

CLIENT ALERT



Taking the Lead or Dropping Back with the Pack? Connecting the Credit Card Late Fees Rulemaking and Litigation with Broader CFPB Trends

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A unique entity, the Consumer Financial Protection Bureau (CFPB) has faced court challenges to its policies and structure since its inception. But in recent years, as the CFPB has become more active and, arguably, more aggressive, it has faced increasing legal scrutiny. The swirling legal challenges against the CFPB raise questions for banks and other regulated entities regarding not only how to respond to CFPB's rulemaking, but how quickly they should act to do so. This article addresses the main litigation surrounding credit card late fees and its overlap with the recent Supreme Court case upholding the validity of the Bureau's funding structure, and in this context provides further insight into the pace at which an entity should respond to this quasi-regulator/quasi-enforcer.

The CFPB has been increasingly active over the past decade, and we see an overall trend upward both in rules and enforcement actions, with some outlier spikes along the way. Although enforcement actions surely have not diminished, the Bureau's rule-making authority has been on an upward swing lately.

CREDIT CARD LATE FEES LITIGATION

In March 2024, the CFPB continued this trend of rulemaking with the announcement of a final rule “ban[ning] excessive credit card late fees.” The CFPB's proposed amendment to Regulation Z would essentially put a cap of \$8 into effect for fees charged to customers who are late on their credit card payments.¹ The CFPB touted this change as essential to close a “2010 loophole exploited by credit card giants.”² The rule would affect regulated entities of a certain size nationwide.³ In connection with the rule, financial institutions and regulated entities would need to also update their customer-facing notices and disclosures regarding fees.

Just two days later, on March 7, 2024, the CFPB was sued by the U.S. Chamber of Commerce and several other business-related associations regarding this rule. *Chamber of Commerce of United States et al v. Consumer Fin. Prot. Bureau*, No. 4:24-cv-00213. On March 25, the plaintiffs appealed the trial court's denial of its motion for expedited consideration of their motion for a preliminary injunction, stating that they were appealing the Court's “effective denial” of the preliminary injunction.⁴ In support, Plaintiffs stated, “[t]o time those changes [changes required to properly comply with the new CFPB rule] with the Final Rule's May 14, 2024 effective date, such notices [disclosing the reduced late fees] would need to be received by customers by March 29, 2024. As a result, Plaintiffs

will suffer irreparable harm absent an immediate injunction.” *Id.* After some juggling between jurisdictions, the case returned to federal court in Texas, and on May 10, Judge Pittman stayed implementation of the new late fees rule.

The Texas federal court’s decision rested heavily on the fact that “the Fifth Circuit has held that the CFPB’s funding structure is unconstitutional,”²⁴ a decision that was just recently overturned in a 7-2 decision by the Supreme Court in *CFSA v. CFPB*. With the Supreme Court’s decision announced, entities that put a hold on their late fee compliance efforts should be watching the federal court Texas litigation closely, as it is likely the Bureau will act quickly to lift the stay and the fight over this rule will continue.

Indeed, the uncertainty of the litigation surrounding credit card late fees exemplifies the conundrum of speed and timing for banks and other financial institutions who must respond to the CFPB’s rules. If entities had adopted the new late fees cap too hastily, they could have suffered financially. Let’s take, for instance, two companies who approached the rule differently.

- Credit Card Issuer 1 rushed to lower its late fees to \$8 in response to the proposed rulemaking, an effort to attract more customers and comply with the CFPB. But its competitors did not, as they took a “wait and see” approach. In this situation, Credit Card Issuer 1 could have lost critical revenue, *or* gained it through a new customer base.
- Credit Card Issuer 2, who took no action and waited for the litigation to end, could have either earned more revenue by continuing to charge higher fees, *or* it could have lost more of its customer base if other customers moved to Credit Card Issuer 1.

Further, if, in the meantime, companies adjusted their customer disclosures—intended to help customers by showing the reduction in fees—the issuer could have faced an action for unfair or arguably deceptive practices that caused confusion.

BEYOND CREDIT CARD LATE FEES: HOW REGULATED ENTITIES CAN PREPARE WHEN FACING CFPB REGULATION IN GENERAL

The stay provided a short respite to regulated entities while they wait to see how the Bureau reacts. But this situation begs the broader question of how regulated entities should approach compliance efforts in a world where there is a high likelihood of litigation turmoil before a final rule becomes effective.

As is typically the case, there is no one correct, one-size-fits-all approach. But there are a number of considerations that regulated entities should take into account in determining how quickly to react to new Bureau rules.

1. **Cost of compliance/non-compliance.** Regulated entities, and large banks in particular, know that even a small change to process can be both burdensome and costly. While acting quickly to implement a new rule may save a company from regulatory penalties on some occasions, it may, as was likely the case for many institutions preparing to comply with the late fees rule, result in a costly waste of resources. Regulated entities will want to pay close attention to the legal environment when a new rule is issued. If litigation or other meaningful challenges arise, companies may want to consider tempering their response.
2. **Cost or benefit of being ahead of the industry.** Many financial institutions seek the reputation of being on the cutting edge of industry trends and standards. Particularly given the Biden administration’s focus on “junk fees,” taking a stance *against* fees—or reducing them to less than \$8—could set a bank ahead in the industry. Yet risks and rewards go hand in hand, and taking a stance on a lower fee could lead to lost revenue if the Bureau’s reign is lessened either through litigation or a change in administration this fall.
3. **Consumer harm.** Just as the banking industry watches rule changes, the plaintiff’s bar closely watches rulemaking (and the industry’s response) to determine whether banks have effectively changed their practices or allegedly harmed consumers. Prevention of consumer harm is therefore critical not only to ensure happy customers but also to avoid costly litigation.

How the CFPB May Enact Policies in an Attempt to Prevent Future Litigation

While regulated entities struggle with how to react to the legal swirl, the Bureau is likely also considering its next moves, and we think the most likely outcome will be increased rulemaking by enforcement, as well as a broader exercise of authority through its supervisory process. The Bureau has, in recent years, had several big enforcement successes, both in terms of dollar amounts, and in its ability to change industry practices through consent orders. [1] In 2023, the CFPB hired a group of technology experts focused on enforcement matters, and it has stated its intention to expand further in 2024. [2] Meanwhile, though the Bureau ultimately withdrew recent changes to its examination manual when challenged in court, its statement in briefings reflected that the Bureau continues to intend to continue to push the boundaries of its authority. [3] These data points suggest that the CFPB intends on implementing more of its policies by filing more enforcement actions—the speed of which can be difficult to predict.

[1] <https://www.consumerfinance.gov/about-us/newsroom/cfpb-bans-excessive-credit-card-late-fees-lowers-typical-fee-from-32-to-8/>; 89 Fed Reg 19128, *accessible at* <https://www.federalregister.gov/documents/2024/03/15/2024-05011/credit-card-penalty-fees-regulation-z>.

[2] <https://www.consumerfinance.gov/about-us/newsroom/cfpb-bans-excessive-credit-card-late-fees-lowers-typical-fee-from-32-to-8/>

[3] As Northern District of Texas Judge Pittman stated in connection with a transfer decision, “[T]he effects of the CFPB’s Rule will be felt in every district in the United States.” *Chamber of Commerce of United States et al v. Consumer Fin. Prot. Bureau*, No. 4:24-cv-00213, Dkt. No. 67 (Mar. 28, 2024).

[4] Notice of Interlocutory Appeal to the Fifth Circuit, No. 4:24-cv-213/57.

[5] See 51 F.4th 616, 623 (5th Cir. 2022).

[6] <https://www.consumerfinance.gov/about-us/blog/the-cfpbs-enforcement-work-in-2023-and-what-lies-ahead/>

[7] *Id.*

[8] 6:22-cv-00381.
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