

Client Alert.

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CFPB Increases Penalty Fee Safe Harbor Amounts for Card Issuers

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In yesterday's *Federal Register*, the Consumer Financial Protection Bureau ("CFPB") published an amendment to the safe harbor thresholds for credit card penalty fees found in Section 1026.52(b)(1)(ii) of Regulation Z to account for increases in the CPI-W, which is a subset of the federal Consumer Price Index ("CPI"). Pursuant to the new thresholds, issuers will be permitted to assess initial penalty fees of \$26 and subsequent fees of \$37. The CFPB's final rule does not address how or whether issuers would be permitted to assess the new, higher fees without amending the cardholder's agreement or sending a change-in-terms notice pursuant to Section 1026.9(c)(2) of Regulation Z. As a result, issuers will need to consider whether they are required to comply with Section 1026.9(c)(2) or state law prior to assessing the increased fees to cardholders. The amendment is effective as of January 1, 2014.

It is worth noting that the CFPB's amendment states the adjustment "reflects a 0.9 percent increase in the CPI-W from April 2012 to April 2013 and is rounded to the nearest \$1 increment." However, applying just a 0.9 percent increase to the base penalty rates would amount to a 22.5-cent increase for the \$25 amount threshold and a 31.5-cent increase for the \$35 amount. As neither of these increases would independently warrant an adjustment to the safe harbor thresholds, and contrary to the explanation in the rule, it appears the CFPB based its adjustments on an unstated cumulative calculation of the CPI-W.

The Federal Reserve Board ("Board") initially implemented the penalty fee limitations of the Credit Card Accountability Responsibility and Disclosure Act of 2009 ("CARD Act") in 12 C.F.R. § 226.52. Pursuant to this section, the Board created a safe harbor for those issuers who imposed penalty fees of no more than \$25 for an initial penalty fee, and no more than \$35 for additional violations. In connection with this safe harbor, the Board also created a mechanism to provide for annual adjustments to the penalty fee thresholds based on changes to the CPI. The CFPB republished these sections in substantially the same form after interpretive authority over the Truth in Lending Act (which includes the CARD Act) was transferred from the Board in July of 2011.

The *Federal Register* version of the amendment may be accessed at: <http://www.gpo.gov/fdsys/pkg/FR-2013-12-16/pdf/2013-29844.pdf>

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