Payments Pros – The Payments Law Podcast
2024 Payments Year in Review: CFPB and FTC Regulatory Trends - Part Two
Hosts: Keith Barnett and Josh McBeain
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Keith Barnett:

Welcome to another episode of *Payments Pros*, a Troutman Pepper Locke 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.

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[EPISODE]

Keith Barnett:

Today, I'm joined by my co-host, Josh McBeain, as we continue our four-part series that takes a look back on what we have seen in the payments landscape in 2024 and what we can expect in 2025. I want to continue our discussion on what we observed from the CFPB in 2024 and delve in to the exciting world of credit products.

You'll see a consistent theme in my portions of this, it will be, here's what happened in 2024, not sure it's going to be enforced in 2025, 2026, 2027, or 2028. So, I'm going to start this off by talking about the CFPB in 2024, so issuing a proposed interpretive rule, opining that EWA products, and for those of you who don't know, it means earned wage access products, whether it provided through employer partnerships or marketed directly to the employees, whether they are subject to the Truth in Lending Act and Reg Z requirement.

The proposed interpretations, broad definitions, and aggressive stance on fees and tips as finance charges actually conflict with many state laws. So, like I said before, not sure if this will actually be implemented or enforced in 2025 because the proposed interpretive rule abruptly reversed the Bureau's earlier stance during the first Trump administration on EWA products. As some of you may recall, in November of 2020, the CFPB issued an advisory opinion stating that EWA products do not involve the offering or extension of credit, as that term is defined in Reg Z and TILA. The 2020 opinion explained that an EWA product is not an extension of credit if it meets several conditions, including providing the consumer with more than the amount of accrued wages earned, the provision by a third party fully integrated with the employer, or no consumer payment, voluntary or otherwise, beyond the recovery of paid amounts via a payroll

deduction from the next paycheck, and no other recourse or collection activity of any kind or any type of underwriting or credit reporting, which to me makes sense.

But the 2024 proposed interpretive rule takes the opposite approach. The interpretive rule, 2024, broadly defines the scope of products that it covers. It applies to any product that involves both the provision of funds to the consumer and an amount that is based by estimate or otherwise on the wages that the consumer has accrued in a given pay cycle and repayment to the third-party provider via some automatic means like a scheduled payroll deduction or a pre-authorized account debit at or after the end of the pay cycle.

The CFPB's proposed interpretation in 2024 takes a broad view of what constitutes credit under TILA. While TILA defines credit as, “The right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.” But according to the Bureau, EWA products are consumer credit for the purposes of TILA. Specifically, the Bureau defines debt to include any obligation to pay money at a future date, even if the amount is contingent on future events, such as the availability of funds from the next payroll event.

One of the more contentious aspects of the proposed rule is its treatment of optional tips expedited fund fees as finance charges. According to the Bureau, these optional fees are conditions of the extension of credit and must be disclosed as a part of the finance charge. Similarly, according to the CFPB, a provider using its authority, real or implied, to exact a tip from a consumer in connection with an EWA transaction that has imposed the resulting consumer payments could also become an issue.

The proposed rule outlines several factors to consider when determining whether a tip is imposed by the creditor as a part of the finance charge. These several factors include whether the tip was solicited before or at the time of the supposed credit extension. Secondly, whether labeling the solicited payment with a term such as tip that carries an expectation of payment. Third, whether there was a setting default tip amounts or making it difficult for the consumer to avoid tipping. Another issue is suggesting tip amounts or percentages. Another factor is repeatedly soliciting tips during a single transaction. Then finally, the last factor listed by the CFPB is implying that tipping may impact future access to the product.

For what it is worth, the CFPB accepted comments on the proposed rule. That comment period closed in August of 2024, and then getting out my crystal ball for 2025. Not so sure if this is really going to get any legs moving forward on being a finalized interpretive rule, given that the prior Trump administration had reached the exact opposite conclusion when it comes to EWA products. With that, I'll kick it over to Josh to talk about more credit products.

Josh McBeain:

Thank you very much, Keith. Yes, I'm going to cover two significant CFPB rule makings, one CFPB interpretive rule and CFPB circular. To start, the CFPB published its final credit card late fee rule in March 2024. The final rule restrictions only apply to large credit card issuers, which is defined as issuers, together with their affiliates, that have one million or more open accounts. Thus, whether an issuer is a large credit card issuer is measured at the issuer level across all of the issuer's programs rather than at the individual card program level.

For large credit card issuers, the final rule sets a safe harbor amount for late fees at $8. It eliminates an increased safe harbor amount for subsequent violations and eliminates the annual inflation adjustment to the safe harbor amount. Under the final rule, these larger credit card issuers will be able to charge late fees above the $8 threshold, so long as they can prove, presumably to the CFPB's satisfaction, that the higher fee is necessary to cover their actual collection costs. The final rule also updated regulations these commentary related to calculating a cost-based late fee amount to prohibit larger credit card issuers from including any collection costs incurred after an account is charged off in the analysis.

Smaller credit card issuers, as defined under the final rule, are not affected by these requirements. The final rule also increased the annual inflation adjustment safe harbor amounts for violating the terms or other requirements of an account to $32 for the first violation and $43 for subsequent violations. Large credit card issuers may not use these increased safe harbor amounts for late fees, but may use them for other penalty fees, such as return payment fees. Small credit card issuers may use the increased safe harbor amounts for all penalty fees, including late fees.

The final rule triggered immediate backlash from the industry. Just days after the final rule was published, the U.S. Chamber of Commerce and multiple bank trade groups sued the CFPB in the U.S. District Court for the Northern District of Texas in the Fifth Circuit to challenge the final rule's legality. The U.S. District Court judge issued a preliminary injunction saying the effective date of the final rule on May 10, 2024, just four days before the final rule's effective date. The case has had a complicated and unusual procedural history. The CFPB has sought multiple times to dissolve the preliminary injunction and transfer the case from the U.S. District Court for the Northern District of Texas to the U.S. District Court for the Northern District of Columbia.

On December 6, 2024, the court denied the CFPB's motion to transfer the case to the District of Columbia and dissolve the preliminary injunction. In support of denying the CFPB's motion to dissolve the preliminary injunction, the court stated, “Given the court's finding that the final rule violates the statutory authority granted to the CFPB under the CARD Act, the plaintiffs maintain a strong likelihood of success on the merits, and this factor weighs against dissolution of the court's preliminary injunction.”

The court highlighted that the CARD Act allows for penalty fees that are reasonable and proportional to the violation and the CFPB's final rule, which focused on covering costs rather than imposing penalties, was inconsistent with the statutory mandate. This is a strong indication that the trade groups may have a winning argument in this case. Also, as mentioned by my co-host, there's a chance that a new CFPB director may pull this rule. So, it's unclear whether this rule will ever take effect. But at the time of this recording, the preliminary junction is still in place.

Next, I'm going to move on to the overdraft rule. So, on December 12, 2024, the CFPB announced its final rule addressing overdraft fees. The rule targets financial institutions with more than 10 billion in assets, imposing new restrictions and requirements on how these institutions manage and charge for overdraft services. These overdraft services are services that financial institutions offer in deposit agreements that provide banks with discretion to pay or not pay overdrafts.

The final rule does a number of things. But the key change, the final rule makes is amending Regulations E to apply consumer credit protections to overdraft credit in certain circumstances, unless overdraft fees are at or below the institution's costs and losses. In sum, large financial institutions subject to the rule have three options for overdraft fees. One, they can cap overdraft fees at $5 as provided in the final rule. Two, they can set fees based on the actual costs and losses incurred from providing overdraft services. Or three, they can charge overdraft fees for what the CFP calls a profit. And if they do, the fees are treated as covered overdraft credit and are subject to Regulation Z credit disclosures.

The final rule also updates Regulation E. Regulation E has historically prohibited requiring automatic pre-authorized electronic payments from a consumer's bank account, and historically provided an exemption from this prohibition for overdraft services of the type we've been discussing. The CFPB's final rule would eliminate this exception for overdraft plans. This means that financial institutions subject to the rule cannot make automatic repayments through preauthorized electronic fund transfers mandatory for overdrafts. It is possible that the final rule will never take effect for multiple reasons. First, trade groups have sued the CFPB over the final rule. They alleged the new overdraft exceeds the agency's authority and violates requirements or well-reasoned agency decision-making.

This has some merit. The CDP's final rule suggests that overdraft fees should be treated like other credit and that overdraft fees are finance charges unless the fees are low enough or charged by certain institutions. This amount distinction is not supported by TILA itself. There's no other circumstance in TILA or Reg Z where a fees characterization as a finance charge is determined by the amount of the charge. Second, as previously mentioned, it's possible that a new CFPB director could rescind or modify the rule. And third, and Carlin mentioned this earlier, the Congressional Review Act provides Congress the ability to reject recent federal regulations within 60 legislative days by a simple majority vote in both chambers.

If CRA legislation is signed by the president, the rule would be rescinded, and the CFP would be prohibited from issuing a substantially similar rule without explicit legislative authorization. So, there's multiple potential avenues for which the industry or Congress or new CFPB director may kill this rule.

Now, I'm going to move on to the buy now, pay later interpretive rule. So, this wasn't a formal rulemaking, it was an interpretive rule. Most buy now, pay later or BNPL providers offer a close-end product without a finance charge that is payable in four or less installments. As a result, these BNPL providers take the position that the Truth in Lending Act and Regulations Z are not applicable because the definition of creditor under Regulation Z excludes this type of product.

In May 2024, the CFPB issued an interpretive rule that subjects BNPL transactions to provisions of Regulations Z applicable to credit cards. The CFPB claimed that its authority to issue the interpretive rule, instead of a formal rulemaking, stems from the Truth in Lending Act, Regulation Z, and its general authority to issue guidance as set forth in Section 1022(b)(1) of the Consumer Financial Protection Act of 2010.

In the interpretive rule, the CFPB argues that a BNPL digital user account is another credit device or other single credit device within the TILA Regulation Z definition of credit card. The CFPB did not provide substantial support for this argument in the interpretive rule. The

significance of this reclassification is that it requires BNPL providers to extend many of the same legal protections and rights to consumers that apply to traditional credit cards. For example, the rights to dispute charges and demand refunds for return products, and receive periodic statements.

The interpretive rule was a big shift in the regulatory requirements for the BNPL space, and the CFPB only provided a short 60-day timeline for compliance. The CFPB also issued a set of frequently asked questions, providing guidance on applying Regulation Z requirements to BNPL products accessed through digital user accounts in September 2024. We have multiple podcasts and blog posts that dive deeper into the interpretive rule and the FAQs. Setting aside all the challenging technical requirements the interpretive rule and FAQs imposed on the BNPL space, the actions taken by the CFPB here are extraordinary. They are rulemaking through what the CFPB is calling an interpretive rule or guidance.

In October 2024, the Financial Technology Association filed a complaint against the CFPB in the U.S. District Court for the District of Columbia seeking to invalidate the interpretive rule. The litigation will hopefully clarify the legality of the CFPB's new approach. It is also possible that a new CFPB director will rescind the interpretive rule.

The last thing I'm going to talk about today is the CFPB's circular on credit cards rewards programs. On December 18, 2024, the CFPB published a circular on credit cards rewards programs to make it clear that the CFPB believes that credit card issuers may commit a UDAP violation if they or their rewards partners devalue earned rewards or otherwise inhibit consumers from obtaining or redeeming promised rewards. The CFPB included some interesting statements in the circular, including that a card issuer may commit a UDAP violation in, “Instances where some of the conduct in question may be attributable to a third party, such as a merchant partner.” This means that the CFPB believes that a card issuer should be subject to a UDAP violation if their merchant partner or co-brand partner commits a UDAP.

Credit card issuers do not always operate credit cards rewards programs themselves, and it is common in a co-brand credit card agreement for the rewards program to be operated by the co-brand partner, not the card issuer. In addition to putting card issuers on notice that they may be subject to a UDAP claim for their merchant partners, the CFPB states that a UDAP violation may occur when, one, rewards that consumers have already earned or devalued, two, consumers' receipt of rewards is revoked, canceled, or prevented based on buried or vague conditions, and three, rewards points are deducted without consumers receiving the corresponding benefit of the rewards.

The CFPB also makes it clear that these three examples are illustrative and non-exhaustive. It is concerning that the CFPB says that a UDAP violation can occur, “Regardless of whether covered persons or service providers are taking actions consistent with rewards programs terms.” Does this mean that the CFPB thinks that it is a UDAP violation to change, update, or remove credit card rewards if the terms of a credit card rewards program allow for such changes? The answer is yes, according to the CFPB, because the CFPB states that it may be a You have violation if, “Consumer's receipt of rewards is revoked, canceled, or prevented based on buried or vague conditions, such as criteria disclosed only in fine print, or up to the operator's discretion.”

I think the CFPB's position that rewards programs cannot change is incorrect. Rewards programs, especially those offered by merchants, are constantly subject to change based on factors that the credit card issuer cannot control. It is unrealistic to expect card issuers to exert control over merchants' rewards programs or to hold issuers liable for merchants' changes to those programs. I also do not think it is realistic to suggest that merchants' changes to rewards programs are inappropriate. Those changes can be driven by factors like the underlying cost of providing rewards. So long as the possibility of rewards changes is adequately disclosed to consumers, I do not see the basis for asserting such changes are UDAP violations.

Setting my thoughts aside, credit card issuers and their merchant partners should be aware of the possibility for increased scrutiny in this area. The CFB has provided the circular sort of as a roadmap for credit card rewards scrutiny going forward in 2025 and beyond.

Keith Barnett:

Thanks, Josh. I want to thank you for joining me today. I would like to remind our listeners that this is part 2 of a 4-part series. Be sure to tune in the next time as we discuss developments we saw from the FTC in 2024. And, don't forget to visit our blog. TroutmanFinancialServices.com and subscribe, so you can get the latest updates, please make sure to also subscribe to this podcast via Apple podcasts. Google Play, Stitcher, or whatever platform you use. We look forward to the next time.