THOMPSON HINE

**Business Litigation Update**

**March 2024**

## CFPB Issues Final Rule on Credit Card Penalty Fees Under Reg Z

On March 5, the Consumer Financial Protection Bureau (CFPB) issued the Credit Card Penalty Fees Final Rule (Final Rule), which amends Regulation Z, the Truth in Lending Act's (TILA) implementing regulation, to reduce the late fee safe harbor threshold for large credit card issuers.

### Current Rule

Presently, card issuers of all sizes may impose fees based on the costs the card issuer incurs when a consumer violates the account terms, but most opt to impose fees under the regulatory safe harbor. Pursuant to that safe harbor, the card issuer may charge $30 for the first violation, $41 if the card issuer has previously imposed a fee for a violation of the same type that occurred during the same billing cycle or one of the next six billing cycles, or 3% of the delinquent balance on a credit card account that requires payment of the balance in full at the end of each billing cycle if the card issuer has not received the required balance for two or more consecutive billing cycles.

### Final Rule

The Final Rule differentiates between large and smaller card issuers. For large card issuers, the Final Rule caps late fees at $8 per month. For large card issuers charging fees for "other types of violations" and for smaller card issuers charging late fees or other fees, the Final Rule amends the safe harbor to $32, and then $43 if the card issuer has previously imposed a fee for a violation of the same type that occurred during the same billing cycle or one of the next six billing cycles, or 3% of the delinquent balance on a credit card account that requires payment of the balance in full at the end of each billing cycle if the card issuer has not received the required balance for two or more consecutive billing cycles. Stated differently, the Final Rule caps late fees for large card issuers at $8 per month while increasing the late fees that smaller card issuers could charge under the applicable safe harbor provisions. And although the regulation states that the CFPB will adjust the fee amount for "other violations" based on annual changes in the Consumer Price Index, no such requirement exists for the $8 late fee safe harbor.

### Litigation and Industry Speculation

The U.S. Supreme Court heard oral arguments in October 2023 in a case to determine whether the CFPB's funding structure is constitutional, and critics of the CFPB submit that this pending decision is justification alone to stay implementation of the Final Rule.

On March 7, the U.S. Chamber of Commerce and bank trade groups sued the CFPB in the U.S. District Court for the Northern District of Texas, alleging that the CFPB's funding structure is unconstitutional; the Final Rule only considers a subset of card issuers' costs in setting late fees and fails to sufficiently consider costs to consumers such as the potential reduced access to credit in violation of the CARD and Dodd-Frank Acts; the Final Rule is arbitrary and capricious for a number of reasons, including its failure to explain why the late fee safe harbor should depend on the number of accounts opened by the card issuer or why adjustments for inflation should apply to the safe harbor for smaller card issuers but not larger ones; the CFPB violated the Administrative Procedures Act by basing the Final Rule on a subset of data that was not made publicly available; and the CFPB violated TILA, which requires that new consumer-credit disclosures have a six-month effective date, whereas the Final Rule takes effect in 60 days.

On the other hand, President Biden touted the Final Rule in his State of the Union address, saying, “My administration just announced we’re cutting credit card late fees from $33 to $8,” and, “I’m saving American families $20 billion a year with all the junk fees I’m eliminating.”

## Conclusion

Although some industry participants anticipate that litigation challenges may delay the Final Rule’s implementation, financial institutions cannot be caught flat-footed and are rightfully seeking guidance to prepare for implementation of the operational changes required to comply with the Final Rule. We recommend that financial institutions seek advice regarding the implementation of all regulatory amendments and work with their internal business operations, compliance, finance, risk, and regulatory units to ensure compliance.

## FOR MORE INFORMATION

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