

LEGAL UPDATES

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A Significant Reduction in Credit Card Late Fees Could Be on the Horizon

On February 1, 2023, the Consumer Financial Protection Bureau (CFPB) proposed a rule that would dramatically decrease the late payment fee amount that card issuers could charge on credit cards and qualify for a safe harbor under Regulation Z. While the proposed rule focuses on credit card late fees, the CFPB is also seeking comments on whether the proposed amendments should apply to other penalty fees such as overlimit fees or whether the penalty fee safe harbor should be eliminated altogether. Comments on the proposed rule are due 30 days after the proposed rule is published to the Federal Register or April 3, 2023, whichever date is later. Industry pushback on the proposed rule is expected. Nonetheless, card issuers should begin to assess how the proposed rule may affect their late fee assessment practices and customer-facing documents.

Nuts and bolts of the proposed rule

The proposed rule reduces the fee amount on credit cards that is presumed to be reasonable and proportional for a late payment under Regulation Z. Currently, Regulation Z provides that a card issuer may qualify for a safe harbor by charging a fee up to \$30 for an initial late payment or up to \$41 for a subsequent late payment that occurs during the same billing cycle or one of the next six billing cycles. The proposed rule would decrease the safe harbor fee amount to \$8 for late a payment regardless of whether a late payment is the initial or a subsequent late payment. The proposed rule would further restrict late payment fees by providing that a card issuer cannot charge a late payment fee that exceeds 25% of the required minimum periodic payment that was due on the credit card immediately prior to assessment of the fee. That means a cardholder's minimum payment due would have to be at least \$32 for the card issuer to be able to charge the proposed \$8 safe harbor late payment fee. The

proposed rule does not change the current safe harbor fee amounts for other penalty fees such as returned payment fees and overlimit fees.

The proposed rule would also remove a requirement that the CFPB annually adjust the safe harbor amount for late payment fees to reflect changes in the Consumer Price Index. The proposed rule does not change the CFPB's current obligation to make annual adjustments to the safe harbor amount for other penalty fees. In remarks released with the proposed rule, the CFPB said it would "monitor market conditions and the immunity provision amount for potential adjustments as necessary." In other words, the CFPB proposes to make ad hoc increases to the safe harbor amount for late payment fees going forward.

The CFPB noted that Regulation Z permits card issuers to charge penalty fees, including late payment fees, greater than the safe harbor amounts if they determine that the fee amount represents a reasonable proportion of the total costs incurred by the card issuer as a result of the late payment. After releasing the proposed rule, the CFPB Director Rohit Chopra said that "banks will just have to prove that their fees are in line with their collection costs, if they go above the immunity provision" and use the "cost analysis" provision.

While not in the proposed rule, the CFPB asked stakeholders whether it should also (i) require a grace period of 15 calendar days before a card issuer imposes a late payment fee, (ii) require card issuers to offer automatic payment options or provide prior notification of the payment due date as a condition of using the safe harbor amount, or (iii) apply the proposed amendments to other penalty fees on credit cards.

The Federal Reserve Board created the penalty fee safe harbor in June 2010 as part of its implementation of the Credit Card Accountability Responsibility and Disclosure (CARD) Act. The Federal Reserve Board engaged in substantial research to set the original safe harbor penalty fees amounts at \$25 for the initial violation and \$35 for each subsequent violation of the same type that occurs during the same billing cycle or in one of the next six billing cycles. The original safe harbor fee amounts eclipse the \$8 safe harbor amount that the CFPB currently proposes for late payment fees.

The CFPB expressed concern that the current late fee payment amounts in the safe harbor are not reasonable and proportional to the card issuer's costs associated with a late payment. The CFPB *estimates* that 75% of credit card late fees do not cover costs incurred from late payments and are merely profits to card issuers. According to the CFPB, the current safe harbor amounts are higher than necessary to deter a cardholder from making future late payments. The CFPB also criticized credit card late payment fees as not being subject to market competition pressures to ensure that card issuers charge reasonable fee amounts.

The broader scrutiny on fees

The CFPB under the Biden Administration has been targeting what it views as “junk” fees with financial services and products. The CFPB uses the term “junk” fees to describe fees that it alleges to be exploitative, back-end, hidden, or excessive. Many of these so-called “junk” fees include fees that are regulated by existing federal and state laws.

In addition to the proposed credit card late fee rule, the CFPB’s 2023 rulemaking agenda revealed that rulemaking efforts on overdraft fees and non-sufficient funds fees are underway. While the CFPB has generally focused on the *amount* of credit card late fees, the CFPB’s guidance on overdraft fees and NSF fees has focused more on the *conditions* under which consumers may be charged those fees. It may be an opportune time for financial services providers to conduct a general assessment of their fees and make adjustments based on existing guidance and anticipated rules.

What this means to you

The CFPB has touted that the proposed rule could reduce credit card late fee revenue by \$9 billion per year. In addition to reducing revenue, the proposed rule could prompt card issuers to re-think how they determine late payment fees. Card issuers should start to think through the process to implement fee-related revisions to their customer-facing documents, including their cardholder agreements.

Contact us

If you have questions on how to prepare for a potential final credit card late fees rule or if you want to discuss the federal scrutiny on fees, please reach out to Susan Seaman, Catherine Albrecht-Wiese, or your Husch Blackwell attorney.