

Alert

CFPB Signals Cuts to Credit Card Late Fees

June 29, 2022

The Consumer Financial Protection Bureau (the “CFPB” or the “Bureau”) continues to aggressively examine the fees associated with consumer financial products and services. The Bureau is pressing for providers under its purview to state total prices up front, rather than rely on “back end” fees which consumers may not take into account when they sign up, or which deceive consumers about what a product or service will really cost. One important focus has been credit card late fees. Before taking action, however, the CFPB has invited public comment through a recently-issued Advance Notice of Proposed Rulemaking (“ANPR”), including from credit card issuers.

Credit Card Late Fees Add Up

Over 175 million Americans hold at least one credit card.¹ The Bureau estimates that “credit card company penalty policies” cost consumers \$12 billion per year.² This amounts to 10 percent of the cost consumers bear to hold credit cards.³

Congress passed the Credit Card Accountability, Responsibility, and Disclosure Act of 2009 (the “CARD Act”) to curb practices that promote excessive fees in the credit card industry.⁴ As relevant here, the CARD Act requires credit card penalties to be “reasonable and proportional” to the event that triggered the fee.⁵ When the Federal Reserve held rulemaking authority for the CARD Act, it issued a rule that capped late fees at the amount the late payment cost the issuer. However, the rule also created a safe harbor—which the Bureau is now calling an “immunity provision”—that deemed any fee below a specified level acceptable.⁶ That limit adjusts over time and is now set at \$30 for the first late payment, and \$41 for each subsequent late payment within six billing cycles. In a recent study, the Bureau found that “18 of the top 20 issuers” set late fees “at or near” the maximum.⁷

With this provision in mind, the ANPR seeks to learn more about how to gauge what makes fees “reasonable and proportional,” and gain context on “card issuers’ revenue and expenses, the potential deterrent effect of late fees, and the role late fees play in credit card companies’ profitability.”⁸ The

¹ Press Release, CFPB Initiates Review of Credit Card Company Penalty Policies Costing Consumers \$12 Billion Each Year (June 22, 2022) [hereinafter “Press Release”], available [here](#).

² *Id.*; see also Consumer Financial Protection Bureau, *Credit card late fees*, at 2, 4 (Mar. 2022), available [here](#) [hereinafter “Late Fee Study”].

³ Press Release, *supra* note 1; Late Fee Study, *supra* note 2, at 4. The Bureau asserts that this “revenue comes disproportionately from people living in low-income neighborhoods.” Late Fee Study at 4

⁴ Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act), Pub. L. 111–24, 123 Stat. 1734 (2009).

⁵ 15 U.S.C. § 1665d(a).

⁶ 15 U.S.C. § 1665d(e); 12 C.F.R. § 1026.52(b)(1)(ii); see also Press Release at 2.

⁷ Press Release, *supra* note 1; Late Fee Study, *supra* note 2, at 6, 14-15 (identifying late fees in the \$36-40 range). There are other limits on fees. For example, a late fee cannot exceed the amount of the last minimum payment the issuer required. 12 C.F.R. § 1026.52(b)(2)(i)(A) & cmt. 52(b)(2)(i)-1.

⁸ Press Release, *supra* note 1.

Bureau believes that seeking this information now is “particularly timely since current rules might give companies the incentive to impose big hikes based on inflation.”⁹

The CFPB Taking Aim at “Junk Fees”

The ANPR follows a statement earlier this year targeting what the Bureau called “junk fees”—back end fees that obscure the true cost of a product or service.¹⁰ There, the Bureau highlighted credit card late fees as well as overdraft and insufficient funds fees for bank accounts, analogizing them to the “resort fees” and “service fees” that some hotels or concert venues add onto the posted price after the fact.¹¹ The Bureau is focused on late fees in particular because they constitute 99 percent of the dollar value of all the penalty fees credit card issuers charge.¹²

In that prior statement, the Bureau asked consumers to share their experiences about fees that had taken them by surprise, including:

- Fees for things people believed were covered by the baseline price of a product or service;
- Unexpected fees for a product or service;
- Fees that seemed too high for the purported service; and
- Fees where it was unclear why they were charged.¹³

Notably, the Bureau did not solicit input from credit card issuers or major banks at that time.¹⁴ The Bureau forecasted a continued focus on these issues, promising to “craft rules, issue industry guidance, and focus supervision and enforcement resources” to reduce these fees.¹⁵

An Opportunity for the Industry to Provide Guidance

The Bureau now invites input “from credit card issuers, consumer groups, and the public regarding credit card late fees and late payments, and card issuers’ revenue and expenses.”¹⁶ Any interested person can submit a public comment by July 22, 2022.

The ANPR itself includes 38 specific questions spanning more than a dozen pages, seeking significant detail from issuers and other providers in this space.¹⁷ Broadly, the Bureau is seeking input on areas including: (1) the factors the industry uses to set late fee amounts; (2) issuers’ costs and losses associated with late payments; (3) the “deterrent effect of late fees”; (4) cardholders’ late-payment

⁹ *Id.*

¹⁰ Press Release, Consumer Financial Protection Bureau, Consumer Financial Protection Bureau Launches Initiative to Save Americans Billions in Junk Fees (Jan. 26, 2022), available [here](#).

¹¹ *Id.*

¹² Late Fee Study, *supra* note 2, at 2, 13.

¹³ *Id.*

¹⁴ *See id.*

¹⁵ *Id.*

¹⁶ CFPB, Advance Notice of Proposed Rulemaking, *Credit Card Late Fees and Late Payments*, at 1 (June 22, 2022), available [here](#) [hereinafter “ANPR”].

¹⁷ *Id.* at 6-17.

behavior; (5) methods issuers use to encourage timely payments; (6) issuers' use of the CARD Act safe harbor; and (7) issuer revenue and expenses related to consumer credit card operations.¹⁸

The CFPB is certain to rely on this information as it updates the safe harbor rule. As the CFPB remains focused on reducing credit card late fees and preventing an inflation rate hike, the Bureau will have to balance the impact its changes may have on consumers' access to credit. The ANPR indicates some of the potential changes, including encouraging issuers to affirmatively notify cardholders of minimum payment amounts and due dates, and to facilitate cardholders' adoption of autopay options.¹⁹ Additionally, the Bureau will look to minimize the safe harbor provision as a barrier to its enforcement authority.²⁰

Conclusion

The ANPR—as well as the Bureau's information request on junk fees—reflect the Bureau's increased regulatory and supervisory efforts under the leadership of Director Rohit Chopra. These actions demonstrate that consumer financial products and services will remain under the magnifying glass. However, this public comment window specifically addressed to the providers of consumer financial products and services provides an opportunity for industry to help inform the regulations it must follow.

Schulte Roth & Zabel's lawyers are available to assist you in preparing a public comment or addressing any questions you may have regarding these developments. Please contact the Schulte Roth & Zabel lawyer with whom you usually work, or any of the following attorneys:

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¹⁸ *Id.* at 1.

¹⁹ See Press Release, *supra* note 1, at 2 (requesting information and comment on “What methods are card issuers using to encourage timely payments, including autopay and notifications?”).

²⁰ See *id.* at 1 (the “immunity provision ... allows credit card companies to escape enforcement scrutiny”).