

## **Alert** | Financial Services Litigation



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### **Court Considers Recusal Standards in CFPB 5th Circuit Suit Over Credit Card Late Fees**

The Consumer Financial Protection Bureau (CFPB) and a coalition of trade-group plaintiffs filed dueling briefs last week over recusal standards in the Fifth Circuit lawsuit challenging the CFPB’s \$8 credit card late fee **final rule**.<sup>1</sup> On April 8, 2024, the court requested supplemental briefing on whether a judge’s ownership interest in a non-party large credit card issuer would be substantially affected by the outcome of the case. The final rule defines a larger card issuer as an issuer that, along with its affiliates, has at least one million open credit card accounts. The issue arose because U.S. Circuit Court Judge Don R. Willett, a judge in this matter who already ruled once in this case in a 2-1 panel majority opinion sending the litigation back from D.C. to Texas federal court, has approximately \$2,000 of a large bank’s stock held in one of his children’s college funds. While the bank is not a party to this case, it is a large credit card issuer that would be impacted by the outcome of this litigation. The supplemental briefing submitted on this issue turns on how narrowly the court considers the issue, with the CFPB arguing that “the law requires any judge who owns stock in a large card issuer to recuse[]” and plaintiffs arguing the potential impact of the litigation is “too remote and speculative” to justify judicial recusal.

The plaintiff trade groups argue that “courts have held that recusal is not warranted under the applicable standard unless the litigation’s substantial effect on the judge’s interest is ‘easily ascertainable.’” Plaintiffs further assert, “Applying these principles, courts across the country, including this one, have been ‘unwilling to adopt a rule requiring recusal in every case in which a judge owns stock of a company in the

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<sup>1</sup> For background, see [previous GT Alerts](#).

same industry as one of the parties to the case.” Using the CFPB’s own conduct concerning the final rule, plaintiffs argued, “The CFPB argued below that, [a]s for the large card issuers, they will be fine[.]” and that based on the CFPB’s own representations, it is not easily ascertainable if there will be “a substantial effect on the stock price—rather than revenue—of any particular credit card issuer.”

The CFPB argues in its supplemental briefing that “the outcome of this litigation could substantially affect an ownership interest in large credit card issuers...[because] there is a *direct* connection between this case—a facial challenge to a regulation governing the late fees that can be charged by the 30 to 35 largest card issuers in the country—and the revenue streams of those directly regulated entities” (emphasis in original). The CFPB further states, “And while it is difficult to say with precision how the Late Fee Rule—or the litigation challenging it—would affect card issuers’ revenue and thus profitability (which could in turn affect share prices), industry analysts have predicted a possible substantial effect.” The CFPB contends that “ownership of stock in a large card issuer would trigger recusal obligations regardless of whether the litigation could substantially affect that ownership interest.”

Judge Willett has said he does not believe he needs to recuse himself from the case and that he has received ethical advice concerning the same from an adviser at the court.

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