

Payments Pros – The Payments Law Podcast**2024 Payments Year in Review: CFPB and FTC Regulatory Trends – Part Three****Hosts: Keith Barnett, Josh McBeain, Carlin McCrory****Aired: February 13, 2025****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.

Before we jump into today's episode, let me remind you to visit and subscribe to our blog, TroutmanFinancialServices.com. And don't forget to check out our other podcasts on troutman.com/podcasts. 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.

[EPISODE]**Keith Barnett:**

Today, I'm joined by my co-hosts, Carlin McCrory and Josh McBeain, as we continue our four-part series that takes a look back at what we've seen in the payments landscape in 2024 and what we expect in 2025. Today's episode will focus on what we saw from the FTC in 2024, and I want to start off by talking about the FTC's most recent amendment to the telemarketing sales rule.

In December, the FTC approved final amendments to the TSR that will extend the rules coverage to inbound telemarketing calls made for technical support services. So, this would include calls made by consumers to companies pitching technical support services through advertisements or direct mail solicitation. Usually, when it comes to telemarketing calls with respect to the telemarketing sales rule, they usually relate to calls from the telemarketer to the consumer. This way it's the other way around, at least under this rule. According to the statement of purpose accompanying the notice, the final rule defines technical support services as, "Any plan, program, software or service that is marketed to repair, maintain or improve the performance or security of any device on which code can be downloaded, installed, run or otherwise used such as a computer, smartphone, tablet or smart home product including any software or application run on such a device."

The rule adds technical support services to the categories of calls excluded from the TSR's exemption for inbound calls made in response to an advertisement through any medium as well as those made in response to direct mail solicitation including email. One of the more interesting things besides the rule was that the commission vote approving publication of the notice was

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4-1 with Commissioner Andrew Ferguson voting no, and at least as of the date of this recording, Commissioner Andrew Ferguson is Trump's nominee to head the FTC moving forward in 2025, assuming Senate confirmation.

I will at least end my FTC update by reading to you Mr. Ferguson's dissent info. Don't worry, it's not too, too long. I just found it a little bit ironic, given that he issued this before he was nominated. I guess he did this in anticipation of being the new head of the commission in 2025. So, I'll start this quote, "I dissent from this rulemaking not because it is bad policy, but because the time for rulemaking by the Biden-Harris FTC is over. The American people have roundly rejected its regulatory assault on American business. They delivered a resounding victory for President Trump and a decisive mandate for his vision for the most pro-innovation, pro-competition, pro-worker, and pro-consumer administration in the history of our country. The proper role of this lame-duck commission is not to announce new policies, but to hold down the fort, conduct routine law enforcement, and provide for an orderly transition to the Trump administration. I will vote against all new rules, not required by statute, and any enforcement action that advances an unprecedented theory of liability until that transition is complete."

All right, so that might give us a preview into the FTC 2025 going forward. With that, I'll turn it back over to Carlin and Josh.

Josh McBeain:

Thank you, Keith. I'm going to talk about the FTC's staff report on actions taken related to credit leases and electronic fund transfers. On May 28, 2024, the FTC released its annual report to the CFPB detailing enforcement and educational activities undertaken in 2023. The report covers actions under the Truth in Lending Act and Regulation Z, the Consumer Leasing Act and Regulation M, the Electronic Fund Transfer Act and Regulation E. And specifically, the report highlights FTC initiatives in areas such as automobile financing and leasing, electronic fund transfers, so-called junk fees, payday lending, and negative options. I'm going to highlight just a few items from this report because I think that these items are what we expect the FTC to focus on going forward, so they're relevant to keep in mind.

To start on the automobile financing and leasing space, the report underscores ongoing litigation and additional refunds by the FTC in two cases arising out of deceptive automobile dealer practices, specifically misleading mailers suggesting government deception, deceptive prize-winning claims, and unclear disclosure of key financing terms. And two, additional fees for unwanted add-ons such as for payment insurance and paint protection. The report also discusses the FTC's finalized combating auto retail scams trade regulation rule, the CARS rule.

I'm not going to go into detail on the CARS rule because we have multiple blogs and podcasts, specifically covering the CARS rule, but it's a big initiative for the FTC that they talk about in detail in this report. Regarding electronic fund transfers, the FTC proposed amendments to its negative option rule, which it's now finalized, and Carlin is going to speak about that next. So, I won't talk about the proposal because it's not been finalized and I'll let Carlin provide more detail in the finalized negative option rule.

The FTC also mentioned related to electronic fund transfers that it is focused on payment fraud and highlighted cases with charges brought under the Electronic Fund Transfers Act. And

finally, the FTC also mentioned its consumer education efforts related to electronic fund transfers in 2023 and highlighted the possible scam risk consumers face when using payment apps and wire transfers. Other items of note that the FTC mentioned include the FTC's proposed rule that would prohibit "junk fees" and what the FTC calls hidden bogus fees.

So, in this report, this was the rule, still a proposed rule, but on December 17th, the FTC announced the final rule on unfair and deceptive fees, which is the junk fee rule. We, again, have extensive blogs on this, but the key takeaway is that the finalized rule is much narrower. So, in the finalized rule, the FTC limited the scope to live event tickets and short-term lodging. The FTC also mentioned its outreach and education work with American-Indian and Alaska Native populations and the issues impacting these populations, including auto purchasing and financing, predatory lending, and other issues. And finally, the FTC provided guidance to consumers on negative equity in auto trade-ins, auto loan refinancing scams, small-dollar lending, and alternative payment options, including for buy now, pay later, rent to own, and lease to own products.

Again, I'm highlighting some of the topics discussed in this report that the FTC sent to the CFPB because we think these are topics that the FTC is going to focus on in 2025 and beyond. Now, I'm going to kick it over to Carlin to talk about the FTC's finalized negative option rule.

Carlin McCrory:

On October 16, 2024, the FTC issued the final amendments to the Negative Option Rule, which has now been retitled the Rule Concerning Recurring Subscriptions and Other Negative Option Programs. These amendments significantly expand the rule's coverage and introduce new requirements that purportedly aim to protect consumers from deceptive and unfair practices and negative option marketing.

So, this new rule applies to a wide range of industries, whether that's gym memberships, Internet services, gift box services, spa memberships, all of those TV memberships that we love to subscribe to. So, now businesses must audit their cancellation flows to ensure compliance with the new requirements. Specifically, the rule mandates that it must be as easy to cancel a subscription as it was to sign up for it. This means that cancellation processes cannot be buried behind multiple screens.

Now, for us, this is something we've always advised our clients to do. It should be very easy to cancel if the consumer logged in online and it was easy to subscribe, that method should be made available to the consumer for cancellation. They shouldn't have to call a phone number, get transferred three times, and then have to negotiate in order to cancel a subscription. It should be just as easy as it was to sign up.

So, the final rule now applies to all negative option programs in any media and includes several critical permissions which I'll now discuss. The first is a prohibition of misrepresentations. The rule prohibits misrepresentations of any material fact made while marketing goods and services using negative option features. A second requirement is required disclosures. Sellers must provide important information before obtaining consumers billing information and charging them. This includes the clear and conspicuous disclosure of recurring payments, deadlines to stop charges, cost consumers may incur, billing dates, and cancellation methods.

Next, sellers must obtain consumers unambiguous affirmative consent to the negative option feature before charging them. There also must be simple cancellation mechanisms as I previously discussed. And there are a couple differences from when the rule was proposed to its final form and it varies in two significant ways. The first is annual reminders. The proposed rule would have required sellers to provide annual reminders to consumers of negative option features and this provision has been admitted in the final rule.

Second, something else that has been omitted from the proposed rule is that the proposed rule would have prohibited sellers from forcing consumers to receive saves, which are additional offers or modifications to retain the existing offer without first obtaining consumers unambiguous affirmative consent. Again, like I said, this has been omitted, but the FTC plans to seek further comment on this issue through a supplemental notice of proposed rulemaking. The amendments are effective 180 days after publication in the Federal Register, except for the provisions related to misrepresentations, which take effect 60 days after publication.

I want to note that there has been a lawsuit filed challenging the rule, arguing that it's arbitrary and capricious, and an abuse of discretion under the Administrative Procedure Act, the APA. The lawsuit also contends that the rule is unsupported by substantial evidence and exceeds the FTC's statutory authority. We're not sure where the lawsuit or how the lawsuit will shake out, but right now businesses need to prepare to comply with the proposed rule as there's no injunction at this time, at least of the date of this recording.

So, you need to plan to prepare. And another thing I want to note is while the FTC has issued this final rule, there are also a host of state laws surrounding negative option offers that companies must be aware of when making their plans. So, you need to comply with this final rule as well as analyze the applicable state laws for your business to ensure that you have a completely compliant federal and state law program.

Keith Barnett:

Carlin and Josh, thank you for joining me today. I would like to remind our listeners that this is part three of our four-part series. Be sure to tune in the next time as we discuss the enforcement actions we observed in the payments industry throughout 2024. And don't forget to visit our blog, [TroutmanFinancialServices.com](https://www.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.

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