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CFPB Seeks Information on Credit Card Late Fees

ANPR Reflects Continued Focus on “Junk Fees” and Signals Likelihood that CFPB will Revisit CARD Act Safe Harbor

SUMMARY

On June 22, 2022, the Consumer Financial Protection Bureau issued an Advanced Notice of Proposed Rulemaking (“ANPR”) requesting information regarding credit card late fees, late payments, and card issuers’ revenue and expenses. The principal purpose of the ANPR is to gather information relevant to potential revisions to the credit card fee “safe harbor” in the CFPB’s Regulation Z. The safe harbor and related provisions implement the Credit Card Accountability Responsibility and Disclosure Act (the “CARD Act”) and were first promulgated by the Board of Governors of the Federal Reserve System (the “Federal Reserve”) in 2010. The safe harbor establishes a presumption that a fee is permissible provided it does not exceed the dollar amounts set out in the safe harbor. Rulemaking authority under the CARD Act was transferred to the CFPB in 2011. Since then, the CFPB’s only adjustments to the safe harbor have been to increase the specified amounts to account for inflation. Now, however, the CFPB appears to view the safe harbor as “allow[ing] credit card issuers to escape enforcement scrutiny” for excessive late fees and, therefore, warranting reconsideration.

Although ostensibly aimed at helping the CFPB determine whether to revisit the safe harbor, the ANPR was issued under the CFPB’s broader market-monitoring authority and requests a wide array of information related to credit card late fees and the domestic credit card market more generally. Moreover, viewed in the context of other recent CFPB bank fee-related developments, the ANPR likely represents another step in a continuing series of CFPB initiatives aimed at reducing or eliminating bank fees the CFPB views as harmful to consumers.

BACKGROUND

A. INCREASED CFPB FOCUS ON “JUNK FEES”

In recent months, the CFPB has criticized what it terms “junk fees”—fees the CFPB considers harmful to consumers because they are not subject to competitive processes that ensure fair pricing. In December 2021, for example, the CFPB released a report examining the practices of depository institutions with regard to overdraft and non-sufficient funds (“NSF”) fees.¹ After finding that “overdraft and NSF fees made up close to two-thirds of reported fee revenue,” CFPB Director Rohit Chopra criticized banks for becoming “hooked on overdraft fees to feed their profit model” instead of competing on price and service. Director Chopra directed CFPB bank examiners to enhance their supervisory and enforcement scrutiny of banks that are heavily dependent on overdraft fees.² The following month, the CFPB issued a request for information (“RFI”) on how junk fees, which the CFPB said may include credit card late fees and deposit account overdraft fees and NSF fees, “have impacted peoples’ lives.”³ Director Chopra described the RFI as marking the start of “a new effort to help save American families billions of dollars in junk fees,” with the collected information being used to identify financial institutions dependent on such fees and to issue new rules and guidance with a view toward “ending banks’ reliance on these exploitative income streams.”⁴

Since December 2021, numerous banks of varying sizes have announced they are reducing and sometimes even eliminating overdraft or NSF fees. In a February 2022 CFPB blog post, the CFPB observed a recent “uptick in changes banks are making to their overdraft programs” and summarized overdraft and NSF data for the 20 banks reporting the most in overdraft and NSF revenue.⁵ According to the summary, as of late 2021, all but one of the 20 banks charged overdraft or NSF fees. In a blog post two months later, the CFPB identified by name the 25 banks reporting the most overdraft and NSF revenue and specified whether each bank charges NSF fees or recently announced eliminating them.⁶ By that time, at least 13 of the 25 named banks had either ceased charging such fees altogether, recently announced plans to eliminate them, or announced reductions in fee charges. Since the April post, at least three additional named banks have announced plans to eliminate or reduce these fees.⁷

In March 2022, in the midst of these developments related to overdraft and NSF fees, the CFPB issued a report analyzing credit card late fees. In the report, which foreshadowed the ANPR, the CFPB concluded that (1) many major card issuers charge the maximum amount allowed under the safe harbor, (2) late fees account for over 10 percent of total fees and interest collected annually industry wide (\$12 billion in 2020 alone), and (3) low-income areas, areas with high shares of Black Americans, and areas with lower economic mobility bear more of the late fee burden.⁸

B. THE CARD ACT AND THE SAFE HARBOR

The 2009 CARD Act limited the fees and interest rate increases credit card issuers are permitted to charge. As particularly relevant here, the CARD Act requires penalty fees charged by issuers, including late fees, to be “reasonable and proportional” to the omission for which the fee is charged.⁹

As originally enacted, the CARD Act assigned rulemaking authority to the Federal Reserve, including a statutory directive to “provide an amount for any penalty fee or charge ... that is presumed to be reasonable and proportional.”¹⁰ This safe harbor, as originally implemented, reflected the amounts the Federal Reserve determined to be presumptively reasonable.¹¹ The Federal Reserve set these amounts at \$25 for the first late payment and \$35 for additional late payments during the next six billing cycles, in each case to be adjusted annually for inflation.¹² An issuer choosing not to rely on the safe harbor (such as by imposing higher fees) may impose a fee only after performing a “cost analysis” and determining that the dollar amount of the fee represented a reasonable proportion of the total costs incurred by the card issuer as a result of the omission.¹³

In 2011, rulemaking authority under the CARD Act was transferred to the CFPB. The CFPB promptly reissued the Federal Reserve’s implementing rule, including the safe harbor and cost analysis provisions, substantially unchanged. Presently, the inflation-adjusted amounts are \$30 for the first late payment and \$41 for each additional late payment during the next six billing cycles.¹⁴

THE CFPB ANPR

The CFPB requests information on a wide variety of topics relating to late fees and the domestic credit card market more generally. The ANPR includes 38 numbered items (most with multiple sub-items), which the CFPB assigns to 11 categories. Where a time period is specified, the CFPB generally seeks information for 2019, 2020, and 2021. The 11 categories are outlined below.

1. **Factors used by card issuers to set existing levels of late fees.** These items focus on how card issuers determine late fee amounts, including the factors card issuers take into account.
2. **Costs and losses.** These items generally focus on the costs to issuers associated with late payments, including types and amounts. Other items also address methods of cardholder contact regarding late payments and data regarding late fee volumes.
3. **Deterrence.** These items focus on the deterrent effect of late fees and other consequences imposed on cardholders for late payments, and whether other methods are used to deter such payments. The CFPB suggests that autopay and due date notifications, each addressed below, may be other methods used by card issuers to deter late payments.
4. **Cardholder behavior.** These items focus on the categories issuers use to classify cardholders based on their late payment behavior. The CFPB requests data on the share of cardholders in these categories and when late-paying cardholders make at least the minimum payment. The CFPB asks if there is other cardholder conduct the CFPB should consider in evaluating potential changes to the safe harbor.

5. **Autopay.** These items address autopay offerings by issuers and related processes, including the rates of cardholder enrollment, incentives for enrolling, concerns with consumer use of autopay, and benefits of autopay.
6. **Notifications of upcoming due date.** These items address the methods used by card issuers to contact cardholders about an upcoming due date, including any opt-in requirement, and whether the frequency or method of communication changes after the cardholder is charged a late fee.
7. **Courtesy periods and fee waivers.** These items focus on whether card issuers offer courtesy periods before assessing late fees, the length of or restrictions placed on such periods, and the circumstances in which issuers waive late fees.
8. **Staggered late fee.** These items address whether issuers offer staggered late fees—for example, \$2 imposed no more often than every five days—and how such fees are structured and determined.
9. **Safe harbor provisions.** These items request information about factors the CFPB should consider in evaluating changes to the safe harbor, late fee assessments that deviate from the safe harbor amount, the safe harbor amount that would allow issuers to recoup their costs in collecting late payments, whether costs are higher with repeat late payments, changes to the safe harbor provisions that may discourage use, and, where an issuer does not use the safe harbor, whether the CFPB should consider methods other than the cost analysis currently specified in Regulation Z to determine the allowable late fee.
10. **Cost analysis provisions.** These items request information regarding the cost analysis provisions in Regulation Z, including amounts charged by issuers who actually use the cost analysis method or amounts that would be charged if they were to use that method, whether additional detail from the CFPB is needed on how to comply with the cost analysis, and whether the CFPB should adopt additional processes and procedures should the CFPB require issuers to comply with the cost analysis provisions.
11. **Revenue and Expenses.** These items request revenue associated with domestic consumer credit card operations, revenue from late fees, expense figures, and losses.

Comments on the ANPR are due by July 22, 2022.¹⁵

IMPLICATIONS

The ANPR may portend not only future proposed revisions to the safe harbor, but also additional areas of CFPB interest and examination scrutiny relating to the domestic credit card market and late fees in particular. More immediately, the ANPR and March 2022 report on credit card late fees, particularly when viewed in light of the CFPB's actions since late last year relating to bank overdraft fees and NSF fees, suggest that the CFPB may seek to exert pressure on credit card issuers outside of the ANPR process to reduce late fees below the amounts specified in the safe harbors—or even eliminate them entirely. Indeed, in his remarks accompanying the ANPR's issuance, Director Chopra clearly articulated his concerns about the potentially duplicative nature of credit card late fees.¹⁶

Card issuers are not required to respond to the ANPR; comments and the submission of detailed information are entirely voluntary. However, if the CFPB does not secure the information it is seeking

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through the ANPR, it could turn to the non-voluntary tools at its disposal to gather data to support the anticipated rulemaking proposal. Accordingly, if a card issuer has views on any of the matters with respect to which the CFPB requests comment, this may be the best opportunity to voice those views. Regardless, in light of the ANPR and the CFPB's other bank fee-related actions, credit card issuers should closely scrutinize their late fee-related practices and ensure they are able to coherently articulate the rationales for these practices.

Finally, issuers that rely on the safe harbor may wish to consider whether their current late fee schedules would be permissible as "reasonable and proportional" if the CFPB later revokes the safe harbor or reduces the safe harbor amounts substantially below what the card issuer currently charges.

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ENDNOTES

- 1 CFPB Research Shows Banks' Deep Dependence on Overdraft Fees (Dec. 1, 2021), *available at* <https://www.consumerfinance.gov/about-us/newsroom/cfpb-research-shows-banks-deep-dependence-on-overdraft-fees/>.
- 2 *Id.*
- 3 CFPB, Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services (Jan. 26, 2022), *available at* https://files.consumerfinance.gov/f/documents/cfpb_fees-imposed-by-providers-of-consumer-financial-products-services_rfi_2022-01.pdf.
- 4 Prepared Remarks of CFPB Director Rohit Chopra on the Junk Fees RFI Press Call (Jan. 26, 2022), *available at* <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-on-the-junk-fees-rfi-press-call/>.
- 5 See CFPB, Comparing overdraft fees and policies across banks (Feb. 10, 2022), *available at* <https://www.consumerfinance.gov/about-us/blog/comparing-overdraft-fees-and-policies-across-banks/>.
- 6 See CFPB, Consumers on course to save \$1 billion in NSF fees annually, but some banks continue to charge these fees (April 13, 2022), *available at* <https://www.consumerfinance.gov/about-us/blog/consumers-on-course-to-save-one-billion-in-nsf-fees-annually-but-some-banks-continue-to-charge-them/>.
- 7 Citizens Enables Customers to Receive Paychecks Early, Commits to Eliminating Non-Sufficient Funds Fees By End of 2022 (June 13, 2022), *available at* <https://investor.citizensbank.com/about-us/newsroom/latest-news/2022/2022-06-13-130819895.aspx>; KeyBank Announces Elimination of Non-Sufficient Fund Fees and Other Overdraft Changes (April 26, 2022), *available at* <https://www.prnewswire.com/news-releases/keybank-announces-elimination-of-non-sufficient-fund-fees-and-other-overdraft-changes-301532559.html>; USAA Bank to end ATM and NSF fees by end of 2022 (April 22, 2022), *available at* <https://communities.usaa.com/t5/USAA-News/USAA-Bank-to-end-ATM-and-NSF-fees-by-end-of-2022/ba-p/257711>.
- 8 CFPB Finds Credit Card Companies Charged \$12 Billion in Late Fee Penalties in 2020 (Mar. 29, 2022), *available at* <https://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-credit-card-companies-charged-12-billion-in-late-fee-penalties-in-2020/>.
- 9 15 U.S. Code § 1665d.
- 10 15 U.S. Code. § 1665d (2009).
- 11 See 75 Federal Register 37526, 37531-37532 (June 29, 2010).
- 12 See 75 Federal Register 37572.
- 13 *Id.*
- 14 CFPB, Advance Notice Of Proposed Rulemaking Regarding Credit Card Late Fees And Late Payment (June 22, 2022), *available at* https://files.consumerfinance.gov/f/documents/cfpb_credit-card-late-fees_anpr_2022-06.pdf.
- 15 *Id.*
- 16 Prepared Remarks of Director Chopra on Credit Card Late Fees ANPR Press Call (June 22, 2022), *available at* <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-director-chopra-on-credit-card-late-fees-anpr-press-call/> ("Looking at these late fees logically, many consumers question why they are getting dinged several times over. Cardholders who miss making the minimum payment by the due date are already punished by paying interest on their debt," which to many consumers seems like a "second penalty for the same event.").

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