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President Obama Signs Into Law The Credit Card Accountability, Responsibility And Disclosure Act Of 2009

Joy Harmon Sperling and David I. Schiefelbein

DAY PITNEY LLP

According to the Federal Reserve, rising unemployment rates and credit card delinquency rates have led to a significant increase in national credit card debt – a number that is now approaching $1 trillion. In response, Congress introduced legislation aimed at providing consumers with access to credit on terms that are fair and more easily understood. Billed as a "common sense reform," on May 22, 2009, President Obama signed into law the Credit Card Accountability, Responsibility and Disclosure Act of 2009 (the "CARD Act" or the "Act").[1] The Act is not intended to provide consumers a "free pass" for irresponsible spending, nor is it intended as a punishment for the credit card companies. Rather, as the President explained, the CARD Act's goal is aimed at mutual responsibility – "Credit card companies provide a valuable service, we don't begrudge them turning a profit. We just want to make sure that they do so while upholding basic standards of fairness, transparency, and accountability."

***Joy Harmon Sperling** is a Partner in the firm. Her practice involves representing consumer lending institutions including the defense and prosecution of mortgage fraud claims. **David I. Schiefelbein** is an Associate in the firm and practices in the areas of consumer finance litigation, white collar defense, and construction law.*

Why Does The CARD Act Matter?

As part of creating a more transparent credit industry, the CARD Act's primary goal is to make sure that credit card companies do not base their claims on the "fine print" in credit card agreements and to further assist consumers in these economically difficult times. As set forth below, the Act imposes several new notification requirements on credit card companies' dealings with consumers.

What Does The CARD Act Provide?

Some provisions of the new CARD Act, such as the reforms addressing advanced notice of rate changes, are scheduled to go into effect within the next month. The Act as a whole, on the other hand, is not scheduled to go into effect for another seven months. Because the effective date of the CARD Act is being "rolled out," credit card companies must be conscious not only of the substantive changes of the Act but also when they go into effect. Below is an overview of the CARD Act:

Provides "Enhanced" Protections For Cardholders

- As stated, prior to raising limits or issuing a new card, card issuers must take into consideration the cardholder's ability "to make the required payments under the terms of such account."
- Card issuers may not raise interest rates (i) in the first year after a credit card account is opened or (ii) on existing balances except:
  - when the increase is the result of a variable interest rate pursuant to a credit card agreement with the cardholder;
  - when the increase is the result of the expiration of a specified period of time, such as a promotional rate;
  - when the increase is due to the completion of a workout or temporary hardship arrangement by the obligor/debtor or the failure to comply with same;
  - when the required minimum payment is not received within 60 days after the due date.
- After the first year, card issuers can only raise the APR if they give 45 days written notice of the rate change to the cardholder. However, no such notice is required for increases resulting from the above exceptions (e.g., agreed-upon variable interest rate).
- A card issuer who increases the interest rate must review the account every six months and decrease the rate "when reduction is indicated by the review" (i.e., the cardholder is paying the account on time, has not defaulted, etc.).
- Requires card issuers to disclose the "number of months" and the "total cost to the consumer, including interest and principal payments" to pay off the card balance if the cardholder makes only the minimum monthly payments.
- Requires the card issuer to indicate the monthly amount that would have to be paid for the consumer to eliminate the outstanding balance in 36 months.
- Credit card agreements will be posted online on a "publicly available website" maintained by the Federal

Please email the authors at jsperling@daypitney.com or dschiefelbein@daypitney.com with questions about this article.

Reserve Board (the "FRB").

- Advertisements for free credit reports must "prominently disclose" that free credit reports are available, as required by federal law, at: www.AnnualCreditReport.com.
- Card issuers "shall not change the terms governing the repayment of any outstanding balance," except that the card issuer may give the cardholder either:
    - five years to pay off the outstanding balance at the prior interest rate; or
    - a required minimum periodic payment that includes a percentage of the outstanding balance that is equal to not more than twice the percentage required before the effective date of the increase," set forth in the notice required by the Act.

Creates "Limits On Fees And Interest Charges"

- If a card issuer raises the interest rate as a result of the cardholder's failure to pay the minimum payment within 60 days following the due date, the card issuer must reinstate the original rate if the cardholder makes on-time minimum payments for six months thereafter.
- Card issuers may not charge over-the-limit fees unless the consumer has asked for the account to allow such transactions; when such fees are charged, they may not be charged more than once per billing cycle.
- Card issuers are not permitted to impose fees to make a payment except for fees associated with "expedited service by a service representative of the creditor."
- All penalty fees must be reasonable and proportional to the omission or violation. The FRB will issue rules to set standards to decide what represents a "reasonable and proportional" fee. (This aspect of the Act is not effective until 15 months after the date of enactment.) Additionally, the FRB may set "safe harbors" for establishing what penalty fees are presumed acceptable.
- Card issuers are prohibited from "Double-cycle billing" – meaning they cannot consider the time in an earlier billing cycle when calculating the amount of interest charged in the current cycle.

Ensures The Application And Timing Of Cardholder Payments Are Fair

- Card issuers must apply amounts paid in excess of the minimum payment to the highest interest rate, except that the card issuer should allocate the entire excess amount to those balances on which interest was deferred during the last two billing cycles.
- Card issuers are prohibited from setting early or arbitrary deadlines for payments. Under the CARD Act, payments must be received by 5 p.m. at a location set by the card issuer.
- Due dates "shall be on the same day each month."
- Card issuers are prohibited from treating a payment as late unless the billing statement is mailed or delivered at least 21 days before the due date.

Restricts Issuance Fees On Fee Harvester Cards[2]

- Effectively bans Fee Harvester Cards by restricting card issuers' ability to impose financing fees and charges for opening a credit card in excess of 25 percent of the credit limit.

Protects "Young Consumers"

- Prior to issuing a card to a person under the age of 21, card issuers must obtain an application which contains either:
    - the signature of a cosigner "who has attained the age of 21"; or
    - information indicating an "independent means" of repaying any credit extended.
- Card issuers are prohibited from increasing the credit limit on accounts held by a person under the age of 21 who has a cosigner without the written consent of the cosigner, who if they do so authorize, assumes joint liability for the increased credit line.
- Protects those under the age of 21 from receiving pre-screened credit card offers unless the consumer has consented.
- Card issuers may not provide "tangible item[s]", such as t-shirts, to students on campus in exchange for filling out a credit card application.
- Requires institutions of higher education to publicly disclose the existence of any contracts made with a card issuer.

Establishes Gift Card Protections

- Gift cards (which include both retailer gift cards and prepaid general use gift cards – but does not include rewards, loyalty, telephone or promotional cards and does not include paper gift cards or paper gift certificates) do not expire less than five years from the date the card was purchased or money was last added to the card, whichever is later.
- No dormancy or inactivity fees may be charged if the card has been used within the past 12 months. If a card remains unused for 12 months, there can be a maximum of one fee imposed per month so long as it is pursuant to the rules promulgated by the FRB.

Impact Of The CARD Act On Future Litigation Claims

While, for the most part, these provisions and requirements appear to be clear, numerous questions remain about the legal consequences of the CARD Act's enactment – namely, whether the CARD Act creates a private cause of action for consumers against the credit card companies should they fail to comply with its terms. For example, one provision of the CARD Act requires credit card companies provide at least 45-days notice before raising interest rates. Should a credit card company fail to comply with the notification requirements, would the consumer have a cause of action against the credit card company for its failure to comply? The Act also requires credit card companies to consider a consumer's "ability to pay" prior to approving a new credit card account or increasing his or her credit limit. Would a consumer be able to defend a suit for payment by alleging this analysis was not properly performed? The answers, at this point, remain unclear, as lawyers and lawmakers alike have differing interpretations of the CARD Act's effect. Regardless of which interpretation turns out to be correct, credit card companies need to be mindful of the Act's provisions.

Should you have any questions or concerns about how the CARD Act may affect your company, or to request assistance with respect to compliance with the provisions of the CARD Act, please contact the attorneys below.

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[1] *The full text of the CARD Act can be found at:* http://www.govtrack.us/congress/billtext.xpd?billh111-627

[2] *A "Fee Harvester Card" has been defined as one that charges substantial fees, but which makes available very little credit. For example, one known "Fee-Harvester Card" comes with a credit limit of $250. However, in order to get the limit of $250, the consumer will automatically incur a $95 program fee, a $29 account set-up fee, a $6 monthly participation fee, and a $48 annual fee – totaling an instant debt of $178 for a buying power of only $72.*