DREHER TOMKIES SCHEIDERER LLP ALERT

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PRELIMINARY INJUNCTION HALTS AMENDMENT TO RULE AFFECTING AIMED AT HIGH FEE SUBPRIME CREDIT CARDS

The United States District Court for the District of South Dakota recently granted First Premier Bank's motion for a preliminary injunction to postpone and enjoin the October 1, 2011 effective date of an amendment to Section 226.52 of Regulation Z, which sought to limit certain credit card fees that may be charged not only to those charged during the first year after account opening, but also to those charged prior to account opening. *First Premier Bank v. United States Consumer Fin. Protection Bureau,* 2011 WL 4458785 (D.S.D., Sept. 23, 2011).

Section 226.52 of Regulation Z originally was promulgated in 2010 by the Federal Reserve Board to implement Section 1637(n) of the Truth in Lending Act, which was enacted as part of the Credit Card Accountability Responsibility and Disclosure Act of 2009. Section 226.52(a) as originally promulgated provided in relevant part that except as provided, if a card issuer charges any fees to a credit card account under an open-end (not home-secured) consumer credit plan *during the first year the account is opened*, the total amount of fees the consumer is required to pay with respect to the account during that year must not exceed 25% of the credit limit in effect when the account is opened. Section 1637(n) of TILA uses the phrase *in the first year during which the account is opened.*

After promulgation of Section 226.52, First Premier offered credit card accounts that required payment by the consumer before the account was opened of a fee ranging from $25 to $95. The fee had to be paid in full before credit was issued, and it could not be paid with credit issued under the account. In late 2010 the Board issued proposed revisions to Section 226.52, which limited the fees charged not only "during the first year," but also "prior to account opening." These revisions were finalized in March 2011 and the revised Section 226.52 was to take effect October 1, 2011. First Premier, which had filed a comment with the Board opposing the new language, filed an action for declaratory judgment and injunctive relief in July 2011.

In considering First Premier's motion for preliminary injunction, the court used the Eighth Circuit's four-part test, which considers (i) whether the movant is likely to prevail on the merits, (ii) the threat of irreparable harm to the movant, (iii) the state of balance between this harm and the injury that granting the injunction will inflict on the other parties litigant and (iv) the public interest. The court noted the most significant factor to be Item (i), and spent the bulk of its opinion considering that factor. As the court stated, to determine whether an agency has validly promulgated administrative regulations generally invites analysis under the *Chevron* test. That test requires the court to determine (i) whether Congress has directly spoken on the issue and (ii) if Congress has not spoken, whether the agency's interpretation is based on a permissible construction of the statute.

To determine whether Congress has directly spoken on the issue, the court looked at the language of Section 1637(n) of TILA. It found that the plain language of the statute indicates that it only is meant to prevent a creditor from charging fees to the credit balance itself, which would deceptively reduce the available credit the consumer has available to him when first opening the account. Nothing in the plain language, the court stated, implies that the statute is meant to prohibit creditors from charging pre-account fees or any other fees as long as they are not charged to the account. The statute is clear and unambiguous the court found, rejecting defendants' claim that review of the plain language requires application of the broad purposes of the legislation. Even if the legislative history and Congressional intent were to be considered, the court said, it would support the same conclusion – the statute was intended to prevent the harm of fees being charged to the account that would reduce the available credit to an unknowing consumer, and not to prevent consumers from paying excessive fees in order to obtain a credit card account.

The court went on to determine whether there was a gap for the Board to fill in promulgating its regulation and, if there was, whether the regulation was arbitrary, capricious, or manifestly contrary to the statute. In examining the statute, the court found nothing to suggest that Congress intended Section 1637(n) to go beyond the issue of creditors charging more than 25% of the credit line through fees charged to the account itself. With its proposed language, the court determined, the Board would change the purpose of the statute from preventing fees that reduce the available credit under the account to prohibiting any fee the Board does not like. Such action, the court

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concluded goes beyond Congress' mandate and is arbitrary, capricious and contrary to the Board's statutory authority. The court went on to find each of the other parts of the test (*i.e.,* Items (ii)-(iv) above) to weigh in favor of granting the preliminary injunction. ❑

✧ ✧ *Judy Scheiderer and Margaret Stolar*