if it makes the determination required under § 1041.5(b) based on a projection of \$2,000 for the relevant monthly period because it reasonably considers the consumer's explanation in determining whether the stated amount is consistent with the verification evidence.

v. Assume that a consumer states that her net income is \$2,000 every two weeks, pursuant to § 1041.5(c)(2)(i)(A). The lender obtains electronic records of the consumer's deposit account transactions as verification evidence pursuant to § 1041.5(c)(2)(ii)(A) showing no income transactions in the preceding month but showing consistent biweekly direct deposits of \$2,000 from ABC Manufacturing prior to that month. The consumer explains that she was temporarily laid off for one month while ABC Manufacturing retooled the plant where she works but that she recently resumed work there. The lender complies with § 1041.5(c)(1) if it makes the determination required under § 1041.5(b) based on a projection of \$4,000 for the relevant monthly period because it reasonably considers the consumer's explanation in determining whether the stated amount is consistent with the verification evidence.

vi. Assume that a consumer states that she owes a child support payment of \$200 each month, pursuant to § 1041.5(c)(2)(i)(B). The national consumer report that the lender obtains as verification evidence pursuant to § 1041.5(c)(2)(ii)(C) does not include any child support payment. The lender must consider the child support obligation listed in the written statement. The lender complies with § 1041.5(c)(1) if it reasonably relies on the amount in the consumer's written statement pursuant to § 1041.5(c)(2)(ii)(C) to make the determination required under § 1041.5(b) based on a projection of a \$200 child support payment each month.

vii. Assume that a consumer does not list a student loan in her written statement pursuant to § 1041.5(c)(2)(i)(B), but the national consumer report that the lender obtains as verification evidence pursuant to § 1041.5(c)(2)(ii)(B) lists such a loan with a payment due during the relevant monthly period. The lender does not comply with § 1041.5(c)(1) if it makes the determination required under § 1041.5(b) without including the student loan payment based on the consumer's failure to list the loan in the written statement or on the consumer's explanation that the loan has recently been paid off. The lender may obtain and reasonably consider other reliable evidence, such as records from the consumer or an updated national consumer report, and may exclude the student loan payment if such additional evidence is consistent with the consumer's statement or explanation.

viii. Assume that a consumer states that he owes a child support payment of \$200 each month, pursuant to § 1041.5(c)(2)(i)(B). The national consumer report that the lender obtains as verification evidence pursuant to § 1041.5(c)(2)(ii)(C) includes the child support payment. The consumer states,

further, that his child support payment is deducted out of his paycheck prior to his receipt of take-home pay. The lender obtains a recent pay stub of the consumer as verification evidence which shows a \$200 deduction but does not identify the payee or include any other information regarding the nature of the deduction. The lender complies with § 1041.5(c)(1) if it makes the determination required under § 1041.5(b) based on a projection of major financial obligations that does not include the \$200 child support payment each month, because it relies on the consumer's statement that the child support payment is deducted from his paycheck prior to receipt of take-home pay and nothing in the verification evidence is inconsistent with the statement.

2. Consumer-specific factors regarding payment of major financial obligations. Under § 1041.5(c)(1), in projecting major financial obligations the lender may consider consumer-specific factors, such as whether other persons are regularly contributing toward the consumer's payment of major financial obligations. The lender may consider such consumer-specific factors only when it is reasonable to do so. It is not reasonable for the lender to consider whether other persons are regularly contributing toward the consumer's payment of major financial obligations if the lender is separately including in its projection of net income any income of another person to which the consumer has a reasonable expectation of access (see comment 5(a)(5)-3).

(1) *General.* To make a reasonable determination required under paragraph (b) of this section, a lender must obtain the consumer's written statement in accordance with paragraph (c)(2)(i), obtain verification evidence to the extent required by paragraph (c)(2)(ii), assess information about rental housing expense as required by paragraph (c)(2)(iii), and use those sources of information to make a reasonable projection of the amount of a consumer's net income and payments for major financial obligations during the relevant monthly period. The lender must consider major financial obligations that are listed in a consumer's written statement described in paragraph (c)(2)(i)(B) of this section even if they cannot be verified by the sources listed in paragraph (c)(2)(ii)(B) of this section. To be reasonable, a projection of the amount of net income or payments for major financial obligations may be based on a consumer's written statement of amounts under paragraph (c)(2)(i) of this section only as specifically permitted by paragraphs (c)(2)(ii) or (iii) or to the extent the stated amounts are consistent with the verification evidence that is obtained in accordance with paragraph (c)(2)(ii) of this section. In determining whether the stated amounts are consistent with the verification evidence, the lender may reasonably consider other reliable evidence the lender obtains from or about the consumer, including any explanations the lender obtains from the consumer.

(2) *Evidence of net income and payments for major financial obligations—*

(i) *Consumer statements.* A lender must obtain a consumer's written statement of:

1. *Statements from the consumer.* Section 1041.5(c)(2)(i) requires a lender to obtain a consumer's written statement of the amounts of the consumer's net income and payments for the consumer's major financial obligations currently and for the relevant monthly period. Section 1041.5(c)(2)(i) also provides that the written statement from the consumer may include a statement from the consumer about the amount of any income of another person to which the consumer has a reasonable expectation of access. A consumer's written statement includes a statement the consumer writes on a paper application or enters into an electronic record, or an oral consumer statement that the lender records and retains or memorializes in writing or electronically and retains.

- (A) The amount of the consumer's net income, which may include the amount of any income of another person to which the consumer has a reasonable expectation of access; and
 - (B) The amount of payments required for the consumer's major financial obligations.
- (ii) *Verification evidence.* A lender must obtain verification evidence for the amounts of the consumer's net income and payments for major financial obligations other than rental housing expense, as follows:

1. *Verification requirement.* Section 1041.5(c)(2)(ii) establishes requirements for a lender to obtain verification evidence for the amounts of a consumer's net income and required payments for major financial obligations other than rental housing expense.

(A) **For the consumer's net income:**

1. *Income.* Section 1041.5(c)(2)(ii)(A) requires a lender to obtain a reliable record (or records) of an income payment (or payments) directly to the consumer covering sufficient history to support the lender's projection under § 1041.5(c)(1) if a reliable record (or records) of income payment (or payments) is reasonably available. Section 1041.5(c)(2)(ii)(A) also provides that if the lender elects to include as the consumer's net income for the relevant monthly period the income of another person to which the consumer has a reasonable expectation of access, the lender must obtain verification evidence of that income in the form of a reliable record (or records) demonstrating that the consumer has regular access to that income. Such verification evidence could consist of bank account statements indicating that the consumer has access to a joint bank account in which the other person's income is deposited, or that the other person regularly deposits income into the consumer's bank account (see comment 5(a)(5)-3 for further clarification). For purposes of verifying net income, a reliable transaction record includes a facially genuine original, photocopy, or image of a document produced by or on behalf of the payer of income, or an electronic or paper compilation of data included in such a document, stating the amount and date of the income paid to the consumer. A reliable transaction record also includes a facially genuine original, photocopy, or image of an electronic or paper record of depository account transactions, prepaid account transactions (including transactions on a general purpose reloadable prepaid card account, a payroll card account, or a government benefits card account) or money services business check-cashing transactions showing the amount and date of a consumer's receipt of income.

2. *Sufficient history.* Under § 1041.5(c)(2)(ii)(A), the lender must obtain a reliable record or records of the consumer's net income covering sufficient history to support the lender's projection under § 1041.5(c). For a covered short-term loan, sufficient history typically would consist of one biweekly pay cycle or one monthly pay cycle, depending on how frequently the consumer is paid. However, if there is inconsistency between the consumer's written statement regarding net income and the verification evidence which must be reconciled by the lender (see comment 5(c)(1)-1), then depending on the circumstances more than one pay cycle may be needed to constitute sufficient history. For a covered longer-term balloon-payment loan, sufficient history would generally consist of two biweekly pay cycles or two monthly pay cycles, depending on how frequently the consumer is paid. However, depending on the length of the loan, and the

need to resolve inconsistency between the consumer's written statement regarding net income and the verification evidence, more than two pay cycles may be needed to constitute sufficient history.

3. *Reasonably available.* The lender's obligation to obtain a reliable record (or records) of income payment (or payments) covering sufficient history to support the lender's projection under § 1041.5(c)(1) applies if and to the extent a reliable record (or records) is reasonably available. A reliable record of the consumer's net income is reasonably available if, for example, the consumer's source of income is from her employment and she possesses or can access a copy of the consumer's recent pay stub. The consumer's recent transaction account deposit history is a reliable record (or records) that is reasonably available if the consumer has such an account. With regard to such bank account deposit history, the lender could obtain it directly from the consumer or, at its discretion, with the consumer's permission via an account aggregator service that obtains and categorizes consumer deposit account and other account transaction data. In situations in which income is neither documented through pay stubs nor transaction account records, the reasonably available standard requires the lender to act in good faith and exercise due diligence as appropriate for the circumstances to determine whether another reliable record (or records) is reasonably available.

4. *Reasonable reliance on consumer's statement if reliable record not reasonably available.* Under § 1041.5(c)(2)(ii)(A), if a lender determines that a reliable record (or records) of some or all of the consumer's net income is not reasonably available, the lender may reasonably rely on the consumer's written statement described in § 1041.5(c)(2)(i)(A) for that portion of the consumer's net income. Section 1041.5(c)(2)(ii)(A) does not permit a lender to rely on a consumer's written statement that the consumer has a reasonable expectation of access to the income of another person (see comment 5(c)(2)(ii)(A)-1). A lender reasonably relies on the consumer's written statement if such action is consistent with a lender's written policies and procedures required under § 1041.12 and there is no indication that the consumer's stated amount of net income on a particular loan is implausibly high or that the lender is engaged in a pattern of systematically overestimating consumers' income. Evidence of the lender's systematic overestimation of consumers' income could include evidence that the subset of the lender's portfolio consisting of the loans where the lender relies on the consumers' statements to project income in the absence of verification evidence perform worse, on a non-trivial level, than other covered loans made by the lender with respect to the factors noted in comment 5(b)-2.iii indicating poor loan performance (e.g., high rates of default, frequent re-borrowings). If the lender periodically reviews the performance of covered short-term loans or covered longer-term balloon-payment loans where the lender has relied on consumers' written statements of income and uses the results of those reviews to make necessary adjustments to its policies and procedures and future lending decisions, such actions indicate that the lender is reasonably relying on consumers' statements. Such necessary adjustments could include, for example, the lender changing its underwriting criteria for covered short-term loans to provide that the lender may not rely on the consumer's statement of net income in absence of reasonably available verification evidence unless the consumer's

debt-to-income ratio is lower, on a non-trivial level, than that of similarly situated applicants who provide verification evidence of net income. A lender is not required to consider income that cannot be verified other than through the consumer's written statement. For an illustration of a lender's reliance on a consumer's written statement as to a portion of her income for which verification evidence is not reasonably available, see comment 5(c)(1)-1.iii.

- (1) The lender must obtain a reliable record (or records) of an income payment (or payments) directly to the consumer covering sufficient history to support the lender's projection under paragraph (c)(1) if a reliable record (or records) is reasonably available. If a lender determines that a reliable record (or records) of some or all of the consumer's net income is not reasonably available, then, the lender may reasonably rely on the consumer's written statement described in paragraph (c)(2)(i)(A) of this section for that portion of the consumer's net income.
 - (2) If the lender elects to include in the consumer's net income for the relevant monthly period any income of another person to which the consumer has a reasonable expectation of access, the lender must obtain verification evidence to support the lender's projection under paragraph (c)(1) of this section.
- (B) For the consumer's required payments under debt obligations, the lender must obtain a national consumer report, the records of the lender and its affiliates, and a consumer report obtained from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or is registered pursuant to § 1041.11(d)(2), if available. If the reports and records do not include a debt obligation listed in the consumer's written statement described in paragraph (c)(2)(i)(B) of this section, the lender may reasonably rely on the written statement in determining the amount of the required payment.

1. *Payments under debt obligations.* To verify a consumer's required payments under debt obligations, § 1041.5(c)(2)(ii)(B) requires a lender to obtain a national consumer report, the records of the lender and its affiliates, and a consumer report obtained from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or is registered pursuant to § 1041.11(d)(2), if available. A lender satisfies its obligation under § 1041.5(d)(1) to obtain a consumer report from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or is registered pursuant to § 1041.11(d)(2), if available, when it complies with the requirement in § 1041.5(c)(2)(ii)(B) to obtain this same consumer report. See comment 5(a)(3)-1 regarding the definition of required payments.

2. *Deduction of debt obligations prior to consumer's receipt of take-home pay.* If verification evidence shows that a debt obligation is deducted prior to the consumer's receipt of take-home pay, the lender does not include the debt obligation in the projection of major financial obligations under § 1041.5(c).

3. *Inconsistent information.* If the consumer reports and lender and affiliate records do not include a debt obligation listed in the consumer's written statement described in § 1041.5(c)(2)(ii)(B), the lender must consider the debt obligation listed in the consumer's written statement to make a reasonable projection of the amount of payments for debt obligations. The lender may reasonably rely on the written statement in determining the

amount of the required payment for the debt obligation. If the reports and records include a debt obligation that is not listed in the consumer's written statement, the lender must consider the debt obligation listed in the report or record unless it obtains additional verification evidence confirming that the obligation has been paid off or otherwise released. A lender is not responsible for information about a major financial obligation that is not owed to the lender, its affiliates, or its service providers if such obligation is not listed in a consumer's written statement, a national consumer report, or a consumer report from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or is registered pursuant to § 1041.11(d)(2).

(C) For a consumer's required payments under child support obligations or alimony obligations, the lender must obtain a national consumer report. If the report does not include a child support or alimony obligation listed in the consumer's written statement described in paragraph (c)(2)(i)(B) of this section, the lender may reasonably rely on the written statement in determining the amount of the required payment.

1. *Payments under child support or alimony obligations.* Section 1041.5(c)(2)(ii)(B) requires a lender to obtain a national consumer report to verify a consumer's required payments under child support obligations or alimony obligations under § 1041.5(c)(2)(ii)(C). A lender may use the same national consumer report to satisfy the verification requirements under both § 1041.5(c)(2)(ii)(B) and (C). See comment 5(c)(2)(ii)(B) for clarification on the interplay between this obligation and § 1041.5(d)(1). If the report does not include a child support or alimony obligation listed in the consumer's written statement described in § 1041.5(c)(2)(i)(B), the lender must consider the obligation listed in the consumer's written statement to make a reasonable projection of the amount of payments for the child support or alimony obligation. The lender may reasonably rely on the written statement in determining the amount of the required payment for the obligation.

2. *Deduction of child support or alimony obligations prior to consumer's receipt of take-home pay.* If verification evidence shows that a child support or alimony obligation is deducted prior to the consumer's receipt of take-home pay, the lender does not include the child support or alimony obligation in the projection of major financial obligations under § 1041.5(c). For an illustration, see comment 5(c)(1)-1.viii.

(D) Notwithstanding paragraphs (c)(2)(ii)(B) and (c)(2)(ii)(C) of this section, the lender is not required to obtain a national consumer report as verification evidence for the consumer's debt obligations, alimony obligations, and child support obligations if during the preceding 90 days:

1. *Exception to obligation to obtain consumer report.* Section 1041.5(c)(2)(ii)(D) provides that notwithstanding § 1041.5(c)(2)(ii)(B) and (C), a lender is not required to obtain a consumer report to verify debt obligations and child support obligations if during the preceding 90 days: the lender or its affiliate has obtained a national consumer report for the consumer, retained the report under § 1041.12(b)(1)(ii) and checked it again in connection with the new loan; and the consumer did not complete a loan sequence of three loans under § 1041.5 and trigger the 30-day cooling-off period under § 1041.5(d)(2) since the previous report was obtained. To illustrate how the two conditions relate to each other, assume a consumer obtains a sequence of three

covered short-term loans under § 1041.5, with each loan being 15 days in duration, the first loan consummating on June 1, and the final loan no longer being outstanding as of July 15. The lender obtained a consumer report on May 30 as part of its ability-to-repay determination for the first loan in the sequence. Under § 1041.5(c)(2)(ii)(D), the lender is not required to obtain a consumer report for the second and third loan in the sequence. Because the consumer took a three-loan sequence, the consumer is subject to a 30-day cooling-off period which expires on August 15 pursuant to § 1041.5(d)(2). If the consumer returns to the lender for another covered short-term loan under § 1041.5 on August 15, the lender must obtain a consumer report under § 1041.5(c)(2)(ii)(B) and (C) to verify debt obligations and child support even though fewer than 90 days has elapsed since the lender previously obtained a consumer report for the consumer because the consumer completed a three-loan sequence and triggered the 30-day cooling-off period since the previous report was obtained.

2. *Conflicts between consumer's written statement and national consumer report.* A lender is not required to obtain a new national consumer report if the conditions under § 1041.5(c)(2)(ii)(D) are met; however, there may be circumstances in which a lender would voluntarily obtain a new national consumer report to resolve potential conflicts between a consumer's written statement and a national consumer report obtained in the previous 90 days. See comments 5(c)(1)-1.vii and 5(c)(2)(ii)(B)-3.

- (1) The lender or an affiliate obtained a national consumer report for the consumer, retained the report under § 1041.12(b)(1)(ii), and checked it again in connection with the new loan; and
- (2) The consumer did not complete a loan sequence of three loans made under this section and trigger the prohibition under paragraph (d)(2) of this section since the previous report was obtained.

(iii) *Rental housing expense.* For a consumer's housing expense other than a payment for a debt obligation that appears on a national consumer report obtained pursuant to paragraph (c)(2)(ii)(B) of this section, the lender may reasonably rely on the consumer's written statement described in paragraph (c)(2)(i)(B) of this section.

1. *Rental housing expense.* Section 1041.5(c)(2)(iii) provides that for the consumer's housing expense other than a payment for a debt obligation that appears on a national consumer report obtained pursuant to § 1041.5(c)(2)(ii)(B) (i.e., with respect to lease or other rental housing payments), the lender may reasonably rely on the consumer's statement described in § 1041.5(c)(2)(i)(B). A lender reasonably relies on the consumer's written statement if such actions are consistent with a lender's written policies and procedures required under § 1041.12, and there is no evidence that the stated amount for rental housing expense on a particular loan is implausibly low or that there is a pattern of the lender underestimating consumers' rental housing expense.

2. *Mortgage obligations.* For a housing expense under a debt obligation (i.e., a mortgage), a lender generally must verify the obligation by obtaining a national consumer report that includes the housing expense under a debt obligation pursuant to § 1041.5(c)(2)(ii)(B). Under § 1041.5(c)(2)(ii)(D), however, a lender is not required to obtain a national consumer report if, during the preceding 90 days, the lender or its affiliate has obtained a national consumer report for the consumer and the consumer has not taken out a loan sequence of

three loans under § 1041.5 and triggered the 30-day cooling-off period under § 1041.5(d)(2) since the previous report was obtained (see comment 5(c)(2)(ii)(D)-1).

(d) Additional limitations on lending—covered short-term loans and covered longer-term balloon-payment loans—

1. *General.* Section 1041.5(d) specifies certain circumstances in which making a new covered short-term loan or a covered longer-term balloon-payment loan under § 1041.5 during or after a sequence of covered short-term loans, covered longer-term balloon-payment loans, or a combination of covered short-term loans and covered longer-term balloon-payment loans is prohibited during a mandatory cooling-off period. The prohibitions apply to making a covered short-term loan or covered longer-term balloon-payment loan under § 1041.5.

2. *Application to rollovers.* The prohibitions in § 1041.5(d) apply to new covered short-term loans or covered longer-term balloon-payment loans under § 1041.5, as well as to loans that are a rollover of a prior loan (or what is termed a “renewal” in some States). Rollovers are defined as a matter of State law but typically involve deferral of repayment of the principal amount of a short-term loan for a period of time in exchange for a fee. In the event that a lender is permitted under State law to roll over a loan, the rollover would be treated as applicable as a new covered short-term loan or covered longer-term balloon-payment loan that, depending on when it occurs in the sequence, would be subject to the prohibitions in § 1041.5(d). For example, assume that a lender is permitted under applicable State law to roll over a covered short-term loan and the lender makes a covered short-term loan with \$500 in principal and a 14- day contractual duration. Assume that the consumer returns to the lender on day 14 (the repayment date of the first loan), the lender reasonably determines that the consumer has the ability to repay a new loan, and the consumer is offered the opportunity to roll over the first loan for an additional 14 days for a \$75 fee. The rollover would be the second loan in a loan sequence, as defined under § 1041.2(a)(14), because fewer than 30 days would have elapsed between consummation of the new covered short-term loan (the rollover) and the consumer having had a covered short-term loan made under § 1041.5 outstanding. Assume that the consumer returns on day 28 (the repayment date of the first rollover, i.e., the second loan in the sequence) and the lender again reasonably determines that the consumer has the ability to repay a new loan and offers to roll over the loan again for an additional 14 days for a \$75 fee. The second rollover would be the third loan in a loan sequence. If the consumer were to return on day 42 (the repayment date of the second rollover, which is the third loan in the sequence) and attempt to roll over the loan again, that rollover would be considered the fourth loan in the loan sequence. Therefore, that rollover would be prohibited and the consumer could not obtain another covered short-term loan or covered longer-term balloon-payment loan until the expiration of the 30-day cooling-off period, which begins after the consumer repays the second rollover (i.e., the third loan in the sequence).

(1) *Borrowing history review.* Prior to making a covered short-term loan or covered longer-term balloon-payment loan under this section, in order to determine whether any of the prohibitions in this subsection are applicable, a lender must obtain and review information about the consumer’s borrowing history from the records of the lender and its affiliates, and from a consumer report obtained from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or is registered with the Bureau pursuant to § 1041.11(d)(2), if available.

1. *Relationship to § 1041.5(c)(2)(ii)(B) and (C)*. A lender satisfies its obligation under § 1041.5(d)(1) to obtain a consumer report from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or is registered pursuant to § 1041.11(d)(2), if available, when it complies with the requirement in § 1041.5(c)(2)(ii)(B) and (C) to obtain this same consumer report.

2. Availability of information systems that have been registered for 180 days or more pursuant to § 1041.11(c)(2) or are registered pursuant to § 1041.11(d)(2). If no information systems that have been registered for 180 days or more pursuant to § 1041.11(c)(2) or are registered pursuant to § 1041.11(d)(2) are available at the time that the lender is required to obtain the information about the consumer's borrowing history, the lender is nonetheless required to obtain information about the consumer's borrowing history from the records of the lender and its affiliates and to obtain the consumer's statement about the amount and timing of payments of major financial obligations as required under § 1041.5(c)(2)(i)(B) (which would include information on current debt obligations including any outstanding covered loans). A lender may be unable to obtain a consumer report from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or that is registered pursuant to § 1041.11(d)(2) if, for example, all registered information systems are temporarily unavailable.

(2) *Prohibition on loan sequences of more than three covered short-term loans or covered longer-term balloon-payment loans made under § 1041.5*. A lender must not make a covered short-term loan or covered longer-term balloon-payment loan under § 1041.5 during the period in which the consumer has a covered short-term loan or covered longer-term balloon-payment loan made under § 1041.5 outstanding and for 30 days thereafter if the new covered short-term loan or covered longer-term balloon-payment loan would be the fourth loan in a sequence of covered short-term loans, covered longer-term balloon-payment loans, or a combination of covered short-term loans and covered longer-term balloon-payment loans made under § 1041.5.

1. *Prohibition*. Section 1041.5(d)(2) prohibits a lender from making a fourth covered short-term loan or covered longer-term balloon-payment loan under § 1041.5 in a loan sequence of covered short-term loans, covered longer-term balloon-payment loans, or a combination of covered short-term loans and covered longer-term balloon-payment loans made under § 1041.5. See § 1041.2(a)(14) for the definition of a loan sequence. 2. *Examples*. The following examples illustrate application of the prohibition under § 1041.5(d)(2):

i. Assume that a lender makes a covered short-term loan to a consumer under the requirements of § 1041.5 on February 1 with a contractual due date of February 15, the consumer repays the loan on February 15, and the consumer returns to the lender on March 1 for another loan. Assume that the second loan is a covered short-term loan with a contractual due date of March 15. The second loan would be part of the same loan sequence as the first loan because 30 or fewer days have elapsed since repayment of the first loan. Assume that the lender makes the second loan, the consumer repays the loan on March 15, and the consumer returns to the lender on April 1 for another loan. Assume that the third loan is a covered short-term loan with a contractual due date of April 15. The third loan would be part of the same loan sequence as the first and second loans because 30 or fewer days have elapsed since repayment of the second loan. Assume that the lender makes the third loan and the consumer repays the loan on April 15. Assume that all loans are reported to a registered information system. The consumer

would not be eligible for another covered short-term loan or covered longer-term balloon-payment loan under § 1041.5(d) from any lender until a 30-day cooling-off period following April 15 has elapsed, that is, starting on May 16. The consumer also would not be eligible for another covered short-term loan under § 1041.6 during the same 30-day cooling-off period. See § 1041.6(c)(2) and accompanying commentary.

ii. Assume that a lender makes a covered short-term loan to a consumer under the requirements of § 1041.5 on February 1 with a contractual due date of February 15, the consumer repays the loan on February 15, and the consumer returns to the lender on March 1 for another loan. Assume that the second loan is a covered longer-term balloon-payment loan that has biweekly installment payments followed by a final balloon payment on the contractual due date of May 1. The second loan would be part of the same loan sequence as the first loan because 30 or fewer days have elapsed since repayment of the first loan. Assume that the lender makes the second loan, the consumer repays the loan in full as of May 1, and the consumer returns to the lender on May 15 for another loan. Assume that the third loan is a covered short-term loan with a contractual due date of May 30. The third loan would be part of the same loan sequence as the first and second loans because 30 or fewer days have elapsed since repayment of the second loan. Assume that the lender makes the third loan and the consumer repays the loan on May 30. Assume that all loans are reported to a registered information system. The consumer would not be eligible to receive another covered short-term loan or covered longer-term balloon-payment loan under § 1041.5(d) from any lender until a 30-day cooling-off period following May 30 has elapsed, that is until after June 29. The consumer also would not be eligible for another covered 1630 short-term loan under § 1041.6 during the same 30-day cooling-off period. See § 1041.6(c)(2) and accompanying commentary.

(3) *Prohibition on making a covered short-term loan or covered longer-term balloon-payment loan under § 1041.5 following a covered short-term loan made under § 1041.6.* A lender must not make a covered short-term loan or covered longer-term balloon-payment loan under § 1041.5 during the period in which the consumer has a covered short-term loan made under § 1041.6 outstanding and for 30 days thereafter.

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

1. *General.* Section 1041.5(e) provides that a lender must not take any action with the intent of evading the requirements of § 1041.5. In determining whether a lender has taken action with the intent of evading the requirements of § 1041.5, 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 § 1041.5. If the lender's action is taken solely for legitimate business purposes, it is not taken with the intent of evading the requirements of § 1041.5. 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 § 1041.5. A lender action that is taken with the intent of evading the requirements of part 1041 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 § 1041.5, but fraud, deceit, or other unlawful or illegitimate activity is not a prerequisite to such a finding.

2. *Illustrative example—lender action that may have been taken with the intent of evading the requirements of the rule.* The following example illustrates a lender action that, depending on the relevant facts and circumstances, may have been taken with the intent of evading the requirements of § 1041.5 and thus may have violated § 1041.5(e):

i. A storefront payday lender makes covered short-term loans to consumers with a contractual duration of 14 days and a lump-sum repayment structure. The lender's policies and procedures provide for a standard loan contract including a "recurring late fee" as a lender remedy that is automatically triggered in the event of the consumer's delinquency (i.e., if the consumer does not pay the entire lump-sum amount on the contractual due date, with no grace period), and in the loan contract the consumer grants the lender authorization to initiate a recurring ACH in the event such remedy is triggered. Assume that the recurring late fee is to be paid biweekly while the loan remains outstanding and is substantially equal to or greater than the fee that the lender charges on transactions that are considered rollovers under applicable State law. The practice of imposing a recurring late fee by contract differs from the lender's prior practice of contacting the consumer on or about the contractual due date requesting that the consumer visit the store to discuss payment options including rollovers. Assume that as a matter of practice, if a consumer does not repay the first loan in a sequence when it is due, the lender charges recurring late fees for 60 days unless the consumer repays the outstanding balance. Such a period is roughly equivalent to two 14-day loan cycles or two rollovers following the initial loan in the sequence, plus a 30-day cooling-off period. See § 1041.5(d)(2) and related commentary. Depending on the relevant facts and circumstances, this action may have been taken with the intent of evading the requirements of § 1041.5. By charging the recurring late fee for 60 days after the initial loan was due, the lender avoided its obligation under § 1041.5(b) to make an ability-to-repay determination for the second and third loans in the sequence and to comply with the mandatory cooling-off period in § 1041.5(d)(2) after the third loan was no longer outstanding.

§ 1041.6 Conditional exemption for certain covered short-term loans.

(a) *Conditional exemption for certain covered short-term loans.* Sections 1041.4 and 1041.5 do not apply to a covered short-term loan that satisfies the requirements set forth in paragraphs (b) through (e) of this section. Prior to making a covered short-term loan under this section, a lender must review the consumer's borrowing history in its own records, the records of the lender's affiliates, and a consumer report from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or is registered with the Bureau pursuant to § 1041.11(d)(2). The lender must use this borrowing history information to determine a potential loan's compliance with the requirements in paragraphs (b) and (c) of this section.

1. *General.* Under § 1041.6(a), a lender that complies with § 1041.6(b) through (e) can make a covered short-term loan without complying with the otherwise applicable requirements under § 1041.5. A lender who complies with § 1041.6 in making a covered short-term loan has not committed the unfair and abusive practice under § 1041.4 and is not subject to § 1041.5. However, nothing in § 1041.6 provides lenders with an exemption to the requirements of other applicable laws, including subpart C of part 1041 and State laws.

2. *Obtaining consumer borrowing history information.* Under § 1041.6(a), the lender

must determine prior to making a covered short-term loan under § 1041.6 that requirements under § 1041.6(b) and (c) are satisfied. In particular, § 1041.6(a) requires the lender to obtain information about the consumer's borrowing history from the records of the lender and the records of the lender's affiliates. (This information about borrowing history with the lender and its affiliates is also important to help a lender avoid violations of § 1041.6(d)). Furthermore, § 1041.6(a) requires the lender to obtain a consumer report from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or is registered pursuant to § 1041.11(d)(2). If no information systems have been registered for 180 days or more pursuant to § 1041.11(c)(2) or are registered pursuant to § 1041.11(d)(2) and available as of the time the lender is required to obtain the report, the lender cannot comply with the requirements in § 1041.6(b) and (c). A lender may be unable to obtain such a consumer report if, for example: (i) no information systems have been registered for 180 days or more pursuant to § 1041.11(c)(2) or are registered pursuant to § 1041.11(d)(2); or (ii) if information systems have been registered for 180 days or more pursuant to § 1041.11(c)(2) or are registered pursuant to § 1041.11(d)(2) but all such registered information systems are temporarily unavailable. Under these circumstances, a lender cannot make a covered short-term loan under § 1041.6.

3. *Consumer reports.* A lender is not responsible for inaccurate or incomplete information contained in a consumer report from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or is registered pursuant to § 1041.11(d)(2).

(b) *Loan term requirements.* A covered short-term loan that is made under this section must satisfy the following requirements:

(1) The loan satisfies the following principal amount limitations, as applicable:

1. *Loan sequence.* Section 1041.2(a)(14) defines a loan sequence. For further clarification and examples regarding the definition of loan sequence, see § 1041.2(a)(14).

2. *Principal amount limitations—general.* For a covered short-term loan made under § 1041.6, different principal amount limitations apply under § 1041.6(b)(1) depending on whether the loan is the first, second, or third loan in a loan sequence. The principal amount limitations apply regardless of whether any or all of the loans are made by the same lender, an affiliate, or unaffiliated lenders. Under § 1041.6(b)(1)(i), for the first loan in a loan sequence, the principal amount must be no greater than \$500. Under § 1041.6(b)(1)(ii), for the second loan in a loan sequence, the principal amount must be no greater than two-thirds of the principal amount of the first loan in the loan sequence. Under § 1041.6(b)(1)(iii), for the third loan in a loan sequence, the principal amount must be no greater than one-third of the principal amount of the first loan in the loan sequence.

3. *Application to rollovers.* The principal amount limitations under § 1041.6 apply to rollovers of the first or second loan in a loan sequence as well as new loans that are counted as part of the same loan sequence. Rollovers are defined as a matter of State law but typically involve deferral of repayment of the principal amount of a short-term loan for a period of time in exchange for a fee. In the event the lender is permitted under State law to make rollovers, the lender may, in a manner otherwise consistent with applicable State law and § 1041.6, roll over a covered short-term loan made under § 1041.6, but the rollover would be treated as the next loan in the loan sequence, as applicable, and would therefore be subject to the principal amount limitations set forth in § 1041.6(b)(1) as well as other limitations in § 1041.6. For example, assume that a lender is permitted under applicable State law to make a rollover. If the consumer obtains a first

loan in a loan sequence under § 1041.6 with a principal amount of \$300, under § 1041.6(b)(1)(ii), the lender may allow the consumer to roll over that loan so long as the consumer repays at least \$100, so that the principal of the loan that is rolled over would be no greater than \$200. Similarly, under § 1041.6(b)(1)(iii), the lender may allow the consumer to roll over the second loan in the loan sequence as permitted by State law, so long as the consumer repays at least an additional \$100, so that the principal of the loan that is rolled over would be no greater than \$100.

4. *Example.* Assume that a consumer who otherwise satisfies the requirements of § 1041.6 seeks a covered short-term loan and that the lender chooses to make the loan without meeting all the specified underwriting criteria required in § 1041.5. Under § 1041.6(b)(1)(i), the principal amount of the loan must not exceed \$500. Assume that the consumer obtains a covered short-term loan under § 1041.6 with a principal amount of \$450, the loan is contractually due in 14 days, and the consumer repays the loan on the contractual due date. Assume that the consumer returns to the lender 10 days after the repayment of the first loan to take out a second covered short-term loan under § 1041.6. Under § 1041.6(b)(1)(ii), the principal amount of the second loan may not exceed \$300. Assume, further, that the consumer is then made a covered short-term loan under § 1041.6 with a principal amount of \$300, the loan is contractually due in 14 days, and the consumer repays the loan on the contractual due date. If the consumer returns to the lender 25 days after the repayment of the second loan to take out a third covered short-term loan under § 1041.6, under § 1041.6(b)(1)(iii), the principal amount of the third loan may not exceed \$150. These same limitations would apply if the consumer went to a different, unaffiliated lender for the second or third loan. If, however, the consumer does not return to the lender seeking a new loan under § 1041.6 until 32 days after the date on which the second loan in the loan sequence was repaid, the subsequent loan would not be part of the prior loan sequence and instead would be the first loan in a new loan sequence. Therefore, if otherwise permissible under § 1041.6, that loan would be subject to the \$500 principal amount limitation under § 1041.6(b)(1)(i).

- (i) For the first loan in a loan sequence of covered short-term loans made under this section, the principal amount is no greater than \$500.
 - (ii) For the second loan in a loan sequence of covered short-term loans made under this section, the principal amount is no greater than two-thirds of the principal amount of the first loan in the loan sequence.
 - (iii) For the third loan in a loan sequence of covered short-term loans made under this section, the principal amount is no greater than one-third of the principal amount of the first loan in the loan sequence.
- (2) The loan amortizes completely during the term of the loan and the payment schedule provides for the lender allocating a consumer's payments to the outstanding principal and interest and fees as they accrue only by applying a fixed periodic rate of interest to the outstanding balance of the unpaid loan principal during every scheduled repayment period for the term of the loan.
1. *Equal payments and amortization for loans with multiple payments.* Section 1041.6(b)(2) provides that for a loan with multiple payments, the loan must amortize completely during the term of the loan and the payment schedule must allocate a consumer's payments to the outstanding principal and interest and fees as they accrue only by applying a fixed periodic rate of interest to the outstanding balance of the unpaid loan principal during every repayment

period for the term of the loan. For example, if the loan has a contractual duration of 30 days with two scheduled biweekly payments, under § 1041.6(b)(2) the lender cannot require the consumer to pay interest only for the first scheduled biweekly payment and the full principal balance at the second scheduled biweekly payment. Rather, the two scheduled payments must be equal in amount and amortize over the course of the loan term in the manner required under § 1041.6(b)(2).

(3) The lender and any service provider do not take vehicle security as a condition of the loan, as defined in § 1041.2(a)(19).

1. Inapplicability of conditional exemption to a loan with vehicle security. Section 1041.6(b)(3) prohibits a lender from making a covered short-term loan under § 1041.6 with vehicle security. If the lender or its service provider take vehicle security in connection with a covered short-term loan, the loan must be originated in compliance with all of the requirements under § 1041.5, including the ability-to-repay determination.

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

1. Inapplicability of conditional exemption to an open-end loan. Section 1041.6(b)(4) prohibits a lender from making a covered short-term loan under § 1041.6 structured as an open-end loan under § 1041.2(a)(16). If a covered short-term loan is structured as an open-end loan, the loan must be originated in compliance with all of the requirements under § 1041.5.

(c) *Borrowing history requirements.* Prior to making a covered short-term loan under this section, the lender must determine that the following requirements are satisfied:

(1) The consumer has not had in the past 30 days an outstanding covered short-term loan under § 1041.5 or covered longer-term balloon-payment loan under § 1041.5;

1. *Preceding loans.* Section 1041.6(c)(1) provides that prior to making a covered short-term loan under § 1041.6, the lender must determine that more than 30 days has elapsed since the consumer had an outstanding loan that was either a covered short-term loan (as defined in § 1041.2(a)(10)) made under § 1041.5 or a covered longer-term balloon-payment loan (as defined in § 1041.2(a)(7)) made under § 1041.5. This requirement applies regardless of whether this prior loan was made by the same lender, an affiliate, or an unaffiliated lender. For example, assume that a lender makes a covered short-term loan to a consumer under § 1041.5, that the loan has a contractual duration of 14 days, and that the consumer repays the loan on the contractual due date. If the consumer returns for a second loan 20 days after repaying the loan, the lender cannot make a covered short-term loan under § 1041.6.

(2) The loan would not result in the consumer having a loan sequence of more than three covered short-term loans under this section; and

1. *Loan sequence limitation.* Section 1041.6(c)(2) provides that a lender cannot make a covered short-term loan under § 1041.6 if the loan would result in the consumer having a loan sequence of more than three covered short-term loans under § 1041.6 made by any lender. This requirement applies regardless of whether any or all of the loans in the loan sequence are made by the same lender, an affiliate, or unaffiliated lenders. See comments 6(b)(1)-1 and -2 for further clarification on the definition of loan sequence, as well as § 1041.2(a)(14) and accompanying commentary. For example, assume that a consumer obtains a covered short-term loan under the requirements of § 1041.6 on February 1 that has a contractual due date of February 15, that the consumer repays the loan on February 15, and that the consumer returns to the lender on March 1 for another loan under § 1041.6. The second loan under § 1041.6

would be part of the same loan sequence because 30 or fewer days have elapsed since repayment of the first loan. Assume that the lender makes the second loan with a contractual due date of March 15, that the consumer repays the loan on March 15, and that the consumer returns to the lender on April 1 for another loan under § 1041.6. The third loan under § 1041.6 would be part of the same loan sequence as the first and second loans because fewer than 30 days have elapsed since repayment of the second loan. Assume that the lender makes the third loan, which has a contractual due date of April 15 and that the consumer repays the loan on April 15. The consumer would not be permitted to receive another covered short-term loan under § 1041.6 until the 30-day period following April 15 has elapsed, that is until after May 15, assuming the other requirements under § 1041.6 are satisfied. The consumer would also be prohibited from obtaining other forms of credit from the same lender or its affiliate for 30 days under § 1041.6(d); see comment 6(d)-1. Loans that are rollovers count toward the sequence limitation under § 1041.6(c)(2). For further clarification on how the requirements of § 1041.6 apply to rollovers, see comment 6(b)(1)-3.

(3) The loan would not result in the consumer having during any consecutive 12-month period:

1. *Consecutive 12-month period.* Section 1041.6(c)(3) requires that a covered short-term loan made under § 1041.6 not result in the consumer having more than six covered short-term loans outstanding during a consecutive 12-month period or having covered short-term loans outstanding for an aggregate period of more than 90 days during a consecutive 12-month period. The consecutive 12-month period begins on the date that is 12 months prior to the proposed contractual due date of the new covered short-term loan to be made under § 1041.6 and ends on the proposed contractual due date. The lender must review the consumer's borrowing history on covered short-term loans for the 12 months preceding the consummation date of the new covered short-term loan less the period of proposed contractual indebtedness on that loan. For example, for a new covered short-term loan to be made under § 1041.6 with a proposed contractual term of 14 days, the lender must review the consumer's borrowing history during the 351 days preceding the consummation date of the new loan. The lender also must consider the making of the new loan and the days of proposed contractual indebtedness on that loan to determine whether the requirement under § 1041.6(c)(3) regarding the total number of covered short-term loans and total time of indebtedness on covered short-term loans during a consecutive 12-month period is satisfied.

(i) More than six covered short-term loans outstanding; or

1. *Total number of covered short-term loans.* Section 1041.6(c)(3)(i) provides that a lender cannot make a covered-short term loan under § 1041.6 if the loan would result in the consumer having more than six covered short-term loans outstanding in any consecutive 12-month period. The requirement counts covered short-term loans made under either § 1041.5 or § 1041.6 toward the limit. This requirement applies regardless of whether any or all of the loans subject to the limitations are made by the same lender, an affiliate, or an unaffiliated lender. Under § 1041.6(c)(3)(i), the lender must use the consumer's borrowing history to determine whether the loan would result in the consumer having more than six covered short-term loans outstanding during a consecutive 12-month period. A lender may make a loan that would comply with the requirement under § 1041.6(c)(3)(i) even if the six-loan limit would prohibit the consumer from taking out one or two subsequent loans in the sequence.

2. Example. Assume that a lender seeks to make a covered short-term loan to a consumer under § 1041.6 with a contractual duration of 14 days. Assume, further, that the lender determines that during the past 30 days the consumer has not had an outstanding covered short-term loan and that during the 351 days preceding the consummation date of the new loan the consumer had outstanding a total of five covered short-term loans. The new loan would be the sixth covered short-term loan that was outstanding during a consecutive 12-month period. Therefore, the loan would comply with the requirement regarding the aggregate number of covered short-term loans under § 1041.6. Because the consumer has not had an outstanding covered short-term loan in the preceding 30 days, this loan would be the first loan in a new loan sequence. Assume that a week after repaying this first loan the consumer seeks another covered short-term loan under § 1041.6, also with a contractual duration of 14 days. Under § 1041.6(c)(3)(i), this second loan in the loan sequence cannot be made if it would result in the consumer taking out more than six covered short-term loans in the 351 days preceding the proposed consummation date of this loan.

(ii) Covered short-term loans outstanding for an aggregate period of more than 90 days.

1. *Aggregate period of indebtedness.* Section 1041.6(c)(3)(ii) provides that a lender cannot make a covered short-term loan under § 1041.6 if the loan would result in the consumer having covered short-term loans outstanding for an aggregate period of more than 90 days in any consecutive 12-month period. In addition to the proposed contractual duration of the new loan, the aggregate period in which all covered short-term loans made to the consumer during the consecutive 12-month period under either § 1041.5 or § 1041.6 were outstanding is counted toward the limit. This requirement applies regardless of whether any or all of the covered short-term loans are made by the same lender, an affiliate, or an unaffiliated lender. Under § 1041.6(c)(3)(ii), the lender must use the information it has obtained about the consumer's borrowing history to determine whether the loan would result in the consumer having covered short-term loans outstanding for an aggregate period of more than 90 days during a consecutive 12-month period. A lender may make a loan that would comply with the requirement under § 1041.6(c)(3)(ii) even if the 90-day limit would prohibit the consumer from taking out one or two subsequent loans in the sequence.

2. *Example.* Assume that Lender A seeks to make a covered short-term loan under § 1041.6 with a contractual duration of 14 days. Assume, further, that Lender A determines that during the past 30 days the consumer did not have an outstanding covered short-term loan and that during the 351 days preceding the consummation date of the new loan the consumer had outstanding three covered short-term loans made by Lender A and a fourth covered short-term loan made by Lender B. Assume that each of the three loans made by Lender A had a contractual duration of 14 days and that the loan made by Lender B had a contractual duration of 30 days, for an aggregate total of 72 days of contractual indebtedness. Assume, further, that the consumer repaid each loan on its contractual due date. The new loan, if made, would result in the consumer having covered short-term loans outstanding for an aggregate period of 86 days during the consecutive 12-month period. Therefore, the loan would comply with the requirement regarding aggregate time of indebtedness. Because the consumer has not had an outstanding covered short-term loan in the preceding 30 days, this loan would be the first loan in a new loan sequence. Assume that

a week after repaying this first loan the consumer seeks another covered short-term loan under § 1041.6, also with a contractual duration of 14 days. Under § 1041.6(c)(3)(ii), this second loan in the loan sequence cannot be made if it would result in the consumer being in debt on covered short-term loans for more than 90 days in the 351 days preceding the proposed consummation date of this loan.

(d) ***Restrictions on making certain covered loans and non-covered loans following a covered short-term loan made under the conditional exemption.*** If a lender makes a covered short-term loan under this section to a consumer, the lender or its affiliate must not subsequently make a covered loan, except a covered short-term loan made in accordance with the requirements in § 1041.6, or a non-covered loan to the consumer while the covered short-term loan made under this section is outstanding and for 30 days thereafter.

1. *General.* If a lender makes a covered short-term loan under § 1041.6 to a consumer, § 1041.6(d) prohibits the lender or its affiliate from making a covered short-term loan under § 1041.5, a covered longer-term balloon payment loan under § 1041.5, a covered longer-term loan, or a non-covered loan to the consumer while the covered short-term loan made under § 1041.6 is outstanding and for 30 days thereafter. During this period, a lender or its affiliate could make a subsequent covered short-term loan in accordance with the requirements in § 1041.6.

2. *Example.* Assume that a lender makes both covered short-term loans under § 1041.6 and non-covered installment loans. Assume, further, that the lender makes on April 1 a covered short-term loan under § 1041.6 to a consumer who has not obtained a covered short-term loan under § 1041.6 in the previous 30 days. Assume that the consumer repays this loan on April 15 and that the consumer returns to the lender on April 30 to seek a non-covered installment loan. Because 30 days have not elapsed since the consumer repaid the loan made under § 1041.6, neither the lender nor its affiliate can make a non-covered installment loan to the consumer on April 30. May 16 is the earliest the lender or its affiliate could make a non-covered installment loan to the consumer. The prohibition in § 1041.6(d) applies to covered short-term loans and covered longer-term balloon payment loans made under § 1041.5 but not to covered short-term loans made under § 1041.6. Section 1041.6(d) would, therefore, not prohibit the consumer from obtaining an additional covered short-term loan under § 1041.6 from the same lender or its affiliate on April 30, provided that such loan complies with the principal amount reduction and other requirements of § 1041.6. The prohibition in § 1041.6(d) on making subsequent noncovered loans applies only to a lender and its affiliates. Section 1041.6(d) would, therefore, not prohibit the consumer from obtaining on April 30 a non-covered installment loan from a lender not affiliated with the lender that made the covered short-term loan on April 1.

(e) **Disclosures.**

(1) ***General form of disclosures.***

1. *General.* Section 1041.6(e) sets forth two main disclosure requirements related to a loan made under the requirements in § 1041.6. The first, set forth in § 1041.6(e)(2)(i), is a notice of the restriction on the principal amount on the loan and restrictions on the number of future loans and the principal amounts of such loans, which is required to be provided to a consumer when the consumer seeks the first loan in a sequence of covered short-term loans made under § 1041.6. The second, set forth in § 1041.6(e)(2)(ii), is a notice of the restriction on the principal amount on the loan and the prohibition on another similar loan for at least 30 days after the

loan is repaid, which is required to be provided to a consumer when the consumer seeks the third loan in a sequence of covered short-term loans made under § 1041.6.

- (i) *Clear and conspicuous.* Disclosures required by this paragraph (e) must be clear and conspicuous. Disclosures required by this section may contain commonly accepted or readily understandable abbreviations.
 - 1. *Clear and conspicuous standard.* Disclosures are clear and conspicuous for purposes of § 1041.6(e) if they are readily understandable by the consumer and their location and type size are readily noticeable to the consumer.
- (ii) *In writing or electronic delivery.* Disclosures required by this paragraph (e) must be provided in writing or through electronic delivery. The disclosures must be provided in a form that can be viewed on paper or a screen, as applicable. This provision is not satisfied by a disclosure provided orally or through a recorded message.
 - 1. *General.* Section 1041.6(e)(1)(ii) requires that disclosures required by § 1041.6 be provided to the consumer in writing or through electronic delivery.
 - 2. *E-Sign Act requirements.* The notices required by § 1041.6(e)(2)(i) and (e)(2)(ii) may be provided to the consumer in electronic form without regard to the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 et seq.).
- (iii) *Retainable.* Disclosures required by this paragraph (e) must be provided in a retainable form.
 - 1. *General.* Electronic disclosures are retainable for purposes of § 1041.6(e) if they are in a format that is capable of being printed, saved, or emailed by the consumer.
- (iv) *Segregation requirements for notices.* Notices required by this paragraph (e) 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 paragraph (e) must not be displayed above, below, or around the required content.
 - 1. *Segregated additional content.* Although segregated additional content that is not required by this section may not appear above, below, or around the required content, this additional content may be delivered through a separate form, such as a separate piece of paper or web page.
- (v) *Machine readable text in notices provided through electronic delivery.* If provided through electronic delivery, the notices required by paragraphs (e)(2)(i) and (ii) of this section must use machine readable text that is accessible via both web browsers and screen readers.
- (vi) *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 consistent with section 1032(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5481, et seq.)
 - (A) *First loan notice.* The content, order, and format of the notice required by paragraph (e)(2)(i) of this section must be substantially similar to Model Form A-1 in appendix A to this part.
 - (B) *Third loan notice.* The content, order, and format of the notice required by paragraph (e)(2)(ii) of this section must be substantially similar to Model Form A-2 in appendix A to this part.

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

(2) *Notice requirements—*

(i) *First loan notice.* A lender that makes a first loan in a sequence of loans made under this section must provide to a consumer a notice that includes, as applicable, the following information and statements, using language substantially similar to the language set forth in Model Form A-1 in appendix A to this part:

1. *As applicable standard.* Due to the requirements in § 1041.6(c)(3), a consumer may not be eligible to complete a three-loan sequence of covered short-term loans under § 1041.6 because additional loans within 30 days of the expected pay-off date for the first loan would violate one or more provisions of § 1041.6(c)(3). Such a consumer may be permitted to obtain only one or two loans in a sequence of covered short-term loans under § 1041.6, as applicable. Under these circumstances, § 1041.6(e)(2)(i) would require the lender to modify the notice in § 1041.6(e)(2)(i) to reflect these limitations on subsequent loans. For example, if a consumer can receive only a sequence of two covered short-term loans under § 1041.6 because of the requirements in § 1041.6(c)(3), the lender would have to modify the notice to list the maximum principal amount on loans 1 and 2 and to indicate that loan 3 would not be permitted.

(A) *Identifying statement.* The statement "Notice of restrictions on future loans," using that phrase.

(B) *Warning for loan made under this section.*

(1) *Possible inability to repay.* A statement that warns the consumer not to take out the loan if the consumer is unsure of being able to repay the total amount of principal and finance charges on the loan by the contractual due date.

(2) *Contractual due date.* Contractual due date of the loan made under this section.

(3) *Total amount due.* Total amount due on the contractual due date.

(C) *Restriction on a subsequent loan required by Federal law.* A statement that informs a consumer that Federal law requires a similar loan taken out within the next 30 days to be smaller.

(D) *Borrowing limits.* In a tabular form:

(1) Maximum principal amount on loan 1 in a sequence of loans made under this section.

(2) Maximum principal amount on loan 2 in a sequence of loans made under this section.

(3) Maximum principal amount on loan 3 in a sequence of loans made under this section.

(4) Loan 4 in a sequence of loans made under this section is not allowed.

(E) *Lender name and contact information.* Name of the lender and a telephone number for the lender and, if applicable, a URL of the website for the lender.

(ii) *Third loan notice.* A lender that makes a third loan in a sequence of loans made under this section must provide to a consumer a notice that includes the following information and statements, using language substantially similar to the language set forth in Model Form A-2 in appendix A to this part:

- (A) *Identifying statement.* The statement “Notice of borrowing limits on this loan and future loans,” using that phrase.
 - (B) *Two similar loans without 30-day break.* A statement that informs a consumer that the lender’s records show that the consumer has had two similar loans without taking at least a 30-day break between them.
 - (C) *Restriction on loan amount required by Federal law.* A statement that informs a consumer that Federal law requires the third loan to be smaller than previous loans in the loan sequence.
 - (D) *Prohibition on subsequent loan.* A statement that informs a consumer that the consumer cannot take out a similar loan for at least 30 days after repaying the loan.
 - (E) *Lender name and contact information.* Name of the lender and a telephone number for the lender and, if applicable, a URL of the website for the lender.
- (3) *Timing.* A lender must provide the notices required in paragraphs (e)(2)(i) and (e)(2)(ii) of this section to the consumer before the applicable loan under § 1041.6 is consummated.
1. *General.* Section 1041.6(e)(3) requires a lender to provide the notices required in § 1041.6(e)(2)(i) and (ii) to the consumer before the applicable covered short-term loan under § 1041.6 is consummated. For example, a lender can provide the notice after a consumer has completed a loan application but before the consumer has signed the loan agreement. A lender would not have to provide the notices to a consumer who inquires about a covered short-term loan under § 1041.6 but does not fill out an application to obtain this type of loan.
 2. *Electronic notices.* If a lender delivers a notice required by this section electronically in accordance with § 1041.6(e)(1)(ii), § 1041.6(e)(3) requires a lender to provide the electronic notice to the consumer before a covered short-term loan under § 1041.6 is consummated. Specifically, § 1041.6(e)(3) requires a lender to present the retainable notice to the consumer before the consumer is contractually obligated on the loan. To comply with § 1041.6(e)(3), a lender could, for example, display a screen on a web browser with the notices required in § 1041.6(e)(2)(i) and (ii), provided the screen can be emailed, printed, or saved, before the covered short-term loan under § 1041.6 has been consummated.

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.

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.

§ 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.

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 purportedly 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.
- (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).**
 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.
 - (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.**
 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.

- (C) Remotely created check as defined in Regulation CC, 12 CFR 229.2(fff).
- (D) Remotely created payment order as defined in 16 CFR 310.2(cc).
- (E) When the lender is also the account-holder, an account-holding institution's transfer of funds from a consumer's account held at the same institution, other than such a transfer meeting the description in paragraph (a)(1)(ii) of this section.

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.

- (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.

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 § 1648 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)(i).

- (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.**

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

(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.

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.

(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.

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.

(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.

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. 1650 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.

(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.

(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.

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.

(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.

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).

(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.

(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.

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.

(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.

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.

(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 re-

presenting 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 specifies the highest amount for such fees that may be charged and the payment channel to be used.

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.

(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 statements required by paragraph (c)(2)(iii) of this section. The lender may provide the terms and statements to the consumer by any one of the following means:

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 required by § 1041.9(c). For the exception in § 1041.8(c)(2) 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.

(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 statements by email in the course of a communication initiated by the consumer in response to the consumer rights notice required by § 1041.9(c).

1. *Request by email.* Under § 1041.8(c)(3)(ii)(A), a lender is permitted to provide the required terms and statements 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 statements 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 statements 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 statements. The required terms and statements 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 e-mail 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.

- (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 statements in that manner in the course of, and as part of, the same communication.

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 statements 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 statements by that method of delivery 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 statements required by paragraph (c)(2)(iii) of this section. The signed authorization must be obtained from the consumer 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.

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

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).

(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:

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). 1662

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.

- (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.

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 part 1041 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 the effective date of the rule that is codified in 12 CFR part 1041. 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, resulting 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.

§ 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.

(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.
 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.
- (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 provision is not satisfied by a disclosure provided orally or through a recorded message.
 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 (ESign Act) (15 U.S.C. 7001 et seq.)
- (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.
 1. *General.* Electronic disclosures, to the extent permitted by § 1041.9(a)(4), are 1665 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.

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

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.

(i) *Consumer consent—*

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.

(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.

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).

(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:

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 disclosures 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).

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

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.

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

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.

(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.

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.

(6) *Machine readable text in notices provided through electronic delivery.* If provided through electronic delivery, the payment notice required by paragraph (b) 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—*

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.

- (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).

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 9(b)(1)(ii).

2. *First payment withdrawal is determined when the loan is in covered status.* As discussed in comments 3(b)(3)-1 and -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 part 1041 is the first payment withdrawal. For example, consider a loan that is not considered covered at the time of origination. If the lender initiates a payment withdrawal during the first and second billing cycles and the loan becomes covered at the end of the second cycle, any lender initiated payment during the third billing cycle is considered a first payment withdrawal under this section.

3. *Intervening payments.* Unscheduled intervening payments do not change the determination of first payment withdrawal for purposes of the notice requirement. For example, a lender originates a loan on April 1, with a payment scheduled to be withdrawn on May 1. At origination, the lender provides the consumer with a first payment withdrawal notice for May 1. On April 28, the consumer makes the payment due on May 1 in cash. The lender does not initiate a withdrawal on May 1. The lender initiates a withdrawal for the next scheduled payment June 1. The lender satisfied its notice obligation with the notice provided at origination, so it is not required to send a first payment notice in connection with the June 1 payment although it may have to send an unusual payment notice if the transfer meets one of the conditions in § 1041.9(b)(3)(ii)(C).

(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

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.

(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.*

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.

(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.

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.

(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.

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, June 1, the lender may

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

- (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.

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).

- (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.

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.

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

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.

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

(7) *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.

(8) *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.*

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

(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 plans.* If the unusual withdrawal notice is for an open-end credit plan 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:

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).

(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. *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 plans, circumstances that trigger an unusual withdrawal for these plans are more limited according to § 1041.9(b)(3)(ii)(C)(1)(ii). Because the outstanding balance on open-end credit plans may change over time, the minimum payment due on the scheduled payment date may also fluctuate. However, the minimum payment amount due for these open-end credit plans 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 an open-end credit plan 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.

(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 plans*. If the payment transfer is for an open-end credit plan 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 reinitiating 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.

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.

- (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;

- 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

1041.9(b)(3)(ii)(A) must be provided in both the email subject line and the body of the email.

(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;

(3) *Website URL.* When the full notice is being provided through a linked URL rather than as a pdf attachment, the unique URL of a website 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.

(iv) *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 webpage 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 following requirements:

(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.

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.

(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:

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.

- (i) *Identifying statement*. A statement that the lender, identified by name, is no longer permitted to withdraw loan 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.consumerfinance.gov/payday-rule]. 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) 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) *Website URL*. When the full notice is being provided through a linked URL rather than as a PDF attachment, the unique URL of a website that the consumer may use to access the full consumer rights notice required by paragraph (c) 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 (c)(1) of this section in the body of the email or deliver the full notice as a linked URL webpage or PDF attachment along with the electronic short notice as provided in paragraph (c)(4)(ii) of this section.

Subpart D—Information Furnishing, Recordkeeping, Anti-Evasion, and Severability

§ 1041.10 Information furnishing requirements.

- (a) *Loans subject to furnishing requirement*. For each covered short-term loan and covered longer-term balloon-payment loan a lender makes, the lender must furnish the loan information described in paragraph (c) of this section to each information system described in paragraph (b)(1) of this section.
1. *Application to rollovers*. The furnishing requirements in § 1041.10(a) apply to each covered short-term loan or covered longer-term balloon-payment loan a lender makes, as well as to loans that are a rollover of a prior covered short-term loan or covered longer-term balloon-payment loan (or what is termed a “renewal” in some States). Rollovers are defined as a matter of State law but typically involve deferral of repayment of the principal amount of a short-term loan for a period of time in exchange for a fee. In the event that a lender is permitted under State law to roll over a covered short-term loan or covered longer-term balloon-payment loan and does so in accordance with the requirements of § 1041.5 or § 1041.6, the rollover would be treated, as applicable, as a new covered short-term loan or as a new covered longer-term balloon-payment loan for purposes of § 1041.10. For example, assume that a lender is permitted under applicable State law to roll over a covered short-term loan; the lender makes a covered short-term loan with a 14-day contractual duration; and on day 14 the lender reasonably determines that the consumer has the ability to repay a new loan under § 1041.5 and offers the consumer the opportunity to roll over the first loan for an additional 14 days. If the consumer accepts the rollover, the lender would report the original loan as no longer outstanding and would report the rollover as a new covered short-term loan.
 2. *Furnishing through third parties*. Section 1041.10(a) requires that, for each covered short-term loan and covered longer-term balloon loan a lender makes, the lender must furnish the information concerning the loan described in § 1041.10(c) to each information system described in § 1041.10(b). A lender may furnish information to a registered information system directly, or may furnish through a third party acting on its behalf, including a registered information system.

(b) Information systems to which information must be furnished.

1. *Provisional registration and registration of information system while loan is outstanding.* Pursuant to § 1041.10(b)(1), a lender is only required to furnish information about a covered loan to an information system that, at the time the loan is consummated, has been registered pursuant to § 1041.11(c)(2) for 180 days or more or has been provisionally registered pursuant to § 1041.11(d)(1) for 180 days or more or subsequently has become registered pursuant to § 1041.11(d)(2). For example, if an information system is provisionally registered on March 1, 2020, the obligation to furnish information to that system begins on August 28, 2020, 180 days from the date of provisional registration. A lender is not required to furnish information about a loan consummated on August 27, 2020 to an information system that became provisionally registered on March 1, 2020.

2. *Preliminary approval.* Section 1041.10(b) requires that lenders furnish information to information systems that are provisionally registered pursuant to § 1041.11(d)(1) and information systems that are registered pursuant to § 1041.11(c)(2) or § 1041.11(d)(2). Lenders are not required to furnish information to entities that have received preliminary approval for registration pursuant to § 1041.11(c)(1) but are not registered pursuant to § 1041.11(c)(2).

(1) A lender must furnish information as required in paragraphs (a) and (c) of this section to each information system that, as of the date the loan is consummated:

- (i) Has been registered with the Bureau pursuant to § 1041.11(c)(2) for 180 days or more; or
- (ii) Has been provisionally registered with the Bureau pursuant to § 1041.11(d)(1) for 180 days or more or subsequently has become registered with the Bureau pursuant to § 1041.11(d)(2).

(2) The Bureau will publish on its website and in the Federal Register notice of the provisional registration of an information system pursuant to § 1041.11(d)(1), registration of an information system pursuant to § 1041.11(c)(2) or (d)(2), and suspension or revocation of the provisional registration or registration of an information system pursuant to § 1041.11(h). For purposes of paragraph (b)(1) of this section, an information system is provisionally registered or registered, and its provisional registration or registration is suspended or revoked, on the date that the Bureau publishes notice of such provisional registration, registration, suspension, or revocation on its website. The Bureau will maintain on the Bureau's website a current list of information systems provisionally registered pursuant to § 1041.11(d)(1) and registered pursuant to § 1041.11(c)(2) and (d)(2). In the event that a provisional registration or registration of an information system is suspended, the Bureau will provide instructions on its website concerning the scope and terms of the suspension or revocation.

(c) Information to be furnished. A lender must furnish the information described in this paragraph, at the times described in this paragraph, concerning each covered loan as required in paragraphs (a) and (b) of this section. A lender must furnish the information in a format acceptable to each information system to which it must furnish information.

1. *Deadline for furnishing under § 1041.10(c)(1) and (3).* Section 1041.10(c)(1) requires that a lender furnish specified information no later than the date on which the loan is consummated or as close in time as feasible to the date the loan is consummated. Section 1041.10(c)(3) requires that a lender furnish specified information no later than the date the loan ceases to be an outstanding loan or as close in time as feasible to the date the loan ceases to be an outstanding loan. Under each of § 1041.10(c)(1) and (3), if it is feasible to report on the specified date (such as the consummation date), the specified date is the date by which the information must be furnished.

- (1) *Information to be furnished at loan consummation.* A lender must furnish the following information no later than the date on which the loan is consummated or as close in time as feasible to the date the loan is consummated:
1. *Type of loan.* Section 1041.10(c)(1)(iii) requires that a lender furnish information that identifies a covered loan as either a covered short-term loan or a covered longer-term balloon-payment loan. For example, a lender must identify a covered short-term loan as a covered short-term loan.
 2. *Whether a loan is made under § 1041.5 or § 1041.6.* Section 1041.10(c)(1)(iv) requires that a lender furnish information that identifies a covered loan as made under § 1041.5 or made under § 1041.6. For example, a lender must identify a loan made under § 1041.5 as a loan made under § 1041.5.
- (i) Information necessary to uniquely identify the loan;
 - (ii) Information necessary to allow the information system to identify the specific consumer(s) responsible for the loan;
 - (iii) Whether the loan is a covered short-term loan or a covered longer-term balloon-payment loan;
 - (iv) Whether the loan is made under § 1041.5 or § 1041.6, as applicable;
 - (v) The loan consummation date;
 - (vi) For a loan made under § 1041.6, the principal amount borrowed;
 - (vii) For a loan that is closed-end credit:
 - (A) The fact that the loan is closed-end credit;
 - (B) The date that each payment on the loan is due; and
 - (C) The amount due on each payment date.
 - (viii) For a loan that is open-end credit:
 - (A) The fact that the loan is open-end credit;
 - (B) The credit limit on the loan;
 - (C) The date that each payment on the loan is due; and
 - (D) The minimum amount due on each payment date.
- (2) *Information to be furnished while loan is an outstanding loan.* During the period that the loan is an outstanding loan, a lender must furnish any update to information previously furnished pursuant to this section within a reasonable period of the event that causes the information previously furnished to be out of date.
1. *Examples.* Section 1041.10(c)(2) requires that, during the period that the loan is an outstanding loan, a lender must furnish any update to information previously furnished pursuant to § 1041.10 within a reasonable period of the event that causes the information previously furnished to be out of date. Information previously furnished can become out of date due to changes in the loan terms or due to actions by the consumer. For example, if a lender extends the term of a closed-end loan, § 1041.10(c)(2) would require the lender to furnish an update to the date that each payment on the loan is due, previously furnished pursuant to § 1041.10(c)(1)(vii)(B), and to the amount due on each payment date, previously furnished pursuant to § 1041.10(c)(1)(vii)(C), to reflect the updated payment dates and amounts. If the amount or minimum amount due on future payment dates changes because the consumer fails to pay the amount due on a scheduled payment date, § 1041.10(c)(2) would require the lender to furnish an update to the amount or minimum amount due on each payment date, previously

furnished pursuant to § 1041.10(c)(1)(vii)(C) or (c)(1)(viii)(D), as applicable, to reflect the updated amount or minimum amount due on each payment date. However, if a consumer makes payment on a closed-end loan as agreed and the loan is not modified to change the dates or amounts of future payments on the loan, § 1041.10(c)(2) would not require the lender to furnish an update to information concerning the date that each payment on the loan is due, previously furnished pursuant to § 1041.10(c)(1)(vii)(B), or the amount due on each payment date, previously furnished pursuant to § 1041.10(c)(1)(vii)(C). Section 1041.10(c)(2) does not require a lender to furnish an update to reflect that a payment was made.

2. Changes to information previously furnished pursuant to § 1041.10(c)(2). Section 1041.10(c)(2) requires that, during the period that the loan is an outstanding loan, a lender must furnish any update to information previously furnished pursuant to § 1041.10(c)(2) within a reasonable period of the event that causes the information previously furnished to be out of date. This requirement extends to information previously furnished pursuant to § 1041.10(c)(2). For example, if a lender furnishes an update to the amount or minimum amount due on each payment date, previously furnished pursuant to § 1041.10(c)(1)(vii)(C) or (c)(1)(viii)(D), as applicable, and the amount or minimum amount due on each payment date changes again after the update, § 1041.10(c)(2) requires that the lender must furnish an update to the information previously furnished pursuant to § 1041.10(c)(2).

- (3) *Information to be furnished when loan ceases to be an outstanding loan.* A lender must furnish the following information no later than the date the loan ceases to be an outstanding loan or as close in time as feasible to the date the loan ceases to be an outstanding loan:
- (i) The date as of which the loan ceased to be an outstanding loan; and
 - (ii) Whether all amounts owed in connection with the loan were paid in full, including the amount financed, charges included in the cost of credit, and charges excluded from the cost of credit.

§ 1041.11 Registered information systems.

(a) *Definitions.*

- (1) *Consumer report* has the same meaning as in section 603(d) of the Fair Credit Reporting Act, 15 U.S.C. 1681a(d).
- (2) *Federal consumer financial law* has the same meaning as in section 1002(14) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5481(14).

(b) *Eligibility criteria for information systems.* An entity is eligible to be a provisionally registered information system pursuant to paragraph (d)(1) of this section or a registered information system pursuant to paragraph (c)(2) or (d)(2) of this section only if the Bureau determines that the following conditions are satisfied:

- (1) *Receiving capability.* The entity possesses the technical capability to receive information lenders must furnish pursuant to § 1041.10 immediately upon the furnishing of such information and uses reasonable data standards that facilitate the timely and accurate transmission and processing of information in a manner that does not impose unreasonable costs or burdens on lenders.
- (2) *Reporting capability.* The entity possesses the technical capability to generate a consumer report containing, as applicable for each unique consumer, all information described in § 1041.10 substantially simultaneous to receiving the information from a lender.

1. *Timing.* To be eligible for provisional registration or registration, an entity must possess the technical capability to generate a consumer report containing, as applicable for each unique consumer, all information described in § 1041.10 substantially simultaneous to receiving the information from a lender. Technological limitations may cause some slight delay in the appearance on a consumer report of the information furnished pursuant to § 1041.10, but any delay must be reasonable.

(3) *Performance.* The entity will perform or performs in a manner that facilitates compliance with and furthers the purposes of this part.

1. *Relationship with other law.* To be eligible for provisional registration or registration, an entity must perform in a manner that facilitates compliance with and furthers the purposes of part 1041. However, this requirement does not supersede consumer protection obligations imposed upon a provisionally registered or registered information system by other Federal law or regulation. For example, the Fair Credit Reporting Act requires that, “[w]hen a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.” 15 U.S.C. 1681e(b). If including information furnished pursuant to § 1041.10 in a consumer report would cause a provisionally registered or registered information system to violate this requirement, § 1041.11(b)(3) would not require that the information be included in a consumer report.

2. *Evidence of ability to perform in a manner that facilitates compliance with and furthers the purposes of this part.* Section 1041.11(c)(1) requires that an entity seeking preliminary approval to be a registered information system must submit an application to the Bureau containing information sufficient for the Bureau to determine that the entity is reasonably likely to satisfy the conditions set forth in § 1041.11(b). Section 1041.11(c)(2) and (d)(1) requires that an entity seeking to be a registered information system or a provisionally registered information system must submit an application that contains information and documentation sufficient for the Bureau to determine that the entity satisfies the conditions set forth in § 1041.11(b). In evaluating whether an applicant is reasonably likely to satisfy or satisfies the requirement set forth in § 1041.11(b)(3), the Bureau will consider the extent to which an applicant has experience functioning as a consumer reporting agency.

(4) *Federal consumer financial law compliance program.* The entity has developed, implemented, and maintains a program reasonably designed to ensure compliance with all applicable Federal consumer financial laws, which includes written policies and procedures, comprehensive training, and monitoring to detect and to promptly correct compliance weaknesses.

1. *Policies and procedures.* To be eligible for provisional registration or registration, an entity must have policies and procedures that are documented in sufficient detail to implement effectively and maintain its Federal consumer financial law compliance program. The policies and procedures must address compliance with applicable Federal consumer financial laws in a manner reasonably designed to prevent violations and to detect and prevent associated risks of harm to consumers. The entity must also maintain and modify, as needed, the policies and procedures so that all relevant personnel can reference them in their day-to-day activities.

2. *Training.* To be eligible for provisional registration or registration, an entity must provide specific, comprehensive training to all relevant personnel that reinforces and helps implement written policies and procedures. Requirements for compliance with Federal consumer financial

laws must be incorporated into training for all relevant officers and employees. Compliance training must be current, complete, directed to appropriate individuals based on their roles, effective, and commensurate with the size of the entity and nature and risks to consumers presented by its activity. Compliance training also must be consistent with written policies and procedures and designed to enforce those policies and procedures.

3. *Monitoring.* To be eligible for provisional registration or registration, an entity must implement an organized and risk-focused monitoring program to promptly identify and correct procedural or training weaknesses so as to provide for a high level of compliance with Federal consumer financial laws. Monitoring must be scheduled and completed so that timely corrective actions are taken where appropriate.

(5) *Independent assessment of Federal consumer financial law compliance program.* The entity provides to the Bureau in its application for provisional registration or registration a written assessment of the Federal consumer financial law compliance program described in paragraph (b)(4) of this section and such assessment:

1. *Assessor qualifications.* An objective and independent third-party individual or entity is qualified to perform the assessment required by § 1041.11(b)(5) if the individual or entity has substantial experience in performing assessments of a similar size, scope, or subject matter; has substantial expertise in both the applicable Federal consumer financial laws and in the entity's or information system's business; and has the appropriate professional qualifications necessary to perform the required assessment adequately.

2. *Written assessment.* A written assessment described in § 1041.11(b)(5) need not conform to any particular format or style as long as it succinctly and accurately conveys the required information.

- (i) Sets forth a detailed summary of the Federal consumer financial law compliance program that the entity has implemented and maintains;
- (ii) Explains how the Federal consumer financial law compliance program is appropriate for the entity's size and complexity, the nature and scope of its activities, and risks to consumers presented by such activities;
- (iii) Certifies that, in the opinion of the assessor, the Federal consumer financial law compliance program is operating with sufficient effectiveness to provide reasonable assurance that the entity is fulfilling its obligations under all Federal consumer financial laws; and
- (iv) Certifies that the assessment has been conducted by a qualified, objective, independent third-party individual or entity that uses procedures and standards generally accepted in the profession, adheres to professional and business ethics, performs all duties objectively, and is free from any conflicts of interest that might compromise the assessor's independent judgment in performing assessments.

(6) *Information security program.* The entity has developed, implemented, and maintains a comprehensive information security program that complies with the Standards for Safeguarding Customer Information, 16 CFR part 314.

(7) *Independent assessment of information security program.*

1. *Periodic assessments.* Section 1041.11(b)(7) requires that, to maintain its registration, an information system must obtain and provide to the Bureau, on at least a biennial basis, a written assessment of the information security program described in § 1041.11(b)(6). The period covered by each assessment obtained and provided to the Bureau to satisfy this requirement

must commence on the day after the last day of the period covered by the previous assessment obtained and provided to the Bureau.

2. *Assessor qualifications.* Professionals qualified to conduct assessments required under § 1041.11(b)(7) include: a person qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security (SANS) Institute; and an individual or entity with a similar qualification or certification.

3. *Written assessment.* A written assessment described in § 1041.11(b)(7) need not conform to any particular format or style as long as it succinctly and accurately conveys the required information.

- (i) The entity provides to the Bureau in its application for provisional registration or registration and on at least a biennial basis thereafter, a written assessment of the information security program described in paragraph (b)(6) of this section and such assessment:
 - (A) Sets forth the administrative, technical, and physical safeguards that the entity has implemented and maintains;
 - (B) Explains how such safeguards are appropriate to the entity's size and complexity, the nature and scope of its activities, and the sensitivity of the customer information at issue;
 - (C) Explains how the safeguards that have been implemented meet or exceed the protections required by the Standards for Safeguarding Customer Information, 16 CFR part 314;
 - (D) Certifies that, in the opinion of the assessor, the information security program is operating with sufficient effectiveness to provide reasonable assurance that the entity is fulfilling its obligations under the Standards for Safeguarding Customer Information, 16 CFR part 314; and
 - (E) Certifies that the assessment has been conducted by a qualified, objective, independent third-party individual or entity that uses procedures and standards generally accepted in the profession, adheres to professional and business ethics, performs all duties objectively, and is free from any conflicts of interest that might compromise the assessor's independent judgment in performing assessments.
 - (ii) Each written assessment obtained and provided to the Bureau on at least a biennial basis pursuant to paragraph (b)(7)(i) of this section must be completed and provided to the Bureau within 60 days after the end of the period to which the assessment applies.
- (8) *Bureau supervisory authority.* The entity acknowledges it is, or consents to being, subject to the Bureau's supervisory authority.
- (c) *Registration of information systems prior to effective date of § 1041.10—*
- (1) *Preliminary approval.* Prior to the effective date of § 1041.10, the Bureau may preliminarily approve an entity for registration only if the entity submits an application for preliminary approval to the Bureau by the deadline set forth in paragraph (c)(3)(i) of this section containing information sufficient for the Bureau to determine that the entity is reasonably likely to satisfy the conditions set forth in paragraph (b) of this section by the deadline set forth in paragraph (c)(3)(ii) of this section. The assessments described in paragraphs (b)(5) and (b)(7) of this section need not be included with an application for preliminary approval for registration or completed

prior to the submission of the application. The Bureau may require additional information and documentation to facilitate this determination.

1. *In general.* An entity seeking to become preliminarily approved for registration pursuant to § 1041.11(c)(1) must submit an application to the Bureau containing information sufficient for the Bureau to determine that the entity is reasonably likely to satisfy the conditions set forth in § 1041.11(b) as of the deadline set forth in § 1041.11(c)(3)(ii). The application must describe the steps the entity plans to take to satisfy the conditions set forth in § 1041.11(b) by the deadline and the entity's anticipated timeline for such steps. The entity's plan must be reasonable and achievable.

(2) *Registration.* Prior to the effective date of § 1041.10, the Bureau may approve the application of an entity to be a registered information system only if:

1. *In general.* An entity seeking to become a registered information system pursuant to § 1041.11(c)(2) must submit an application to the Bureau by the deadline set forth in § 1041.11(c)(3)(ii) containing information and documentation adequate for the Bureau to determine that the conditions described in § 1041.11(b) are satisfied. The application must succinctly and accurately convey the required information, and must include the written assessments described in § 1041.11(b)(5) and (7).

- (i) The entity received preliminary approval pursuant to paragraph (c)(1) of this section; and
- (ii) The entity submits an application to the Bureau by the deadline set forth in paragraph (c)(3)(ii) of this section that contains information and documentation sufficient for the Bureau to determine that the entity satisfies the conditions set forth in paragraph (b) of this section. The Bureau may require additional information and documentation to facilitate this determination or otherwise to assess whether registration of the entity would pose an unreasonable risk to consumers.

(3) *Deadlines.*

- (i) The deadline to submit an application for preliminary approval for registration pursuant to paragraph (c)(1) of this section is 90 days from the effective date of this section.
- (ii) The deadline to submit an application to be a registered information system pursuant to paragraph (c)(2) of this section is 120 days from the date preliminary approval for registration is granted.
- (iii) The Bureau may waive the deadlines set forth in this paragraph.

(d) *Registration of information systems on or after effective date of § 1041.10—*

(1) *Provisional registration.* On or after the effective date of § 1041.10, the Bureau may approve an entity to be a provisionally registered information system only if the entity submits an application to the Bureau that contains information and documentation sufficient for the Bureau to determine that the entity satisfies the conditions set forth in paragraph (b) of this section. The Bureau may require additional information and documentation to facilitate this determination or otherwise to assess whether provisional registration of the entity would pose an unreasonable risk to consumers.

1. *In general.* An entity seeking to become a provisionally registered information system pursuant to § 1041.11(d)(1) must submit an application to the Bureau containing information and documentation adequate for the Bureau to determine that the conditions described in § 1041.11(b) are satisfied. The application must succinctly and accurately convey the required information, and must include the written assessments described in § 1041.11(b)(5) and (7).

- (2) *Registration.* An information system that is provisionally registered pursuant to paragraph (d)(1) of this section shall automatically become a registered information system pursuant to this paragraph (d)(2) upon the expiration of the 240-day period commencing on the date the information system is provisionally registered. For purposes of this paragraph, an information system is provisionally registered on the date that the Bureau publishes notice of the provisional registration on the Bureau's website.
- (e) *Applications.* Applications for preliminary approval, registration, and provisional registration shall be submitted in the form required by the Bureau and shall include, in addition to the information described in paragraph (c) or (d) of this section, as applicable, the following information:
- (1) The name under which the applicant conducts business, including any "doing business as" or other trade name;
 - (2) The applicant's main business address, mailing address if it is different from the main business address, telephone number, electronic mail address, and Internet website; and
 - (3) The name and contact information (including telephone number and electronic mail address) of the person authorized to communicate with the Bureau on the applicant's behalf concerning the application.
- (f) *Denial of application.* The Bureau will deny the application of an entity seeking preliminary approval for registration under paragraph (c)(1) of this section, registration under paragraph (c)(2) of this section, or provisional registration under paragraph (d)(1) of this section, if the Bureau determines, as applicable, that:
- (1) The entity does not satisfy the conditions set forth in paragraph (b) of this section, or, in the case of an entity seeking preliminary approval for registration, is not reasonably likely to satisfy the conditions as of the deadline set forth in paragraph (c)(3)(ii) of this section;
 - (2) The entity's application is untimely or materially inaccurate or incomplete; or
 - (3) Preliminary approval, provisional registration, or registration of the entity would pose an unreasonable risk to consumers.
- (g) *Notice of material change.* An entity that is a provisionally registered or registered information system must provide to the Bureau in writing a description of any material change to information contained in its application for registration submitted pursuant to paragraph (c)(2) of this section or provisional registration submitted pursuant to paragraph (d)(1) of this section, or to information previously provided to the Bureau pursuant to this paragraph, within 14 days of such change.
- (h) *Suspension and Revocation.*
- (1) The Bureau will suspend or revoke an entity's preliminary approval for registration pursuant to paragraph (c)(1) of this section, provisional registration pursuant to paragraph (d)(1) of this section, or registration pursuant to paragraphs (c)(2) or (d)(2) of this section if the Bureau determines:
 - (i) That the entity has not satisfied or no longer satisfies the conditions described in paragraph (b) of this section or has not complied with the requirement described in paragraph (f) of this section; or
 - (ii) That preliminary approval, provisional registration, or registration of the entity poses an unreasonable risk to consumers.
 - (2) The Bureau may require additional information and documentation from an entity if it has reason to believe suspension or revocation under paragraph (h)(1) of this section may be warranted.

- (3) Except in cases of willfulness or those in which the public interest requires otherwise, prior to suspension or revocation under paragraph (h)(1) of this section, the Bureau will provide written notice of the facts or conduct that may warrant the suspension or revocation and an opportunity for the entity or information system to demonstrate or achieve compliance with this section or otherwise address the Bureau's concerns
 - (4) The Bureau will revoke an entity's preliminary approval for registration, provisional registration, or registration if the entity submits a written request to the Bureau that its preliminary approval, provisional registration, or registration be revoked.
 - (5) For purposes of §§ 1041.5 and 1041.6, suspension or revocation of an information system's registration is effective five days after the date that the Bureau publishes notice of the suspension or revocation on the Bureau's website. For purposes of § 1041.10(b)(1), suspension or revocation of an information system's provisional registration or registration is effective on the date that the Bureau publishes notice of the suspension or revocation on the Bureau's website. The Bureau will also publish notice of a suspension or revocation in the Federal Register.
 - (6) In the event that a provisional registration or registration of an information system is suspended, the Bureau will provide instructions concerning the scope and terms of the suspension on its website and in the notice of suspension published in the Federal Register.
- (i) *Administrative appeals*—
- (1) *Grounds for administrative appeals.* An entity may appeal a determination of the Bureau that:
 - (i) Denies the application of an entity seeking preliminary approval for registration under paragraph (c)(1) of this section, registration under paragraph (c)(2) of this section, or provisional registration under paragraph (d)(1) of this section; or
 - (ii) Suspends or revokes the entity's preliminary approval for registration pursuant to paragraph (c)(1) of this section, provisional registration pursuant to paragraph (d)(1) of this section, or registration pursuant to paragraphs (c)(2) or (d)(2) of this section.
 - (2) *Time limits for filing administrative appeals.* An appeal must be submitted on a date that is within 30 business days of the date of the determination. The Bureau may extend this time for good cause.
 - (3) *Form and content of administrative appeals.* An appeal shall be made by electronic means as follows:
 - (i) The appeal shall be submitted as set forth on the Bureau's website. The appeal shall be labeled "Information System Registration Appeal."
 - (ii) The appeal shall set forth contact information for the appellant including, to the extent available, a mailing address, telephone number, or email address at which the Bureau may contact the appellant regarding the appeal;
 - (iii) The appeal shall specify the date of the letter of determination, and enclose a copy of the determination being appealed; and
 - (iv) The appeal shall include a description of the issues in dispute, specify the legal and factual basis for appealing the determination, and include appropriate supporting information.
 - (4) *Appeals process.* The filing and pendency of an appeal does not by itself suspend the determination that is the subject of the appeal during the appeals process. Notwithstanding the foregoing, the Bureau may, in its discretion, suspend the determination that is the subject of the appeal during the appeals process.

- (5) *Decisions to grant or deny administrative appeals.* The Bureau shall decide whether to affirm the determination (in whole or in part) or to reverse the determination (in whole or in part) and shall notify the appellant of this decision in writing.

§ 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.

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 part 1041. These written policies and procedures must provide guidance to a lender's employees on how to comply with the requirements in part 1041. 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 ability-to-repay requirements in § 1041.5, alternative requirements in § 1041.6, payments requirements in §§ 1041.8 and 1041.9, and requirements on furnishing loan information to registered and provisionally registered information systems in § 1041.10. 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.

2. *Examples.* The written policies and procedures a lender must develop and follow under § 1041.12(a) depend on the types of loans that the lender makes. A lender that makes a covered loan under § 1041.5 must develop and follow written policies and procedures to ensure compliance with the ability-to-repay requirements, including on projecting a consumer's net income and payments on major financial obligations, and estimating a consumer's basic living expenses. Among other written policies and procedures, a lender that makes a covered loan under § 1041.5 or § 1041.6 must develop and follow written policies and procedures to furnish loan information to registered and provisionally registered information systems in accordance with § 1041.10. A lender that makes a covered loan subject to the requirements in § 1041.6 or § 1041.9 must develop and follow written policies and procedures to provide the required disclosures to consumers.

- (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. *General.* Section 1041.12(b) requires a lender to retain various categories of documentation and information in connection with the underwriting and performance of covered short-term loans and covered longer-term balloon payment loans, as well as payment practices in connection with covered loans generally. The items listed are non-exhaustive as to the records that may need to be retained as evidence of compliance with part 1041 concerning loan origination and underwriting, terms and performance, and payment practices.

(1) *Retention of loan agreement and documentation obtained in connection with originating a covered short-term or covered longer-term balloon-payment loan.* To comply with the requirements in this paragraph (b), a lender must retain or be able to reproduce an image of the loan agreement and documentation obtained in connection with a covered short-term or

covered longer-term balloon-payment loan, including the following documentation, as applicable:

1. *Methods of retaining loan agreement and documentation obtained for a covered short-term or covered longer-term balloon-payment loan.* Section 1041.12(b)(1) requires a lender either to retain the loan agreement and documentation obtained in connection with a covered short-term or covered longer-term balloon-payment loan in original form or to be able to reproduce an image of the loan agreement and documentation accurately. For example, if the lender uses a consumer's pay stub to verify the consumer's net income, § 1041.12(b)(1) requires the lender to either retain a paper copy of the pay stub itself or be able to reproduce an image of the pay stub, and not merely the net income information that was contained in the pay stub. For documentation that the lender receives electronically, such as a consumer report from a registered information system, the lender may retain either the electronic version or a printout of the report.

(i) Consumer report from an information system that has been registered for 180 days or more pursuant to § 1041.11(c)(2) or is registered with the Bureau pursuant to § 1041.11(d)(2);

(ii) Verification evidence, as described in § 1041.5(c)(2)(ii);

(iii) Written statement obtained from the consumer, as described in § 1041.5(c)(2)(i);

(2) *Electronic records in tabular format regarding origination calculations and determinations for a covered short-term or covered longer-term balloon-payment loan under § 1041.5.* To comply with the requirements in this paragraph (b), a lender must retain electronic records in tabular format that include the following information for a covered loan made under § 1041.5:

1. *Electronic records in tabular format.* Section 1041.12(b)(2) requires a lender to retain records regarding origination calculations and determinations for a covered loan 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. A lender does not have to retain the records required in § 1041.12(b)(2) in a single, combined spreadsheet or database with the records required in § 1041.12(b)(3) and (b)(5). Section 1041.12(b)(2), however, requires a lender to be able to associate the records for a particular covered short-term or covered longer-term balloon payment loan in § 1041.12(b)(2) with unique loan and consumer identifiers in § 1041.12(b)(3).

(i) The projection made by the lender of the amount of a consumer's net income during the relevant monthly period;

(ii) The projections made by the lender of the amounts of a consumer's major financial obligations during the relevant monthly period;

(iii) Calculated residual income or debt-to-income ratio during the relevant monthly period;

(iv) Estimated basic living expenses for the consumer during the relevant monthly period; and

(v) Other consumer-specific information considered in making the ability-to-repay determination.

(3) *Electronic records in tabular format regarding type, terms, and performance of covered short-term or covered longer-term balloon-payment loan.* To comply with the requirements in this paragraph (b), a lender must retain electronic records in tabular format that include the following information for a covered short-term or covered longer-term balloon-payment loan:

1. Electronic records in tabular format. Section 1041.12(b)(3) requires a lender to retain records regarding loan type, terms, and performance of covered short-term or covered longer-term balloon-payment loans for a covered loan in electronic, tabular format. See comment 12(b)(2)-1 for a description of how to retain electronic records in tabular format. A lender does not have to retain the records required in § 1041.12(b)(3) in a single, combined spreadsheet or database with the records required in § 1041.12(b)(2). Section 1041.12(b)(3), however, requires a lender to be able to associate the records for a particular covered short-term or covered longer-term balloon payment loan in § 1041.12(b)(2) and (b)(5) with unique loan and consumer identifiers in § 1041.12(b)(3).

- (i) As applicable, the information listed in § 1041.10(c)(1)(i) through (viii) and § 1041.10(c)(2);
- (ii) Whether the lender obtained vehicle security from the consumer;
- (iii) The loan number in a loan sequence of covered short-term loans, covered longer-term balloon-payment loans, or a combination thereof.
- (iv) For any full payment on the loan that was not received or transferred by the contractual due date, the number of days such payment was past due, up to a maximum of 180 days;
1. Maximum number of days, up to 180 days, any full payment was past due. Section 1041.12(b)(3)(iv) requires a lender that makes a covered loan to retain information regarding the number of days any full payment is past due beyond the payment schedule established in the loan agreement, up to 180 days. For this purpose, a full payment is defined as principal, interest, and any charges. If a consumer makes a partial payment on the contractual due date and the remainder of the payment 10 days later, the lender must record the full payment 1688 as being 10 days past due. If a consumer fails to make a full payment on a covered loan more than 180 days after the contractual due date, the lender must only record the full payment as being 180 days past due.
- (v) For a loan with vehicle security: whether repossession of the vehicle was initiated;
- (vi) Date of last or final payment received; and
- (vii) The information listed in § 1041.10(c)(3).

(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:

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.

- (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 short-term or covered longer-term balloon-payment loan.* To comply with the requirements in this paragraph

(b), a lender must retain electronic records in tabular format that include the following information 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. See comment 12(b)(2)-1 for a description of how to retain electronic records in tabular format. A lender does not have to retain the records required in § 1041.12(b)(5) in a single, combined spreadsheet or database with the records required in § 1041.12(b)(2) and (b)(3). Section 1041.12(b)(5), however, requires a lender to be able to associate the records for a particular covered short-term or covered longer-term balloon payment loan in § 1041.12(b)(5) with unique loan and consumer identifiers in § 1041.12(b)(3).

- (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).

§ 1041.13 Prohibition against evasion.

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

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 part 1041. In determining whether a lender has taken action with the intent of evading the requirements of part 1041, 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 part 1041. If the lender's action is taken solely for legitimate business purposes, it is not taken with the intent of evading the requirements of part 1041. 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 part 1041. A lender action that is taken with the intent of evading the requirements of part 1041 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 part 1041, but fraud, deceit, or other unlawful or illegitimate activity is not a prerequisite to such a finding.

§ 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.

Appendix A to Part 1041—Model Forms