

Insights

CFPB Provides Flexibility to Financial Institutions When Dealing with Billing Errors, Payment Rules and Deposit Accounts Terms Related to the COVID-19 Pandemic

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On May 13, 2020 the Consumer Financial Protection Bureau (the "Bureau") released a Statement on Supervisory Practices Regarding Regulation Z (the "Statement") and two FAQs regarding the Bureau's Payment and Deposits Rule (the "Payments and Deposits FAQs") and Open-End (not Home-Secured) Rule (the "Open-End Rules FAQs"), providing additional guidance regarding the obligations financial institutions have during the COVID-19 pandemic. This Client Alert outlines the key portions of the Statement and FAQs as provided by the Bureau.

I. Statement on Supervisory and Enforcement Practices

The Bureau's Statement provides additional clarity regarding supervisory and enforcement practices related to Regulation Z (12 CFR part 1026). More specifically, the Bureau focuses on creditors' compliance with the maximum timeframe for billing error resolution.^[1] Ordinarily, under 12 CFR § 1026.13(c)(1) a creditor has 30 days to mail a consumer acknowledgement of their billing error notice. Additionally, § 1026.13(c)(2) requires creditors to comply with procedures provided under §§ 1026.13(e) and (f) within 2 complete billing cycles, but in no event later than 90 days after receiving a billing error notice.^[2]

The Bureau's Statement makes clear that when evaluating a creditor's compliance with the maximum time frame for billing error resolution under § 1026.13(c)(2), it will consider a creditor's circumstances and will not cite violations or initiate enforcement actions "against a creditor that takes longer than required by § 1026.13(c)(2) to resolve a billing error so long as the creditor has made requisite good faith efforts to obtain the necessary information and make a determination as quickly as possible."^[3]

The Bureau's Statement makes clear that while relief may be provided from obligations under § 1026.13(c)(2), creditors are expected to fully comply with § 1026.13(d). Until a creditor has resolved a billing issue properly under §§ 1026.13(e) and (f) the requirements of § 1026(d) apply, including:

- The consumer is not required to pay any portion of the disputed amount (including related charges); and
- The creditor may not make or threaten to make an adverse report about the consumer's credit standing because the consumer failed to pay the disputed amount; and

- The creditor is not permitted to accelerate any part of the consumer's indebtedness or restrict the consumer's debt strictly because the consumer disputed an amount in good faith.

Finally, the Bureau's Statement encourages creditors to demonstrate flexibility when determining whether to impose the 60-day timeline granted consumers to provide billing error notices under Regulation Z.

II. Consumer Financial Protection Bureau FAQs Related to COVID-19

The Bureau also published two FAQs to provide additional clarity regarding Payments and Deposits Rules and Open-End (not home-secured) Rules during the COVID-19 Pandemic.

Payments and Deposits FAQs

The Bureau answered three questions in the Payments and Deposits FAQs. First, the Bureau addresses whether a financial institution ("FI") or a depository institution ("DI") may change account terms for consumer checking, savings, or prepaid accounts due to the pandemic. According to the Bureau, FI's and DI's may change account terms so long as proper notice is provided to consumers. Any change that is more favorable to the consumer can be made immediately and without prior written notice. FI's and DI's should be mindful of notice requirements under Regulations E and DD, which provide notice requirements for changes to ATM Fees and overdraft fees. Regulation E requires an FI to provide consumers with 21 days' advance notice before changing account terms while Regulation DD requires a DI to provide consumers with 30 days' written notice. Any notice provided pursuant to Regulations E and DD should state clearly the effective date of any change.

Second, the Bureau addresses whether an FI or a DI can immediately change account terms to consumer checking, savings, or prepaid accounts to provide relief to consumers. As noted above, FI's and DI's are able to make account changes that are favorable to the consumer effective immediately and without advance notice. By way of example, the Bureau provides that under Regulation E, an FI would not be required to provide advance written notice if it decided to drop ATM fees from \$2 to free. Nevertheless, the Bureau recommends that FI's and DI's do attempt to provide notice of changes beneficial to the customer as soon as reasonably practicable. Finally, the Bureau reminds FI's and DI's that written notice must be provided to consumers once changes favorable to consumers are reversed. Thus, the FI in the example above will be required to provide the requisite advance written notice under Regulation E when it re-introduces ATM fees.

Third, the Bureau addresses other ways in which FI's and DI's can provide immediate relief to consumers with checking, savings, or prepaid accounts. The Bureau encourages FI's and DI's to waive fees and proactively engage with consumers. The Bureau notes that so long as such activity is consistent with other law, fee waivers or reductions can be done on a case-by-case basis without changing account terms. The Bureau reminds FI's and DI's that stop payment requests from consumers related to preauthorized transfers must be honored, as many consumers may be prioritizing other payments.

Open-End Rules FAQs

The Bureau also answered three questions regarding the Open-End (not Home-Secured) Rules as they relate to the COVID-19 Pandemic. First, the Bureau addresses whether a creditor extending open-end (not

home-secured) credit (i.e. a credit card issuer) can change account terms for a consumer due to the COVID-19 pandemic. According to the Bureau, a creditor may change account terms, but such changes may require advance written notice. Generally, a creditor must provide 45 days' notice prior to a change in account terms.^[4] There is no advance notice requirement if a creditor extends the grace period for an account.^[5] Similarly, there is no notice requirement when the creditor chooses to reduce any finance or other charge which might provide immediate relief to the consumer.^[6] Finally, a creditor with a temporary hardship arrangement that includes the reduction of a consumer's APR would not need to provide notice to the consumer of such change.

Second, the Bureau addresses notice requirements regarding hardship relief arrangements between creditors providing open-end (not home-secured) and consumers. If a creditor extends open-end (not home-secured) credit, no advance written notice of any increase in charges or payments following the completion of a hardship arrangement must be provided so long as the creditor complies with certain requirements. For instance, a creditor entering into a temporary hardship arrangement with a consumer via telephone can put the relief plan in place after providing the consumer with an oral disclosure of the terms of the arrangement, including the terms upon completion of the arrangement. The creditor is required to mail or deliver a written disclosure as soon as reasonably practicable after the oral disclosure is made. For the creditor to take advantage of the flexibility to avoid advance written notice requirements, the terms that apply at the end of the hardship arrangement must be as favorable to the consumer as they were prior to the beginning of the hardship arrangement. The Bureau also provided that, while not required, creditors may remind consumers when a hardship arrangement nears its end.

Finally, the Bureau addresses how creditors may engage with consumers to provide additional assistance during the COVID-19 pandemic. The Bureau recommends that open end (non-home secured) creditors communicate proactively with consumers in an effort to provide helpful information. The Bureau hopes proactive engagement will limit problems and reduce the amount of wait time experienced by consumers seeking to engage service hotlines. Other recommendations include 1) adding helpful information to existing period statements, 2) making consumers aware of Bureau resources, and 3) increasing electronic communications, including the use of electronic disclosures.

The Krieg DeVault Financial Services team is closely monitoring the regulatory response to the COVID-19 pandemic and is able to assist your institution navigate the myriad of issues presented by this unprecedented crises. As further updates occur, this Alert will be updated.

[1] (12 CFR § 1026.13(c)(2)).

[2] These regulations require a creditor to conduct a reasonable investigation to determine whether a billing error occurred.

[3] *Statement on Supervisory and Enforcement Practices Regarding Regulation Z Billing Error Resolution Timeframes in Light of the COVID-19 Pandemic*, Consumer Financial Protection Bureau,
https://files.consumerfinance.gov/f/documents/cfpb_statement_regulation-z-error-resolution-covid-19_2020-05.pdf.

[4] 12 CFR § 1026.9(c)(2)(i)(A).

[5] 12 CFR § 1026.9(c)(2)(v)(A).

[6] *Id.*