***Payments Pros – The Payments Law Podcast*: *2023 Payments Year in Review*: CFPB and FTC Regulatory Trends**
Hosts: Keith Barnett, Carlin McCrory, Josh McBeain

Keith Barnett:

Welcome to another episode of *Payments Pros*, a Troutman Pepper podcast focusing on the highly regulated and ever-evolving payment processing industry. This podcast features insights from members of our fintech and payments practice, as well as guest commentary from business leaders and regulatory experts in the payments industry.

My name is Keith Barnett and I'm one of the hosts of the podcast. Before we jump into today's episode, let me remind you to visit and subscribe to our blogs, ConsumerFinancialServicesLawMonitor.com and TroutmanPepperFinancialServices.com. And don't forget to check out our other podcasts on Troutman.com/Podcast. We have episodes that focus on trends that drive enforcement activity, digital assets, consumer financial services and more. Make sure to subscribe to hear the latest episodes.

Today I'm joined by my co-hosts, Carlin McCrory and Josh McBeain for what will be a two-part series that takes a look back at what we have seen in the payments landscape in 2023 and what we can expect in 2024.

Carlin and Josh, we have a lot to discuss in this series. So, let's just jump right into it and focus on the CFPB's oversight of big tech and the war on fees.

Carlin McCrory:

Yeah. I'd love to discuss this one. It's been a really hot topic if you've been looking at the news recently. The CFPB issued a proposed rule covering larger participants in the market for general-use digital consumer payment applications. And the comment period for the proposed rule closed on January 8th. And the CFPB didn't issue any extension on the comment period.

We have released a podcast with a broad overview of the coverage of the rule. Please check that out if you're interested in hearing more about the specific details of the rule and its coverage just more generally. I'll kind of get into a few nits and our internal thoughts between the three of us here.

Unlike prior larger participant rule-makings, this proposed rule itself in our opinion conflates different markets and proposes almost a one-size-fits-all approach for the digital payments ecosystem. As we know, I mean, digital payments are highly diversified. And lumping together some of these markets, just for example P2P transfers, digital assets, merchant payment processing. I mean, it just doesn't really make sense how those markets are similar.

And also, if you think about it, the risks of these markets very drastically. And the bureau didn't address this factor that they all have varying risks in the proposed rule. And I think, generally speaking, if you take a step back and you go back to the 30,000-foot level, there's no such thing as a general-use digital consumer payment market. What does that even mean or entail?

And just to juxtapose this, the bureau would never conflate credit markets, like installment loans, credit cards, student lending and mortgages. It's unclear why the bureau in this specific circumstance conflated all of these markets together.

The other thing that I thought the proposed rule did was overstate the benefits of supervision versus the cost to some of these companies. Just as an example, to pull one thing out of the proposed rule, the Bureau estimates that the total employer costs of labor for supervision would be one compliance officer and one-tenth of the time of a full-time attorney amounting to roughly 25 grand.

And I think we all know that supervision costs some multiple of $25,000. And the CFPB has information from its past exams. The bureau knows it takes more than one compliance officer and one-tenth of a full-time attorney. I mean, these companies hire consultants. They hire outside counsel. There are a multitude of people within the company that are involved within supervision. It's unclear how the bureau came to this $25,000 estimate.

Since we are making some predictions, I don't think this is going to be a wild speculation. But our prediction would be that the bureau will probably finalize the rule at some point this year prior to the end of 2024. And examinations will likely start in 2025. I don't think it would surprise us either if the rule got tied up in some sort of litigation.

Keith, do you have any additional thoughts on that?

Keith Barnett:

Thank you, Carlin. I do have a couple of additional thoughts. In addition to all of the things that you just mentioned with respect to the problems, the CFPB also just had as fundamental issues with respect to the overregulation of payments.

And what I mean by that is not only is that threshold pretty low at five million transactions. But the CFPB in other public statements has also just made it clear that they are trying to regulate anything that concerns any type of consumer payments. And so, it's not just the larger participants that are affected.

You could see this as early as when Chopra first became the director in 2022. But we also saw this in September of 2023 when the CFPB issued a report that highlights the role of big tech firms in mobile payments. And some of the things that the CFPB says that it found with respect to big tech firms, these are things that happened, quite frankly, with payments just generally.

And what I mean by that is that particular issue spotlight by the CFPB focused on the evolution of payments in point-of-sale purchases and the role that mobile device operating systems play. It's not just big tech. It is everyone. But the CFPB pointed out that the tech companies play a powerful role with respect to payments generally, especially when the pay payments are made through mobile devices using near field communication technology.

And the bureau went on to say that there are only a handful of companies that dominate the NFC technology market. And as a result of that domination from just a handful of companies, there could be roadblocks to open banking and may also hinder lower-cost banking options for consumers. They serve that as the prop for the proposed open banking rules.

One of the other things that I noticed from that is that the bureau went on to say that they want to foster competition, create open markets and be a champion for innovation. But as Carlin mentioned, with respect to the larger participants, if you over-regulate, you might actually stifle competition and you might stifle innovation. That is something that they definitely need to watch out for.

While on the one hand, the CFPB says that it does not want big data or big tech to negatively impact consumers with respect to the payments, at the same time they also need to make sure that they don't negatively impact the innovators. And with that, I'll turn it over to Josh to talk about service members' use of digital payment apps.

Josh McBeain:

Thank you, Keith. Yeah. The CFPB's Office of Servicemember Affairs Annual Report, which they published last June, is it's in this same theme of regulation of technology. And in that report, we see that the CFPB analyzed complaints submitted by service members, veterans and their families in 2022.

The report found that credit reporting remains the top issue for service members. Followed by debt collection and credit cards. But nonetheless, much of the report focused on the rising number of complaints from service members related to payment app fraud. And the CFPB recommended steps that the industry can take to address this issue.

The CFPB's key findings of the report included service members' complaints related to payment apps are rising faster than average. Service members are more likely to experience identity theft, which can heighten the risk of fraudulent activity on their payment app accounts. And service member complaints suggest that payment app providers often fail to provide timely resolutions to service members.

In the report, the CFPB included recommendations for technology payment app companies to address these concerns, which included recommending removing repeat frauds from the system and adopting tools to mitigate fraud at account opening.

Also, where appropriate, payment app providers were encouraged to invest in technology and tools to improve safety and security of their networks. Where fraud involves multiple entities, the CFPB recommended that all parties coordinate more closely to ensure that problems related to fraud are resolved quickly. And finally, the, CFPB recommended that payment apps should recognize the unique challenges of service members including overseas deployments and to take on a comprehensive approach to reimbursement when fraud occurs.

It's possible that what we see in this report is a potential blueprint for a UDAP claim by the CFPB combining a series of recommended steps with the assertion that service members are uniquely vulnerable to these types of frauds. In keeping with payment apps, I'm going to kick it back to you, Keith, to talk about findings by the CFPB on money stored on payment apps.

Keith Barnett:

Yeah. Sure. Thanks, Josh. What's interesting is everyone listening here might be able to figure out this theme, right? Because Carlin started off by talking about the proposed larger participants rule. And we've gone on to talk about findings that the CFPB has made throughout the year.

For those of you who might fall within that larger participant's category, the CFPB throughout the year has kind of given you a road map as to some of the things that they're going to be looking for during their supervisory examinations. Josh just mentioned service members. And I mentioned earlier just the general role that big Tech firms play in multiple payments. But we have also a third category, and this came out in June of 2023. The CFPB issued findings concerning federal insurance and making a statement. And they made a statement that billions of dollars stored on popular payment apps may lack federal insurance.

This apparently was born out of consumer thoughts or consumer confusion whereby the consumers believed that when they had money just sitting in their payments-related apps that were non-bank payments apps that that money was federally insured. And that's not the case in most instances.

The CFPB published an issue spotlight on digital payment apps concerning that very issue. The CFPB said that unlike traditional bank and credit union accounts which have the FDIC Deposit Insurance, funds stored in the non-bank companies may be unprotected. Well, I mean, the CFPB uses the word unprotected. But those of us in payments reality know that there are protections there given that these payment companies that have these apps where money is stored within the payments company or the fintech, most of these companies have money transmitter licenses which have bonding requirements and other requirements that protect the consumers.

But the CFPB's spotlight was really directed towards the consumers and told them that when the users or the consumers of these digital apps receive payments, the funds are not usually swept automatically into the consumer's linked bank or credit union account. And instead, the companies hold and invest the funds as they are allowed to do so if they have a money transmitter license.

The CFPB just wanted to make it clear and let consumers know that they don't have necessarily FDIC protection when they have money that's stored in these apps. And with that, we can transition to talk about one of the major themes of 2023 or one of the other major themes of 2023, and that is the war on fees.

Carlin, do you want to get us started on what the CFPB and the FTC call junk fees?

Carlin McCrory:

Yeah. As we've seen, the CFPB continues this war on junk fees as Keith stated. And we don't expect this to slow down at all or in the slightest. There's two topics I want to talk about. The first being the CFPB talking about banks and junk fees.

Following the bureau's June 2022 release for public input on customer service obstacles encountered when consumers interact with large financial institutions, the CFPB issued an advisory opinion regarding section 1034C of the CFPA, which requires large banks and credit unions to comply in a timely manner with consumer requests for information concerning their accounts.

The CFPB indicated here that impediments to customer requests for information could include requiring the customer to pay a fee to request certain account information possibly excessively long wait times to interact with a customer service rep. Or requiring consumers to submit the same requests multiple times.

Some other examples where consumers have to interact with a chatbot that doesn't understand or can't adequately respond to the customer's requests or directing customers to obtain information that the institution possess from a third-party instead.

The CFPB further advised that whether a response is timely to a consumer will be ultimately a fact-specific determination informed by other federal laws. And as for what constitutes an accurate and complete response pursuant to section 1034C, the CFPB indicated that it expects financial institutions to provide consumers with the information that they request to the extent that it's in their controller possession. The CFPB will begin issuing fines for violations after February 1st.

The other thing I wanted to talk about was that the CFPB issued a special edition of its supervisory highlight on October 11th of 2023. Keith and I did a podcast on this topic. Please listen into that podcast episode if you're interested in hearing the details of the report specifically. But I'll provide a general overview right now.

These supervisory highlights report focused on the bureau's efforts to protect consumers again from what I'll put in air quotes if you will, "illegal junk fees". Including fees for fake paper statements and add-on products for auto loans.

And as a result of the CFPB's supervisory work, the companies in the report are refunding over $140 million to consumers. And 120 million of which is for surprise overdraft fees and double dipping on NSF funds and fees. The bureau also issued a separate report finding that most financial institutions have eliminated NSF fees. And that's saving consumers a bundle of money every year.

I'll kick it off a little bit by talking about NSF fees. The report discusses the CFPB identifying unfair practices by financial institutions for charging consumers representment NSF fees without providing an opportunity to prevent those additional fees after the first failed attempt.

And the bureau's analysis was split between both core processors as service providers to financial institutions and then to financial institutions. The core processors needed to enhance their systems so that the representment transactions were properly coded so that financial institutions were able to flag the representment.

However, according to the bureau, some of the financial institutions have used incomplete data that failed to capture all instances of representment NSF fees charged to consumers. The CFPB is currently seeking comprehensive reporting on when consumers were charged multiple representment fees and ensuring that consumers are properly reimbursed.

And as noted in the report, institutions are refunding more than $22 million to consumers in response to these directives. NSF fees have been a particular point of criticism for the bureau for a while. The bureau argues that the fees not only are too high but they're also charged without providing any real service to the consumer. And the bureau has strongly been pushing for financial institutions to eliminate NSF fees in their entirety.

The report also addresses unfair, unanticipated overdraft fees. And these are namely those authorized positive settle negative fees, which we've talked about on other podcast episodes. We're expecting the bureau to release a rule on overdraft and NSF fees likely pretty soon here. We'll see what that has to say.

Going back to the supervisory highlights though to round this out, the report also addresses the bureau's findings on auto servicing. For the auto servicing highlights, they focused on unfair acts or practices related to auto servers' handlings of refunds and add-on products after the loans terminate. For example, not refunding fees for products such as gap or credit life insurance after early termination of the loan. And lastly, if you want to hear more go to our podcast episode, but the bureau also addresses findings on payment processing for student meal accounts and pandemic relief benefits.

Keith, I'll turn it back over to you now.

Keith Barnett:

Yeah. Thanks, Carline. And I actually don't have much more to add to that. But once again, the CFPB put out in October 2023 supervisory highlight that talked about all of the things that Carlin just talked about in more detail. We could turn it over to Josh to talk about CFPB issuing a spotlight that examines the high fees that chip away at the public benefits.

Josh McBeain:

Thanks, Keith. In March of 2023, the CFPB published an issue spotlight highlighting concerns about prepaid card programs for accessing public assistant benefits. Particularly specific recurring issues related to cash assistance benefits including Social Security, temporary assistance for needy families and unemployment benefits that are provided on prepaid cards. The spotlight focuses on two areas that it claims limit recipients' access to funds, fees and inadequate customer service.

In 2022, the prepaid card issuers administering public assistance benefits collected around 1.3 billion in fees which the CFPB finds troubling. Because even low-dollar fees can pose outsize harm to those who rely on public assistant benefits.

Further, inadequate customer service harms consumers, because if issues are not resolved in a timely manner, then recipients may wait weeks or months for access to their funds. Despite acknowledging the benefits of prepaid card programs, the CFPB stressed that it intends to monitor public assistant benefit prepaid card programs and take action when appropriate to protect consumers. It's fair to assume from this issue spotlight that the CFPB will continue to be focused on fees charged by vendors offering benefit card programs in 2024 and in the future.

Now I'm going to shift and talk about a specific proposed rule keeping with the theme of the war on fees. The CFPB published in February 2023 a proposed rule to reign in what the CFPB believes are excessive credit card late fees. The proposed rule would amend regulation Z. Regulation Z currently requires late charges to be "reasonable and proportional to the emission or violation". And provides credit card issuers a safe harbor late fee amount. Actually, provides two safe harbor late fee amounts, which, if charged, allow issuers to avoid regulatory scrutiny. Regulation Z also currently provides that the safe harbor amounts are set to adjust annually based on changes in the consumer price index.

The CFPB's proposed rule will amend reg Z as follows. First, it will decrease the safe harbor for credit card late fees to $8 and eliminate altogether a higher safe harbor amount for subsequent late payments. Because right now the subsequent payments can charge a higher amount. Second, the proposed rule would eliminate the annual inflation adjustments for the late fee save harbor amount. And third, the proposed rule would mandate that late fees must not exceed 25% of the required minimum payment.

In addition to the proposed regulations the amendments for credit card late fees, the CFBP also is soliciting comment on a few additional items and they publish these in the in the same proposed rule on credit card late fees. And I'll highlight four of them here. First, the CFPB is soliciting comment on whether card issuers should be prohibited from imposing late fees on consumers that make the required payment within 15 days of the due date. Second, whether as a condition of using the safe harbor, it may be appropriate to require card issuers to offer automatic payment options, such as for the minimum payment amount, and/or whether to provide notification of the payment due date within a certain number of days prior to the due date. Third, whether the same or similar changes proposed for late payments should be applied to other penalty fees, such as over-the-limit fees, return payment fees and decline access check fees. And finally, whether instead of the proposed changes, the CFPB should eliminate the safe harbor for all penalty fees including late fees, over-the-limit fees, return payment fees and decline access check fees.

In some, the CFPB's proposed rule seeks to impose significant changes to late fees and likely will require modifications to existing card programs beyond simply reducing late fee amounts based on the additional items that I just mentioned that the CFPB is soliciting comments on that they may also change.

Carlin McCrory:

And Josh, to round out your discussion, has the CFPB issued a final rule yet?

Josh McBeain:
That's a good question, Carlin. The proposal was published as I mentioned in February last year. It's been almost a year. But no, to answer your question. No. The CFPB has not published a final rule yet. Thus, some of the proposed changes may be modified in the final rule. I just highlighted the major ones for how credit card late fees may change and then that they're soliciting comments. All of that may be different when we get the final rule.

And when the CFPB publishes that final rule, we'll do a podcast on that final rule and provide an update on the impact of credit card late fees and if any of the other items that the CFPB was soliciting comments on. If those have been adopted. And we'll talk about the implementation date and so on and so forth. I anticipated it'll be a large impact on the industry.

Keith, I'll kick it back to you to continue our conversation on the war on fees.

Keith Barnett:

Sure. And thanks for that, Josh. And once again, with us getting our crystal ball out here, we've talked about two major topics, right? We're now talking about the war on fees by the CFPB. But also, we spoke about digital payments and the CFPB's efforts to supervise that industry. But let's also not forget that, in the payments industry, not only do we have the CFPB, and we have the states which we talked about earlier when we talked about money transmission, but we also have the Federal Trade Commission.

And the Federal Trade Commission has also weighed in on what they call junk fees. And in 2023, on October 11th, 2023, the Federal Trade Commission announced that it was seeking public comments on a proposed new rule to prohibit junk fees. And it's interesting because the FTC, much like the CFPB, defines junk fees as "hidden and bogus fees" that can harm consumers and undercut honest businesses.

And so, they go on to give certain examples within the proposed rule of these types of fees and where people will more likely find them. And they listed just as a few examples. They listed a whole litany of them. But they mentioned hotel and short-term lodging fees. Live event ticket fees and even grocery delivery apps.

And there, the FTC is proposing to prohibit as an unfair or deceptive practice any type of fees misrepresenting the total cost of goods and services by either omitting mandatory fees from advertised prices or misrepresenting the nature and purpose of the fees.

The other interesting thing here is that the public comment period was originally set to expire on January 8th. By the time that we record this, it would have expired. But the FTC said that, because the existing deadline fell immediately after the holiday season, the commission extended the public comment period for 30 days until February 7th, 2024, which is unlike what the CFPB did with respect to the larger participants' rule concerning digital payments.

But that's neither here nor there at this point. What we want you all to get away from this first episode of the year-end review is not only looking at what has happened in the past in 2023. But we do want you to get a good sense of what is going to happen in 2024. It's going to be greater regulation overpayments. And even though there's the proposed rule of larger participants, expect the smaller and midsized participants to get ensnared within that. But also, with respective fees. And that's both from the CFPB and the FTC.

2024 is going to be a very busy year for payments. And we thank you for joining us on this episode. And in our next episode of the year-end review, we will take a look at developments related to subscriptions, FedNow, the Money Transmission Modernization Act and Nacha. Thank you again for listening. And do not forget to visit our blogs, ConsumerFinancialServicesLawMonitor.com and TroutmanPepperFinancialServices.com. And subscribe so you can get the latest updates through Apple Podcast, Google Play, Stitcher or whatever platform you use.