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The CFPB Drastically Cuts The Safe Harbor Amount For Credit Card Late Fees

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After much anticipation, the Consumer Financial Protection Bureau (CFPB) has issued a final rule drastically reducing Regulation Z's safe harbor fee amount for credit card late fees to $8 for card issuers that do not qualify as a smaller card issuer (as discussed below in more detail). Currently, Regulation Z provides that a card issuer may qualify for a safe harbor from the limitation on penalty fees by charging a fee of 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 $8 safe harbor amount applies to all late payment fees and does not increase with late payments in certain subsequent billing cycles. Unlike the current safe harbor, the reduced $8 safe harbor amount is not subject to annual adjustment by the CFPB.

Notably, in the final rule, the CFPB *raised* the safe harbor fee amount for other types of credit card fees that are subject to the penalty fee limitation in Regulation Z's Section 1026.52(b), such as over-the-limit fees and returned check fees. Specifically, under the final rule, a card issuer would qualify for a safe harbor if the dollar amount of these fees does not exceed: (i) $32; or (ii) $43 if the card issuer previously imposed the $32 fee for a violation of the same type that occurred during the same billing cycle or one of the next six billing cycles. Unlike the safe harbor amount for late fees, the safe harbor amounts for these other fees continue to be subject to annual adjustment by the CFPB.

Although it was not in the proposed rule, the CFPB added a carve out to the $8 late fee safe harbor amount for "smaller card issuers." That term is defined as a card issuer that, together with affiliates, had fewer than one million open credit accounts for the entire preceding calendar year and in the current calendar year. The final rule provides in Section 1026.52(b)(1)(ii)(E) that smaller card issuers may charge late fees as set out in Section 1026.52(b)(1)(ii)(A) or (b)(1)(ii)(B) (i.e., the $32 and $43 amounts above). However, amended language in the official interpretations appears to assume, without explanation, that smaller card issuers will charge the original historical safe harbor threshold amounts of $25 for the first late payment violation and $35 for a subsequent late payment violation. In addition to this apparent discrepancy—which the CFPB perhaps can clarify during the regulatory implementation process—the late fee carve out for smaller card issuers could be particularly challenging to implement for card issuers who are close to the one million open credit accounts threshold. Namely, these smaller card issuers may be faced with reducing late fees to $8 in the middle of a calendar year if the card issuer opens too many credit card accounts during the calendar year to qualify for the exception.

It should be reiterated that the CFPB's final rule adjusts safe harbor fee amounts. Regulation Z permits card issuers to charge penalty fees, including late payment fees, that are 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. Regulation Z already provides guidance on how to determine total costs with different credit card penalty fees. In reality, using Regulation Z's "cost analysis" approach instead of the safe harbor to charge credit card penalty fees has risks; however, it could be more attractive to some card issuers given the drastic reduction of the safe harbor late fee amount.

The final rule states that it becomes effective 60 days after publication to the *Federal Register*. This would be a shockingly fast timeline to provide a change in terms to cardholder agreements and adjust other credit card documentation and systems. However, given the strong industry pushback on the proposed and final rules, it would not be surprising to see the financial services industry challenge the final rule, which, at the very least, could delay its effective date. While excluding small card issuers from coverage may marginally help the final rule's likelihood of success, it likely does not change the overall vulnerability of the final rule.

While a delay to the final rule's implementation or even a vacatur of the rule is possible, a reduction to the credit card late fee safe harbor amount presents a number of regulatory, operational, and technical issues for card issuers to work through potentially in the interim including, but not limited to, following federal and state change-in-terms notice requirements.

Contact us

If you have questions about the final rule, or regulatory considerations with implementing a change in terms on credit cards, please reach out to Susan Seaman, Mike G. Silver, Catherine Albrecht-Wiese, or your Husch Blackwell attorney.