~~make the required payments under new comment 51(a)(1)-6, as discussed above. Comment 51(b)(1)-1 is adopted as proposed.~~

~~Proposed comment 51(b)(2)-1 provided that the requirement under § 226.51(b)(2) that a cosigner, guarantor, or joint accountholder for a credit card account opened pursuant to § 226.51(b)(1)(ii) must agree in writing to assume liability for a credit line increase does not apply if the cosigner, guarantor or joint accountholder who is at least 21 years old requests the increase. Because the party that must approve the increase is the one that is requesting the increase in this situation, the Board believed that § 226.51(b)(2) would be redundant. An industry commenter requested the Board clarify situations in which this applies. For example, the commenter requested whether comment 51(b)(2)-1 would apply if a consumer under the age of 21 requests the credit line increase over the telephone, but subsequently passes the telephone to the cosigner, guarantor, or joint accountholder who is at least 21 years old to make the request after being told that they are not sufficiently old enough to do so. The Board believes this approach will be tantamount to an oral approval and would circumvent the protections of § 226.51(b)(2). Consequently, the Board is modifying the proposed comment to clarify that it must be the cosigner, guarantor, or joint accountholder who is at least 21 years old who initiates the request to increase the credit line.~~

Section 226.52 Limitations on Fees

52(a) Limitations During First Year After Account Opening

New TILA Section 127(n)(1) applies "[i]f the terms of a credit card account under an open end consumer credit plan require the payment of any fees (other than any late fee, over-the-limit fee, or fee for a payment returned for insufficient funds) by the consumer in the first year during which the account is opened in an aggregate amount in excess of 25 percent of the total amount of credit authorized under the account when the account is opened." 15 U.S.C. 1637(n)(1). If the 25 percent threshold is met, then "no payment of any fees (other than any late fee, over-the-limit fee, or fee for a payment returned for insufficient funds) may be made from the credit made available under the terms of the account." However, new TILA Section 127(n)(2) provides that Section 127(n) may not be construed as authorizing any imposition or payment of advance fees prohibited by any other provision of law. The Board proposed to implement new TILA Section 127(n) in § 226.52(a).[31]

Subprime credit cards often charge substantial fees at account opening and during the first year after the account is opened. For example, these cards may impose multiple one-time fees when the consumer opens the account (such as an application fee, a program fee, and an annual fee) as well as a monthly maintenance fee, fees for using the account for certain types of transactions, and fees for increasing the credit limit. The account-opening fees are often billed to the consumer on the first periodic statement, substantially reducing from the outset the amount of credit that the consumer has available to make purchases or other transactions on the account. For example, some subprime credit card issuers assess $250 in fees at account opening on accounts with credit limits of $300, leaving the consumer with only $50 of available credit with which to make purchases or other transactions. In addition, the consumer may pay interest on the fees until they are paid in full.

[31] In a separate rulemaking, the Board will implement new TILA Section 149 in § 226.52(b). New TILA Section 149, which is effective August 22, 2010, requires that credit card penalty fees and charges be reasonable and proportional to the consumer's violation of the cardholder agreement.

Because of concerns that some consumers were not aware of how fees would affect their ability to use the card for its intended purpose of engaging in transactions, the Board's January 2009 Regulation Z Rule enhanced the disclosure requirements for these types of fees and clarified the circumstances under which a consumer who has been notified of the fees in the account-opening disclosures (but has not yet used the account or paid a fee) may reject the plan and not be obligated to pay the fees. See § 226.5(b)(1)(iv), 74 FR 5402; § 226.5a(b)(14), 74 FR 5404; § 226.6(b)(1)(xiii), 74 FR 5408. In addition, because the Board and the other Agencies were concerned that disclosure alone was insufficient to protect consumers from unfair practices regarding high-fee subprime credit cards, the January 2009 FTC Act Rule prohibited institutions from charging certain types of fees during the first year after account opening that, in the aggregate, constituted the majority of the credit limit. In addition, these fees were limited to 25 percent of the initial credit limit in the first billing cycle with any additional amount (up to 50 percent) spread equally over the next five billing cycles. Finally, institutions were prohibited from circumventing these restrictions by providing the consumer with a separate credit account for the payment of additional fees. See 12 CFR 227.26, 74 FR 5561, 5566; see also 74 FR 5538-5543.

In the October 2009 Regulation Z Proposal, the Board discussed two issues of statutory interpretation related to the implementation of new TILA Section 127(n). First, as noted above, new TILA Section 127(n)(1) applies when "the terms of a credit card account . . . require the payment of any fees (other than any late fee, over-the-limit fee, or fee for a payment returned for insufficient funds) by the consumer in the first year during which the account is opened in an aggregate amount in excess of 25 percent of the total amount of credit authorized under the account when the account is opened." (Emphasis added.) In the proposal, the Board acknowledged that Congress's use of "require" could be construed to mean that Section 127(n)(1) applies only to fees that are unconditional requirements of the account—in other words, fees that all consumers are required to pay regardless of how the account is used (such as account-opening fees, annual fees, and monthly maintenance fees). However, the Board stated that such a narrow reading would be inconsistent with the words "any fees," which indicate that Congress intended the provision to apply to a broader range of fees. Furthermore, the Board expressed concern that categorically excluding fees that are conditional (in other words, fees that consumers are only required to pay in certain circumstances) would enable card issuers to circumvent the 25 percent limit by, for example, requiring consumers to pay fees in order to receive a particular credit limit or to use the account for purchases or other transactions. Finally, the Board noted that new TILA Section 127(n)(1) specifically excludes three fees that are conditional (late payment fees, over-the-limit fees, and fees for a payment returned for insufficient funds), which suggests that Congress otherwise intended Section 127(n)(1) to apply to fees that a consumer is required to pay only in certain circumstances (such as fees for other violations of the account terms or fees for using the account for transactions). In other words, if Congress had intended Section 127(n)(1) to apply only to fees that are unconditional requirements of the account, there would have been no need to specifically exclude conditional fees such as late payment fees. For these reasons, the Board concluded that the best interpretation of new TILA Section 127(n)(1) was to apply the 25 percent limitation to any fee that a consumer is required to pay with respect to the account (unless expressly excluded), even if the requirement only applies in certain circumstances.

Consumer group commenters strongly supported this interpretation of new TILA Section 127(n)(1), while industry commenters strongly disagreed. In particular, institutions that do not issue subprime cards argued that Congress intended Section 127(n) to apply only to fees imposed on subprime cards with low credit limits and that it would be unduly burdensome to require issuers of credit card products with higher limits to comply. However, while new TILA Section 127(n) is titled "Standards Applicable to Initial Issuance of Subprime or 'Fee Harvester' Cards," nothing in the statutory text limits its application to a particular type of credit card. Instead, for the reasons discussed above, it appears that Congress intended Section 127(n) to apply to a broad range of fees regardless of the type of credit card account. Although the practice of charging fees that represent a high percentage of the credit limit is generally limited to subprime cards at present, it appears that Congress intended Section 127(n) to prevent this practice from spreading to other types of credit card products. Accordingly, although the Board understands that complying with Section 127(n) may impose a significant burden on card issuers, the Board does not believe that this burden warrants a different interpretation of Section 127(n).

Second, in the proposal, the Board interpreted new TILA Section 127(n)(1), which provides that, if the 25 percent threshold is met, "no payment of any fees (other than any late fee, over-the-limit fee, or fee for a payment returned for insufficient funds) may be made from the credit made available under the terms of the account." The Board stated that, although this language could be read to require card issuers to determine at account opening the total amount of fees that will be charged during the first year, this did not appear to be Congress's intent because the total amount of fees charged during the first year will depend on how the account is used. For example, most card issuers currently require consumers who use a credit card account for cash advances, balance transfers, or foreign transactions to pay a fee that is equal to a percentage of the transaction. Thus, the total amount of fees charged during the first year will depend on, among other things, the number and amount of cash advances, balance transfers, or foreign transactions. Accordingly, the Board interpreted Section 127(n)(1) to limit the fees charged to a credit card account during the first year to 25 percent of the initial credit limit and to prevent card issuers from collecting additional fees by other means (such as directly from the consumer or by providing a separate credit account). The Board did not receive significant comment on this interpretation, which is adopted in the final rule.

Accordingly, in order to effectuate this purpose and to facilitate compliance, the Board uses its authority under TILA Section 105(a) to implement new TILA Section 127(n) as set forth below.

52(a)(1) General Rule

Proposed § 226.52(a)(1)(i) provided that, if a card issuer charges any fees to a credit card account under an open-end (not home-secured) consumer credit plan during the first year after account opening, those fees must not in total constitute more than 25 percent of the credit limit in effect when the account is opened. Furthermore, in order to prevent card issuers from circumventing proposed § 226.52(a)(1)(i), proposed § 226.52(a)(1)(ii) provided that a card issuer that charges fees to the account during the first year after account opening must not require the consumer to pay any fees in excess of the 25 percent limit with respect to the account during the first year.

Commenters generally supported the proposed rule. However, a federal banking agency requested that the Board clarify the proposed rule, expressing concern that, as proposed, § 226.52(a)(1) could be construed to authorize card issuers to require consumers to pay an unlimited amount of fees so long as the total amount of fees charged to the account did not equal the 25 percent limit. This was not the Board's intent, nor does the Board believe that the proposed rule supports such an interpretation. Nevertheless, in order to avoid any potential uncertainty, the Board has revised § 226.52(a)(1) to provide that, if a card issuer charges any fees to a credit card account under an open-end (not home-secured) consumer credit plan during the first year after the account is opened, the total amount of fees the consumer is required to pay with respect to the account during that year must not exceed 25 percent of the credit limit in effect when the account is opened.

The Board has also reorganized and revised the proposed commentary for consistency with the revisions to § 226.52(a)(1). Comment 52(a)(1)-1 clarifies that § 226.52(a)(1) applies if a card issuer charges any fees to a credit card account during the first year after the account is opened (unless the fees are specifically exempted by § 226.52(a)(2)). Thus, if a card issuer charges a non-exempt fee to the account during the first year after account opening, § 226.52(a)(1) provides that the total amount of non-exempt fees the consumer is required to pay with respect to the account during the first year cannot exceed 25 percent of the credit limit in effect when the account is opened. The comment further clarifies that this 25 percent limit applies to fees that the card issuer charges to the account as well as to fees that the card issuer requires the consumer to pay with respect to the account through other means (such as through a payment from the consumer to the card issuer or from another credit account provided by the card issuer). The comment also provides illustrative examples of the application of § 226.52(a), including the examples previously provided in proposed comments 52(a)(1)(i)-1 and 52(a)(1)(ii)-1.

Proposed comment 52(a)(1)(i)-2 clarified that a card issuer that charges a fee to a credit card account that exceeds the 25 percent limit could comply with § 226.52(a)(1) by waiving or removing the fee and any associated interest charges or crediting the account for an amount equal to the fee and any associated interest charges at the end of the billing cycle during which the fee was charged. Thus, if a card issuer's systems automatically assess a fee based on certain account activity (such as automatically assessing a cash advance fee when the account is used for a cash advance) and, as a result, the total amount of fees subject to § 226.52(a) that have been charged to the account during the first year exceeds the 25 percent limit, the card issuer could comply with § 226.52(a)(1) by removing the fee and any interest charged on that fee at the end of the billing cycle.

Some industry commenters expressed concern that, because fees are totaled at the end of the billing cycle, there would be circumstances in which their systems would not be able to identify a fee that exceeds the 25 percent limit in time to correct the account before the billing cycle ends (such as when the fee was charged late in the cycle). The Board is concerned that providing additional time will result in fees that exceed the 25 percent limit appearing on consumer's periodic statements. However, in order to facilitate compliance, the Board has revised the proposed comment to require card issuers to waive or remove the excess fee and any associated interest charges within a reasonable amount of time but no later than the end of the billing cycle following the billing cycle during which the fee was charged. For organizational purposes, the Board has also redesignated this comment as 52(a)(1)-2.

Proposed comment 52(a)(1)(i)-3 clarified that, because the limitation in § 226.52(a)(1) is based on the credit limit in effect when the account is opened, a subsequent increase in the credit limit during the first year does not permit the card issuer to charge to the account additional fees that would otherwise be prohibited (such as a fee for increasing the credit limit). An illustrative example was provided. For organizational purposes, this comment has been redesignated as 52(a)(1)-3.

In addition, in response to comments from consumer groups, the Board has also provided guidance regarding decreases in credit limits during the first year after account opening. Consumer groups expressed concern that card issuers could evade the 25 percent limitation by, for example, providing a $500 credit limit and charging $125 in fees for the issuance or availability of credit at account opening and then quickly reducing the limit to $200, leaving the consumer with only $75 of available credit. Although there are legitimate reasons for reducing a credit limit during the first year after account opening (such as concerns about fraud), the Board believes that, in these circumstances, it would be inconsistent with the intent of new TILA Section 127(n) to require the consumer to pay (or to allow the issuer to retain) any fees that exceed 25 percent of the reduced limit. Accordingly, proposed comment 52(a)(1)-3 clarifies that, if a card issuer decreases the credit limit during the first year after the account is opened, § 226.52(a)(1) requires the card issuer to waive or remove any fees charged to the account that exceed 25 percent of the reduced credit limit or to credit the account for an amount equal to any fees the consumer was required to pay with respect to the account that exceed 25 percent of the reduced credit limit within a reasonable amount of time but no later than the end of the billing cycle following the billing cycle during which the fee was charged. An example is provided.

52(a)(2) Fees Not Subject to Limitations

Section 226.52(a)(2)(i) implements the exception in new TILA Section 127(n)(1) for late payment fees, over-the-limit fees, and fees for payments returned for insufficient funds. However, pursuant to the Board's authority under TILA Section 105(a), § 226.52(a)(2)(i) applies to all fees for returned payments because a payment may be returned for reasons other than insufficient funds (such as because the account on which the payment is drawn has been closed or because the consumer has instructed the institution holding that account not to honor the payment). The Board did not receive significant comment on § 226.52(a)(2)(i), which is adopted as proposed.

As discussed above, new TILA Section 127(n)(1) applies to fees that a consumer is required to pay with respect to a credit card account. Accordingly, proposed § 226.52(a)(2)(ii) would have created an exception to § 226.52(a) for fees that a consumer is not required to pay with respect to the account. The proposed commentary to § 226.52(a) illustrated the distinction between fees the consumer is required to pay and those the consumer is not required to pay. Proposed comment 52(a)(2)-1 clarified that, except as provided in § 226.52(a)(2), the limitations in § 226.52(a)(1) apply to any fees that a card issuer will or may require the consumer to pay with respect to a credit card account during the first year after account opening. The proposed comment listed several types of fees as examples of fees covered by § 226.52(a). First, fees that the consumer is required to pay for the issuance or availability of credit described in § 226.5a(b)(2), including any fee based on account activity or inactivity and any fee that a consumer is required to pay in order to receive a particular credit limit. Second, fees for insurance described in § 226.4(b)(7) or debt cancellation or debt suspension coverage described in § 226.4(b)(10) written in connection with a credit transaction, if the insurance or debt cancellation or debt suspension coverage is required by the terms of the account. Third, fees that the consumer is required to pay in order to engage in transactions using the account (such as cash advance fees, balance transfer fees, foreign transaction fees, and other fees for using the account for purchases). And fourth, fees that the consumer is required to pay for violating the terms of the account (except to the extent specifically excluded by § 226.52(a)(2)(i)).

Proposed comment 52(a)(2)-2 provided as examples of fees that generally fall within the exception in § 226.52(a)(2)(ii) fees for making an expedited payment (to the extent permitted by § 226.10(e)), fees for optional services (such as travel insurance), fees for reissuing a lost or stolen card, and statement reproduction fees.

Commenters generally supported proposed § 226.52(a)(2)(ii) and proposed comments 52(a)(2)-1 and -2. Although one industry commenter suggested that the Board take a broader approach to identifying the fees that fall within the exception in § 226.52(a)(2)(ii), the Board believes that such an approach would be inconsistent with the purposes of TILA Section 127(n). Accordingly, the Board adopts these aspects of the proposal.

Finally, proposed comment 52(a)(2)-3 clarified that a security deposit that is charged to a credit card account is a fee for purposes of § 226.52(a). However, the comment also clarified that § 226.52(a) would not prohibit a card issuer from providing a secured credit card that requires a consumer to provide a cash collateral deposit that is equal to the credit line for the account. Consumer group commenters strongly supported this commentary. However, a federal banking agency requested that the Board clarify that a security deposit is an amount of funds transferred by a consumer to a card issuer at account opening that is pledged as security on the account. The Board has revised the proposed comment to include similar language. Otherwise, comment 52(a)(2)-3 is adopted as proposed.

52(a)(3) Rule of Construction

New TILA Section 127(n)(2) states that "[n]o provision of this subsection may be construed as authorizing any imposition or payment of advance fees otherwise prohibited by any provision of law." 15 U.S.C. 1637(n)(2). The Board proposed to implement this provision in § 226.52(a)(3). As an example of a provision of law limiting the payment of advance fees, proposed comment 52(a)(3)-1 cited 16 CFR § 310.4(a)(4), which prohibits any telemarketer or seller from "[r]equesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit for a person." The Board did not receive significant comment on either the proposed regulation or the proposed commentary, both of which have been adopted as proposed.