DREHER TOMKIES LLP

ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

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CFPB FINALIZES CREDIT CARD LATE FEE RULE, SLASHING LATE FEE SAFE HARBOR

Over a year after the issuance of a notice of proposed rulemaking to amend the Regulation Z safe harbor for credit card late fees, the Consumer Financial Protection Bureau ("CFPB") announced the final rule to slash the credit card late fee safe harbor from its current rate of $30 for the first violation and $41 thereafter to a flat $8 late fee for card issuers with more than 1 million open accounts. *See our* ALERTS of Feb. 28, 2023, June 24, 2022 and Jan. 26, 2022. The late fee safe harbor is the latest casualty in the CFPB's ongoing battle against "junk fees."

In addition to lowering the numerical safe harbor amount, the rule eliminates the traditional inflation adjustment provision for larger card issuers, which allowed the late fee safe harbor to be adjusted in response to inflation and existed in the regulations implementing the CARD Act since the initial Federal Reserve regulations promulgated in 2010.

In statements announcing the finalized rule, the CFPB refers to the elimination of the inflation adjustment mechanism as "closing a loophole", despite the fact that the mechanism has been explicitly described and authorized by the rules since 2010 and reliance on the safe harbor amounts, as adjusted for inflation, constituted compliance with the law. The amended rule does not provide for a mechanism to automatically increase the $8 safe harbor fee, leaving any future increases to the discretion of the CFPB, which has stated that it will "adjust the immunity threshold as necessary" but without providing issuers any information for prudent strategic planning and business forecasting purposes.

The lower safe harbor amount applies to the "largest card issuers" (approximately 35 in number), which the CFPB claims account for more than 95% of total outstanding credit card balances. Larger credit card issuers can charge more than the $8 safe harbor if they can justify the higher amount by demonstrating that such issuers need to charge more to cover their actual collection costs. No guidance is provided on how to appropriately calculate such alternative amounts. Smaller card issuers, defined as card issuers (including their affiliates) that have fewer than 1 million open credit card accounts for the entire preceding year, are still authorized to charge the "old" safe harbor, which will continue adjust for inflation annually and has been adjusted for 2024 inflation to $32 for the first violation and $43 thereafter for a violation of the same type that occurred during the same billing cycle or one of the next 6 billing cycles.

Industry trade groups largely oppose the new rule, which they believe will reduce competition, increase the cost of credit and lead to lower credit scores (due to increased late payments), among other things. The amended rule strips late fees of their deterrent effect, which was specifically identified as one of the factors the Federal Reserve considered when initially promulgating rules under the CARD Act.

The U.S. Chamber of Commerce has indicated that it plans to combat the proposed rule through litigation "imminently", while U.S. Senator Tim Scott has threatened to fight the rule's implementation through the Congressional Review Act.

Barring any stays, the rule will become effective 60 days after its publication in the Federal Register.

We will, of course, continue to monitor and report on any challenges to this rule. ❑

✧ *Elizabeth Anstaett, Michael Tomkies and Mercedes Ramsey*

Darrell L. Dreher
ddreher@dltlaw.com

Elizabeth L. Anstaett
eanstaett@dltlaw.com

Mercedes C. Ramsey
mramsey@dltlaw.com

Susan L. Ostrander
sostrander@dltlaw.com

2750 HUNTINGTON CENTER
41 S. HIGH STREET
COLUMBUS, OHIO 43215
TELEPHONE: (614) 628-8000 FACSIMILE: (614) 628-1600
WWW.DLTLAW.COM

Michael C. Tomkies
mtomkies@dltlaw.com

Judith M. Scheiderer
jscheiderer@dltlaw.com

Robin R. De Leo
robin@deher-la.com