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Insights

CFPB Issues Proposed Credit Card Late Fee Rule

February 1, 2023

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The Consumer Financial Protection Bureau ("CFPB" or the "Bureau") continued its campaign against financial services fees this week with the release of their Proposed Rule on Credit Card Penalty Fees (the "**Proposed CARD Act Rule**"). The Bureau has rulemaking authority over the federal Truth in Lending Act and Regulation Z, which include regulations implementing provisions of the Credit Card Accountability and Responsibility Act of 2009 (the "CARD Act"). Card issuers rely on a legal safe harbor in the CARD Act that currently provides they may assess a late fee in such amount that represents a reasonable proportion of the total costs incurred by the card issuer in connection with the late payment, or an amount that complies with a safe harbor that adjusts periodically based on inflation. Not surprisingly the safe harbor amounts have become the default late fee limit for most, if not all card issuers. The late fee safe harbor is currently $30 for an initial late payment, and $41 for a subsequent late payment within the next six (6) billing cycles. Apart from the safe harbor for late fees, Regulation Z also prohibits any fee on a credit card account to not more than the dollar amount associated with the violation of terms. i.e. – 100% of the loan payment amount for a late fee.

The Proposed CARD Act Rule slashes the safe harbor for an initial late payment from $30 to $8, and eliminates the existing safe harbor of up to $41 on future late payments within the next six billing cycles. The Proposed CARD Act Rule does not change the existing three percent (3%) of the delinquent balance permissible fee if a payment has not been made for two (2) or more consecutive billing cycles. The Proposed CARD Act Rule would eliminate any future increases in the late fee safe harbor limits, and reduce the existing late fee cap from 100% of the loan payment amount to no more than 25% of the required minimum payment amount.

While the proposed reductions in late fees are significant, the CFPB raised several additional issues in Proposed CARD Act Rule that are worthy of note. In particular, the Bureau notes that it is considering the following additional amendments to the CARD Act provisions in Regulation Z:

- Increasing the courtesy period in which to pay without incurring a late fee to fifteen (15) days after a payment due date;
- Expanding the fifteen (15) day courtesy period to other fees associated with a credit card account;
- Requiring card issuers who wish to avail themselves of the late payment safe harbor to offer an automatic payment option or provide notice of the payment amount due date with a certain number of days prior to the due date, or both; and

- Eliminating the safe harbor for all penalty fees (not just late fees) entirely. This would require card issuers to be able to defend any credit card fee as representing a reasonable proportion of the total costs in connection with the violation of the cardholder agreement.

In a press release on the Proposed Card Act Rule, CFPB Director Rohit Chopra commented in part, *"[o]ver a decade ago, Congress banned excessive credit card late fees, but companies have exploited a regulatory loophole that has allowed them to escape scrutiny for charging an otherwise illegal junk fee."* This comment, along with the broader Presidential Initiative against Illegal Junk Fees discussed in our prior **Client Alert**, leaves little doubt that the Bureau is unlikely to make many, if any, positive changes from the financial services industry's perspective to the proposal when it is presented in final form.

The Proposed Card Act Rule is open for public comment until April 3, 2023, or thirty (30) days after its publication in the federal register. Once the CFPB has considered all public comments, it will issue a Final Rule in the federal register that is expected to become effective sixty (60) days after publication.

For questions regarding content found in this alert, please contact **Brett J. Ashton**, or a member of the firm's **Financial Institutions Practice**.

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