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The Debanking Debate: Regulators, Risk, and Reality for Payments

SPEAKERS

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In this special crossover episode of *The Consumer Finance* and *Payments Pros* podcasts, Carlin McCrory, Keith Barnett, and Chris Willis explore the federal government's increasing attention to "debanking" and what it means for payment processors, money transmitters, banks, and other financial services providers. They discuss recent federal initiatives and agency activity that have heightened scrutiny of decisions to onboard, maintain, or terminate customers and merchants, particularly where those decisions may be perceived as based on political or religious viewpoints.

The conversation highlights emerging regulatory theories about when debanking could be treated as an unfair practice, and how those theories align with existing statutory and case law frameworks. The group also examines the interaction between legitimate risk management under the BSA and reputational risk.

They close with practical takeaways for the industry, including the importance of revisiting risk and onboarding practices, aligning those practices with evolving regulatory expectations, and maintaining clear documentation to support decisions about customer and merchant relationships in a changing oversight environment.

Transcript

The Consumer Finance Podcast — The Debanking Debate: Regulators, Risk, and Reality for Payments
Hosts: Keith Barnett, Chris Willis, and Carlin McCrory
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Carlin McCrory (00:04):

Welcome to a special crossover edition of *Payments Pros* and *The Consumer Finance Podcast*. I'm Carlin McCrory, one of the hosts of the *Payments Pros* podcast, and today I'm joined by my co-host Keith Barnett and Chris Willis, the host of *The Consumer Finance Podcast*. In this episode, we are going to take a closer look at the federal government's growing focus on debanking and what the FTC's recent actions mean for payment processors, including the policy landscape, enforcement risks, and practical implications for companies operating in the payment space. 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

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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. Chris, Keith, I'm looking forward to our conversation today.

Keith Barnett (00:37):

So are we.

Chris Willis (01:10):

Thanks for hosting today. I really appreciate it.

Carlin McCrory (01:12):

Of course. All right, Chris, let's dive right in. What is the background on the administration's debanking initiative?

Chris Willis (01:19):

Well, let's just take a stroll through memory lane together for that, shall we? So about a little over a year ago, the President issued an executive order that complained of widespread, what it termed as politicized or unlawful debanking in the economy, and directing a bunch of federal agencies to take action on this issue. And the President's executive order asserted that banks had engaged in practices where they would decline the availability of deposit accounts or loans to customers based on either the customer being in a disfavored industry, like oil and gas exploration, or a gun manufacturer, or a payday lender, or something like that, or because of the customer's affiliation with a particular religion or political party. And so the executive order essentially said, this is not okay. The President directed the federal banking agencies and the Small Business Administration to take action to investigate and put an end to what it termed politicized or unlawful debanking. And that's the first domino that got this whole chain going that we're going to be talking about today.

Carlin McCrory (02:28):

And so what have other federal agencies done so far on this front?

Chris Willis (02:34):

Sure, there's been several actions that have occurred since the executive order came out. The first one was from the Small Business Administration. So the Small Business Administration sent letters to approximately 5,000 SBA lenders, asking them to conduct retrospective look-backs to see if they had engaged in any unlawful or politicized debanking, as defined by the President's executive order, to report whether or not they had done that, to report any remedial actions that they had taken upon finding that, and to do so by a deadline specified by the SBA. And failure to report back or failure to cease doing politicized or unlawful debanking was going to potentially result in the removal of the lender's eligibility to make SBA loans. So the SBA was the first agency that moved. Shortly after that, the Office of the Comptroller of the Currency announced that it had begun examinations of the nine largest banks in the United States for unlawful or politicized debanking. And then a little bit later in 2025, closer to

the fall, the OCC released a set of preliminary findings saying that through these examinations that it had conducted, it had discovered instances of debanking, and this was just a preview, and that it was continuing the examinations and would take action to ensure that this did not happen again. The OCC also stated publicly that it was going to take debanking activities and violations into account in assigning Community Reinvestment Act ratings to banks, as well as in consideration of things like merger or branch opening decisions that were required for national banks under its jurisdiction. The FDIC has been doing some quieter work on debanking, but it hasn't been nearly as public as the OCC. But that really sort of brings you up to date in terms of what the SBA and the federal banking regulators have done.

Carlin McCrory (04:27):

And has the Federal Reserve said anything?

Chris Willis (04:29):

Not that I'm aware of. Not publicly that I remember.

Carlin McCrory (04:33):

So, Keith, let's now move to the FTC. What did the FTC say in its warning letters?

Keith Barnett (04:39):

Thanks, Carlin. Overarching issues here. The FTC says three things at a very broad level. I mean, first, the letters generally state that companies that deplatform consumers or deny them access to financial products or services may be violating the FTC Act if their actions are contrary to consumers' reasonable expectations or if their practices cause substantial injury, not reasonably avoidable by consumers and not outweighed by the countervailing benefits to consumers or competition. That's an interesting approach by the FTC with respect to the first issue because of the focus on consumers, even though the FTC cites instances where there were certain merchants that could not get on payment processing platforms or merchants that were removed from payment processing platforms because they engaged in behavior, at least from the payment perspective, that was unlawful. But notwithstanding that, the articles cited related to political beliefs as to why these merchants were removed from the platforms.

Keith Barnett (05:59):

Second, the letters go into somewhat greater specifics, but still make general statements. And what I mean by that is that the FTC stated in the letters that concerns had been raised about the processors' treatment of customers. And the letters specifically state that the processors have either denied or rumored to have denied access to merchants on their platforms due to political or religious beliefs. And in doing so, according to the FTC, the processors may have been violating the FTC Act, the First Amendment, or their own terms of use. But again, these are general statements. Again, there were no direct citations to the removal of any merchants from the platform based upon religion or political beliefs. And then even when they cite to the terms of use, they're just general citations to the terms of use. But these are the terms of use that are set forth by the processors that pretty

much say that we can remove you from the platform for any and all reasons. But in any event, that leads to the third issue that's raised. And so third, the FTC generally states that it is inconsistent with American values to deny law-abiding individuals the ability to run their businesses and feed their families because they get within the crosshairs of rogue American officials, overzealous advocates, or foreign governments. So those are the three basic things that these letters say. And then they go on to talk about the alleged legal basis for their position.

Carlin McCrory (07:43):

And Keith, I may be jumping ahead of what you and Chris have to say in the rest of this podcast, but I would think that some of the processors may have certain reasons for not onboarding merchants. Maybe it's BSA/AML concerns or something like that. What's your take on that?

Keith Barnett (08:00):

That's absolutely right. So payment processors, like banks, assess risk. And the Bank Secrecy Act tells banks and processors to consider the risks of money laundering, terrorist financing, or the likelihood of other unlawful activities before they onboard merchants. And there are certain industries in the payments and banking world that are considered to be more risky than others. And some processors have a higher risk tolerance than others. And the current laws, specifically the Bank Secrecy Act, allow processors with the freedom of choice on what level of risk they are willing to take. But notwithstanding that, the letter goes on to cite cases that stand for the proposition that the FTC has a long history of bringing enforcement actions against processors for UDAP violations. And these include misleading merchants about fees and contract terms and processing payments for merchants who facilitate fraud on consumers. But these cases, and I've read them all, all deal with telling the merchant that pricing will be one thing and it will be another, or processing payments for a merchant who's making false statements to a consumer or having high returns that exceed the NACHA or card network thresholds. Bottom line here is that these prior enforcement actions do not concern debanking or what amounts to being a potential enforcement action that is based upon a processor's prohibited industry list if the FTC deems a prohibited industry to be the expression of a political or religious belief. So my point here is that even though the FTC seems to be bringing this, or at least the legal citations are under Section 5 of the FTC Act, which prohibits unfair deceptive acts, there is nothing about Section 5, at least the plain language of Section 5 or the prior enforcement actions involving Section 5, that prohibit a processor from exercising its rights under its own terms of use. And Chris, I don't know if you have anything to add to that or any experience you've had with that.

Chris Willis (10:14):

Well, the thing is, the whole position by the FTC in these warning letters contains a healthy dose of the presumption that discrimination on the basis of, say, political affiliation or industry group or something like that is an unfair practice under Section 5 of the FTC Act. And the thing is, that presumption is strongly reminiscent of the position that the CFPB took under its UDAAP statute, which has the same word in it, unfair, in 2022 when it announced that, via an update to its UDAAP exam manual, that it believed that discrimination was an unfair practice under the Dodd-Frank UDAAP statute. The consumer credit industry sued the CFPB over that, arguing that it was an improper exercise of authority that was outside the bureau's jurisdiction and that the word unfair wouldn't bear the weight of prohibiting discrimination. The district judge agreed with that and entered summary judgment for the industry ultimately in that case, saying it was beyond the CFPB's authority to add discrimination

to the list of things that was unfair under the Dodd-Frank UDAAP statute. The CFPB appealed that to the Fifth Circuit. And then, while the Fifth Circuit was considering the issue, the administration changed and the CFPB ended up agreeing with the district court's decision and making that injunction permanent, prohibiting it from using its unfair authority under its UDAAP statute to go after cases of discrimination. Well, if that's true about the word unfair in Dodd-Frank UDAAP, I don't see why the same conclusion doesn't apply to the word unfair in Section 5 of the FTC Act. And so to me, the legal basis for the FTC's position here is just as suspect as the CFPB's was in 2022.

Keith Barnett (12:03):

Right. I mean, and it does look here like trying to fit a square peg within a round hole. And that's clear by the cases that they cited that do not stand for the proposition for which they are presenting them now. And even the news articles that they cited have absolutely nothing to do with the proposition for which they're citing them. So I agree with that take on it.

Carlin McCrory (12:26):

So, Chris, what are some of the key takeaways for the payments industry in the wake of these warning letters?

Chris Willis (12:33):

Well, I feel like assuming a payments company doesn't want to provoke the FTC into doing something following these warning letters, I think it would be a good idea to examine whatever processes or policies or practices that the company has that would have excluded or prohibited industries or heightened scrutiny for particular types of groups or industries or whatever. Or if the company has made a decision based on reputational risk of, "I don't want to do business with X or Y type of customer," particularly if those types of customers are ones that are likely to be favored by the current administration, I think it'd be a good idea to revisit those and determine whether or not the benefit from excluding them is worth the risk of waving a red flag in front of the bull on this issue. That to me is the primary takeaway. You don't want to create a situation with a complaining customer that could be reported to the regulator and then make yourself the poster child for debanking in the payments industry. That to me is really the imperative for the payments industry right now, unless you just want to litigate this case with the FTC.

Keith Barnett (13:41):

Yeah, bottom line there is, Chris, I agree. Get together with your banks, actually, because at least payment processors, they are at the behest of their banks. Right? The banks will have a prohibited industry list, which means that the processor has to also have that same prohibited industry list. So get together with your banks, perform an assessment on the prohibited industries. And you're absolutely right, Chris, I agree. For processors, look at your contracts and look at your rights to terminate the agreement and what constitutes a default under the agreement and try to reconcile that with the FTC's letters. For example, if you're gonna terminate a merchant or not onboard a merchant, you will want to do so for a reason that's not based upon religion or political beliefs. And I'm not much of a lawyer that does employment-related work, but I know enough to be dangerous. Right? So it's similar to the requirement that an employer can only terminate an employee for a legitimate, non-discriminatory

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reason, and not a pretext. And so in the payments world, the FTC and Trump's executive order has brought that same issue into the banking and payments world. If you're not gonna onboard someone or if you're gonna term someone, make sure that you document everything to make sure that it is for a legitimate, non-discriminatory reason under the current administration's beliefs as to what is discriminatory.

Chris Willis (15:11):

And Keith, picking up on that, it's a great point. Payment processors should understand that one of the concepts in the OCC's examinations of large banks dealing with debanking is that it's possible that banks used AML considerations as a pretext for closing or denying accounts for these other improper reasons. And so what that says, following up on your comments, is not only should we have a legitimate reason, and it could be AML, for example, and it may be in a lot of instances with some of these industries, that there be significant and persuasive documentation that shows that's what the concern was and here's why we had it and that's why we took this action, so that you're in a position to defend those decisions against the potential argument of, "like, Oh, it really wasn't an AML consideration. You just said that to give you a reason to close the account or not open the account." So understand the role of good documentation reflecting those non-discriminatory reasons that you just mentioned, Keith.

Keith Barnett (15:42):

That's right.

Carlin McCrory (16:13):

So, Chris, as part of the Payments Pros podcast, we like to look ahead into the future, make predictions. So as part of that, the inevitable swing in who's running the country will happen. And so what does that look like, or what could it look like? Because now we have opened the floodgates, so to speak, of allowing all of these customers. And let's say in the future we can consider reputational risk and we could consider other factors. What does that look like, you think?

Chris Willis (16:44):

Well, I think it's very easy to know what that's gonna look like because we've seen this movie already in the banking industry under prior Democratic administrations. So the idea that banks were restricting access to things like deposit accounts for certain types of industries didn't occur mostly by the banks' own decision acting on their own. It occurred under regulatory pressure from the federal banking regulators under things like Operation Choke Point and Operation Choke Point 2.0, where the federal regulators used their leverage over financial institutions to try to reduce the viability of businesses that were disfavored by those administrations. So I don't remember there being similar pressure applied to non-bank payments companies in the past, but now that the FTC has decided to bring them into it on the debanking side of it, there's the possibility that the FTC under different commissioners in the future, and again, this president has set the precedent of firing the commissioners that were not of his own party and having the commission be solely composed of members of his own party, so you could have a brand new set of, say, Democratic FTC commissioners who might exert pressure on payments companies to restrict service to certain disfavored industries. And so the payment processors may experience the same whipsawing on

this issue that banks already have over the previous several administrations.

Keith Barnett (18:10):

And it's funny that you bring that up, Chris. And just for our listeners, by way of background, the FTC at maximum can have five commissioners, right? And no more than three from the same party. So there's a loophole there, right? And so that allowed the current administration pretty much to get rid of all the Democrats and then just keep in, at least right now, two Republicans who are commissioners. And the old saying is what's good for the goose is what's good for the gander. What's gonna happen if we have a Democratic president who wants to put forward a certain agenda? Well, the Trump administration has already laid out the blueprint. Just have three Democrats as commissioners and no Republicans, and you could just push through your agenda pretty easily. And so it's gonna be really interesting to see what happens when we do have a Democrat as the president again and these things arise. I mean, why not just follow this blueprint?

Carlin McCrory (19:10):

Well, Keith and Chris, thank you for joining us today, and thank you to our audience for listening to today's episode. 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 next time.

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