

BankNotes: Winter 2023

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FEDERAL LAW UPDATES

CFPB Proposes Rule to Limit Credit Card Late Payment Fees

On February 1, 2023, the Consumer Financial Protection Bureau (CFPB) issued a proposed rule to “better ensure that the late fees charged on credit card accounts are 'reasonable and proportional' to the late payment...” The final rule, if adopted, would amend CFPB Regulation Z, which implements the Truth in Lending Act (TILA).

The proposed rule would affect the following changes to Regulation Z:

- It would create a “safe harbor” to permit a card issuer to impose a late payment fee on an account if it does not exceed \$8. This “safe harbor” amount is not to be adjusted for inflation.
- Notwithstanding the \$8 “safe harbor” fee, it would permit charge card issuers to impose a fee of up to 3% of the delinquent balance on the account if the account terms require payment of outstanding balances in full at the end of each billing cycle and the card issuer has not received the required payment for two or more consecutive

billing cycles.

- Credit card issuers must not impose a late payment fee if it would exceed 25% of the required minimum payment due immediately before assessing the late payment fee.

In its press release which accompanied the proposed rule, the CFPB noted that American families paid credit card late fees totaling approximately \$12 billion in 2020. The CFPB predicts that the rule, if adopted, may reduce those late fees by up to \$9 billion per year.

Interested parties may submit comments on the proposed rule to the CFPB. The deadline to submit comments is April 3, 2023.

If adopted, credit card issuers will need to review and, if needed, amend their new and existing account terms (including TILA disclosures) to conform to the new fee limits.

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CFPB Proposed Rule would Require Supervised Nonbanks to Submit Contract Provisions to Registry

On January 11, 2023, the CFPB issued a proposed rule that would affect supervised nonbanks. The rule would apply to supervised entities other than chartered banks, savings banks, and credit unions, such as mortgage lenders, payday lenders, private education lenders, and certain other nonbank institutions that the CFPB determines are larger participants in consumer financial markets.

Under the proposed rules, supervised nonbanks must submit or update, on an annual basis, to a new CFPB registry any “take it or leave it” terms in its standard form contracts that would waive or limit any consumer rights or protections, including terms which:

- Preclude the consumer from bringing a legal action after a certain period of time;
- Require that any legal action by the consumer be brought in a particular forum or venue;
- Limit class action or class arbitration rights;
- Contain any limitation on liability to the consumer, including any cap on the amount of recovery or type of remedy;
- Waive any cause of action by the consumer or disclaim any liability to the consumer;
- Limit the ability of the consumer to make complaints or post reviews;
- Waive, or contain an agreement of the consumer not to assert, any right, defense or protection under federal or state law; or
- Require arbitration of any dispute.

If the proposed rule is adopted, the CFPB intends to utilize data from the

registry to identify risks posed by such terms and conditions and to prioritize examination and enforcement against supervised nonbanks.

Interested parties may submit comments on the proposed rule to the CFPB. The deadline to submit comments is March 12, 2023.

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CFPB Proposes to require Registration of Nonbank Covered Persons Subject to Agency and Court Orders

In a proposed rule published January 30, 2023, the CFPB proposes to create and maintain a registry to collect information about certain orders issued by public agencies and courts against supervised entities other than chartered banks, savings banks, and credit unions.

Under the proposed rule, supervised nonbanks would be required to register with the CFPB upon becoming subject to a public written order or judgment that imposes obligations based on violation of certain federal and state consumer protection laws, including federal consumer financial laws and federal and state laws prohibiting unfair, deceptive, or abusive acts or practices (UDAP or UDAAP).

Interested parties may submit comments on the proposed rule to the CFPB. The deadline to submit comments is March 31, 2023.

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Federal Reserve Limits State Member Bank Activities; Denies Application for Federal Reserve Membership to Crypto-Banks

On January 27, 2023, the Board of Governors of the Federal Reserve System (the Board) issued a policy statement, which interpreted section 9(13) of the Federal Reserve Act and created a rebuttable presumption that the Board will require state bank applicants for Federal Reserve System membership limit their activities to those that are permissible for national banks.

On the same day, the Board denied the Federal Reserve System membership application of Custodia Bank, a Wyoming-chartered special purpose depository institution which does not have federal deposit insurance. According to the Board's press release, Custodia Bank "proposed to engage in novel and untested crypto activities that include issuing a crypto asset on open, public and/or decentralized networks. The firm's novel business model and proposed focus on crypto-assets presented significant safety and soundness risks [which are] highly likely to be inconsistent with safe and sound banking practices."

In 2019, Wyoming became the first state to charter special purpose depository institutions "that receive deposits and conduct other activity

incidental to the business of banking, including custody, asset servicing, fiduciary asset management, and related activities,” focusing on digital assets. The Board's policy statement and denial of Custodia Bank's application likely stem, in significant part, from recent volatility in crypto-asset markets and high-profile failures of crypto-businesses such as FTX Trading Ltd.

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NCUA Proposes Amendment to Rules on Loan Participations and Eligible Obligations

On December 29, 2022, the National Credit Union Administration (NCUA) proposed to amend existing NCUA rules regarding the purchase of loan participations and the purchase, sale and pledge of eligible obligations and other loans. If adopted, the proposed rule would provide federal credit unions (FCUs) and federally insured credit unions (FICUs) additional flexibility to participate in loans acquired through indirect lending arrangements, purchase eligible obligations of their members, and facilitate engagement with fintech technologies.

Interested parties may submit comments on the proposed rule to the NCUA. The deadline to submit comments is February 28, 2023.

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FinCEN Issues Alert on Potential U.S. Commercial Real Estate Investment by Sanctioned Russian Elites, Oligarchs, and their Proxies

On January 25, 2023, the Financial Crimes Enforcement Network (FinCEN) issued an alert to all financial institutions regarding potential investments in the U.S. commercial real estate sector (CRE) by “sanctioned Russian elites, oligarchs, their family members, and the entities through which they act.” The alert points out certain “red flags” and methods used to evade sanctions. In particular, the FinCEN alert cautioned financial institutions to:

- Remain vigilant in monitoring, detecting, and reporting suspicious activities that may indicate sanction evasion activities; and
- Be on the lookout for potential sanction evasion activities such as pooled investment resources, creation of shell companies and trusts, using third parties to make investments, and inconspicuous CRE investments that provide stable returns.

Under the Bank Secrecy Act (BSA), financial institutions are required to file a Suspicious Activity Report (SAR) if they know, suspect, or have reason to suspect that a transaction was conducted or attempted by, at, or through the financial institution is intended to facilitate criminal activity, including sanctions evasion. Any SAR submitted involving suspected sanctions

evasion through CRE investment should include the key term “FIN-2023-RUSSIACRE” in SAR field 2 as well as in the narrative.

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STATE LAW UPDATES

Proposed UCC Changes Affecting Emerging Technology Assets

The Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws), in partnership with the American Law Institute, recently promulgated and recommended enactment by all states of amendments to the Uniform Commercial Code (UCC). The proposed amendments highlight emerging technologies, including artificial intelligence, distributed ledger technology, and virtual currency.

Highlights of the proposed amendments include the following:

- **New UCC Article 12 (controllable electronic records, controllable accounts, and controllable payment intangibles).** A proposed new UCC Article 12 would govern the transfer of property rights in certain intangible digital assets (controllable electronic records) that have been or may be created and may involve the use of new technologies. These assets include certain types of non-fiat virtual currency and nonfungible tokens (NFTs).
- **Amendments to UCC Article 9 (secured transactions).** The amendments propose extensive changes to Article 9, including addressing attachment, perfection, and priority of security interests in controllable electronic records and in related rights to payment. Other significant amendments affect security interests in chattel paper and money, and perfection of security interests by control through another person.
- **Amendments to UCC Articles 3 (negotiable instruments), 4 (bank deposits and collections), and 4A (funds transfers).** The proposed amendments include several important amendments to Articles 3, 4 and 4A, relating to negotiability, remote deposit capture, statements of account, definition of “payment order” under Article 4A, and security procedures.

As of the date of this publication the amendments have been introduced, but not yet enacted, in Arizona, California, Colorado, the District of Columbia, Hawaii, Indiana, Kentucky, Maine, Massachusetts, Nebraska, New Hampshire, New Mexico, North Dakota, Oklahoma, Tennessee, Washington and West Virginia. Additional states are expected to introduce legislation to enact the amendments in the near future. No state has enacted the amendments to date.

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Alaska

The Alaska Department of Commerce, Community and Economic Development has proposed changes to certain existing banking regulations, including:

- Allowing Alaska state-chartered banks to make the same types of investments as national banks are permitted to make under federal law;
- Amending the requirements for an application for a branch bank, operating a mobile facility branch bank, and repealing certain branch bank application requirements to match those required of an Alaska-chartered credit union;
- Deleting publication requirements and fact-finding hearings;
- Modernizing fee requirements for a state-chartered credit union to complete a branch application to have parity with state-chartered banks; and
- Amending investment regulations applicable to mutual savings banks to match those of state-chartered banks.

The comment period expired on December 30, 2022.

Separately, the Alaska Department of Commerce, Community and Economic Development issued a final rule, which went into effect January 1, 2023, which subjected virtual currencies to existing Alaska money transmission laws and regulations.

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Nevada

On January 9, 2023, the Nevada Financial Institution Division issued an advisory opinion affecting collection agency activities in Nevada. The Division opined that Nevada law requires that a collection agency only communicate with a Nevada debtor using its own licensed name, and not that of the creditor.

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Utah

Under the recently enacted Commercial Financing Registration and Disclosure Act, effective January 1, 2023, Utah prohibits engaging in a commercial financing transaction as a provider in Utah or with a Utah resident unless the commercial finance company maintains a valid registration with the Utah Department of Financial Institutions. In addition, the commercial finance company is required to provide certain disclosures in connection with a commercial financing transaction.

The Act applies to business purpose transactions (i.e., with proceeds not intended to be used for personal, family, or household purposes) which constitute loans to businesses, commercial open-end credit plans (such as a corporate credit card or revolving line of credit), and accounts receivable factoring transactions.

Unless exempt, the provider of a commercial financing transaction must disclose the following before consummating the transaction (or, in the case of a commercial open-end credit plan, no later than 15 days after the last day of the calendar month in which a disbursement of funds occurs):

- The total amount of funds to be provided to the business;
- The total amount of funds disbursed to the business, if less;
- The total amount to be paid to the provider;
- The total dollar cost of the transaction;
- The manner, frequency and amount of each payment (or, if they may vary, the manner, frequency and amount of the initial payment);
- A statement of whether there are any costs or discounts associated with prepayment (including a reference to the relevant section in the agreement); and
- The amount of funds in the financing that the provider pays to a broker.

In addition, the financing agreement must include a description of the methodology for calculating any variable payment amount and the circumstances that may cause a payment amount to vary.

The following are exempt from the Act:

- Banks, credit unions, and other depository institutions and their subsidiaries and service corporations;
- Other entities which are regulated by a federal banking agency;
- Farm Credit Act lenders;
- Utah-licensed money transmitters;
- A provider that consummates five (5) or fewer commercial financing products in Utah during any 12-month period;
- Commercial financing transactions which are secured by retail properties;
- Leases;
- Purchase-money financings;
- Certain commercial loans and open-end credit plans of \$50,000 or more to a motor vehicle dealer or its affiliate or a motor vehicle rental company or its affiliate;
- Retail credit provided by the manufacturer, licensor or distributor of the product (or such person's parent company or controlled subsidiary) to finance the sale of a product or service; and

- Commercial financing transactions exceeding \$1,000,000.

Applications for registration and annual renewals must be submitted through the Nationwide Multistate Licensing System and Registry (NMLS).

In enacting the Act, Utah joins a small group of states (including California and North Dakota) which require licensure, registration, or disclosures by commercial lenders and factors.

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