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On June 22, 2022, the Consumer Financial Protection Bureau announced an advance notice of proposed rulemaking (ANPR) seeking comments from credit card issuers, consumer groups, and the public regarding credit card late fees and late payments, as well as revenue and expenses related to the imposition of late fees. In particular, the CFPB is evaluating credit card penalty policies in relation to the Card Accountability Responsibility and Disclosure (CARD) Act of 2009 and Regulation Z.

CFPB's request for information

The ANPR focuses on the penalty fee provisions of the CARD Act and Regulation Z. Specifically, Section 149(a) of the CARD Act provides that penalty fees or charges associated with a credit card account under an open-end consumer credit plan must be "reasonable and proportional" to the omission or violation that triggered the fee.[1] The CFPB has previously implemented regulatory provisions pursuant to Section 149(b), which states that the CFPB may "establish standards for assessing whether the amount of any penalty fee or charge … is reasonable and proportional to the omission or violation to which the fee or charge relates."[2] These sections are implemented in part by Regulation Z, which requires that the amount of a fee represent a "reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation."[3] Alternatively, a card issuer may impose a penalty fee in an amount compliant with a separate safe harbor provision, often referred to as the immunity provision[4] (currently $30 for the first violation and $41 for a subsequent violation of the same type occurring with the next six billing cycles), which imposes a fee cap subject to an annual inflation adjustment.

To evaluate these statutory provisions, and to understand the domestic credit card market more broadly, the CFPB is seeking responses to 38 questions spanning several different categories. The CFPB is interested in, among other things:

- **Factors used by card issuers to set existing levels of late fees:** For example, what factors do card issuers use to determine the amount of the late fee to charge per incident for late fees assessed to cardholders who were previously assessed a late fee in at least one of the previous six billing cycles?
- **Costs and losses:** For example, what types of costs are associated with credit card late payments, such as losses due to nonpayment or costs of funding delinquent accounts?
- **Deterrence:** For example, whether late fees deter future late payments. More generally, the CFPB seeks to understand how card issuers facilitate or encourage timely payments.
- **Cardholder behavior:** For example, what categories do card issuers use to classify cardholders based on their late payment behavior?
- **Autopay:** Do issuers offer autopay and, if so, what is the current rate of cardholder enrollment?
- **Notifications of upcoming due date:** For example, cardholders can describe actions and methods through which card issuers contact them about an upcoming due date (other than through periodic statements).
- **Safe harbor provisions:** For example, what late fee safe harbor amount would be sufficient for purposes of allowing card issuers to recover, through late fees, their costs in collecting late payments?
- **Cost analysis provisions:** For example, whether and how card issuers are using cost analysis provisions as opposed to the safe harbor provisions.
- **Other categories:** The CFPB also has asked for comments on staggered late fees, courtesy periods and fee waivers, and revenue and expenses.

The CFPB has requested that card issuer commenters provide their responses based on information relevant to their domestic consumer credit card portfolios, while other commenters should base their answers on their knowledge of the domestic consumer credit card market. Interested parties may submit comments through the Federal eRulemaking Portal, by email or via direct mail. **Comments must be received on or before July 22, 2022.**

Focus on fees

The ANPR is the latest of several steps the CFPB has recently taken that indicate the CFPB's particular interest in combating late fees. In January 2022, the CFPB published a request for public input seeking comments related to "back-end fees." (We covered the CFPB's request in a client alert: CFPB Requests Information on Consumer Financial Products or Services Fees). In that request, the CFPB indicated that it would use the information it collected to inform its rulemaking, guidance and enforcement priorities. Additionally, the CFPB noted that it had identified particular products and services that could impose substantial costs to consumers, including credit cards.

The CFPB then indicated in a March report that credit card issuers charged $12 billion in late fees in 2020. Of particular note, the press release for the report highlighted that fees have continued to rise due to the annual inflation adjustment contained in the immunity provision. Finally, in April, Director Rohit Chopra indicated before the House Committee on Financial Services that the CFPB would explore late fees "because it is important that this market is competitive."

Taking together the ANPR and the CFPB's recent activity surrounding late fees, it appears the CFPB is considering potential changes to the immunity provision. More broadly, credit card issuers and other industry stakeholders should take note of the CFPB's continued interest in this area.

Notes

1. 15 USC 1665d(a).
2. 15 USC 1665d(b).
3. § 1026.52(b)(1)(i).
4. § 1026.52(b)(1)(ii).

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