
Payments Pros – The Payments Law Podcast — Payments Year in Review 2025: Federal and State Developments – Part 2

Hosts: Keith Barnett, Carlin McCrory, and Jason Cover

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Keith Barnett (00:05):

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](https://www.troutmanfinancialservices.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 Jason Cover for part two of our review of the 2025 payments landscape, as well as predictions on what we can expect in 2026. Carlin and Jason, thank you for joining me again today.

Jason Cover (01:10):

Thanks, Keith.

Carlin McCrory (01:11):

Thanks.

Keith Barnett (01:12.3):

What I'm thinking is that we would just pick back up on our discussion on buy now pay later rules, particularly looking at state laws. So Jason, do you have anything else to add before we head on over to Carlin to talk about convenience fees?

Jason Cover (01:25):

Absolutely. Keith, I think that's a perfect introduction, whether you listened to the last episode or not. It's emblematic of, I think, a rollback at the federal level, which we somewhat talked about last week, and the state reaction to that rollback. So just to recap briefly, we left off with the CFPB's rescission of the buy now pay later rule, which would have made most buy now pay later products and other products, even that maybe we don't think about as buy now pay later, credit cards under Regulation Z. So I think that was a great win for the industry. Everyone was happy except maybe some of the folks at the state level who thought that was a good idea, New York being one of them. So last year they enacted a law that made any closed-end credit provided to a consumer with such consumer's particular purchase of goods and services a buy

now pay later product, which on its face is really, really broad. It doesn't fit into that traditional pay-in-four product that we think of when people say BNPL. It really could arguably be lots of things that are closed-end credit used to buy a product or a service. And then it continues on where the CFPB left off by making those products subject to the credit card rules under Regulation Z.

(02:39):

And as we talked about last week, there's a host of problems with that because it's a closed-end product, but that classification as a credit card arguably makes it subject to multiple parts of the open-end provisions of Reg Z. And I think I said last time that it's a square peg in a round hole because they just don't fit together very neatly because the products just aren't meant to work that way under the regulation. So it really creates a conundrum for a lot of folks offering these products. That statute also requires a license for non-bank buy now pay later providers. It attempts to impose rate and fee restrictions on certain buy now pay later providers and has other substantive and disclosure requirements. So emblematic of this trend of federal rollback with state regulation following it. And I think Carlin talked last time in similar fashion that the states were doing this as well with EWA. So we talked about how the EWA rule making various fees like expedited funding fees and tips finance charges under Reg Z had been rescinded and replaced with a similar administrative opinion from the CFPB mirroring the Kraninger opinion.

(03:44):

But states have quickly stepped in to fill that void as well. And I think Carlin said we're up to like 14 states or so that have either enacted legislation and/or have given guidance on these types of products. And I would say the activity in the last couple years from Connecticut would be emblematic of filling that void left by the federal regulation. And states like Connecticut are taking the position that expedited funding fees, tips, membership fees, other fees that we typically see in these EWA products, whether they're employer-based or direct to consumer, are finance charges or interest or usury under state law regardless of federal law. So this obviously has the effect of limiting those charges or bringing them under the usury cap. And they may require licensing. Some of these laws seek to classify EWA products as credit or other. California recently promulgated regulations that require registration for EWA. So there's these handful of states that have taken a more restrictive lens looking at EWA more as credit-like than not. And then on the flip side, we had Louisiana that kind of mirrors states that have taken a more permissive approach.

(04:51):

They may have a registration requirement of some sort, but on the whole, they're sort of authorizing EWA as we know it. They may have disclosure requirements or no-cost options, cancellation rights, requirements that there's no collection, no credit reports. Those types of things that Carlin had talked about that are already in the federal rule, somewhat mirroring that. But on the whole, they are permissive as EWA products and authorize them. So that state EWA action I think will continue to develop. We'll see whether states follow New York's lead in continuing on with the buy now pay later classification as credit cards. But I think those will be two interesting fields that have developed over the last year and then continue to develop over the next year or two.

Carlin McCrory (05:33):

Thanks, Jason. I'm going to dive into convenience fees and some of the state laws on that topic. So, states have enacted laws that regulate fees, including convenience fees and surcharges, which has created a patchwork of state laws just like EWA. But you also have to consider the card network rules governing convenience fees and surcharges as well. Now, some of the state laws have recently been amended, or some were overturned by federal courts deeming those laws as unconstitutional. So what happened in 2025, Oklahoma passed a surcharge law that became effective on November 1st. Prior to November of 2025, Oklahoma's code prohibited merchants from imposing a surcharge on a card holder who elected to use a credit or debit card instead of paying by cash, check or similar means. And now, their law states that a seller can impose a surcharge for a client's use of a credit card, only if advanced notice is provided clearly and conspicuously at the point of entry or at the point of sale for in-person payments, on the homepage and payment page for online payments, and verbally disclosed for phone payments.

(06:42):

The amount is limited to the lesser of either 2% of the total transaction or the actual cost incurred to process the payment. If the seller only accepts credit cards, it can't treat the charge as voluntary. So I want to contrast this a little bit with Colorado's law, which actually allows for the greater of 2% or the actual cost to process a credit card payment. I also want to note that the Visa rules allow for a surcharge to be 3% rather than 2%. So again, you have to keep track of these laws because they're varying and they sometimes are different than what the card network rules say. Interestingly, though, the Oklahoma statute has an exemption for money transmitters who are registered with the Department of Treasury, which is unlike many of the other states who regulate convenience fees or surcharges. So more specifically, the exemption states that any registered money transmitter who provides electronic funds transmission services, including services by phone and internet, can charge a different price for a funds transmission service based on the mode of transmission used in the transaction, without violating the code section, as long as the price charged for a service paid for with an open-end credit card or debit card account, isn't greater than the price charged for the service if paid for with a currency or other similar means accepted within the same mode of transmission.

(08:25):

In the Oklahoma statute, a seller is defined as any person, entity or retailer doing business in the state, in any sales, service or lease transaction, including but not limited to any consumer credit sales transaction. So the definition of a seller is quite broad. So depending what business you're in, you definitely need to take a look at the state statutes to see if they're applicable to your business. I want to again compare and contrast the Oklahoma statute with some other state statutes. So for example, New York has a law that explicitly permits businesses to assess a surcharge so long as the seller clearly and conspicuously post the total price for using a credit card inclusive of any surcharge, or alternatively display both the credit card price alongside with the cash price. And then in New York, any credit card surcharge amount imposed on the customer can't exceed the amount charged to the seller by the credit card company. And in New York, the definition of a seller again is broadly defined to mean any person who honors credit cards or debit cards, which may be used to purchase or lease property or services.

(09:36):

So both New Jersey and California have similar laws to New York states. However, I mentioned Colorado earlier, and Colorado has a very unique surcharge law in which you are required to provide a Colorado specific disclosure for the services. Many of the states, when we're talking about surcharging or fees, require some type of clear and conspicuous disclosure if the charge won't be refunded, usually you need to state that if the product is also refunded. And then it just needs to be clear the amount that the consumer is being charged prior to processing, and then the consumer should generally have the ability to back out of the transaction prior to being assessed the type of fee. Keith, I know there is some litigation going on as it relates to these type of fees. Do you want to talk a little bit about that?

Keith Barnett (10:55):

Yeah, sure. But we could. This is the state law section of our podcast, but we probably just need to back up a little bit and talk about the significant change that we have seen over the past year. And what I mean by change is that last year, I keep saying during the Biden administration, even though Biden is not the head of the CFPB or the FTC, but I think you all know what I mean when I say Biden administration. But during the Biden administration, the CFPB and FTC referred to convenience fees as junk fees, right? And they pretty much called everything junk fees that fit within a bucket that was beyond whatever the cost of the product was. So last year, 2025, the CFPB, as you know, has taken a significant step back on investigations and enforcement, and so has the FTC. And as a result, we have not heard as much about "junk fees" at least from those federal regulators. But what we have seen over the past year, year plus, is increased litigation on convenience fees. And so by way of background, payment processors or money transmitters have charged convenience fees to consumers.

(12:15):

And these processors or money transmitters are processing payments for lenders, servicers, debt collectors, those industries. And at least in the litigation, as the facts have come out, the processors have not shared the fees with the merchants. And this factor is pretty significant because there is case law, federal case law, 11th Circuit, other circuit courts, supporting the fact that processors can charge the fees if they are not shared with the lenders, servicers, or debt collectors. But over the past year, year and a half, plaintiff lawyers have nonetheless sued the lenders, servicers, debt collectors arising out of the processors charging of the convenience fees. Now, oddly and ironically, the processors have not been named as parties. It has been the lenders, servicers, and debt collectors. And the arguments by the plaintiffs, who are consumers, is that the merchants are liable because the processors are charging the fees on their behalf, even though those fees are not being shared. So bottom line is that is a misleading, somewhat false statement by the plaintiff's lawyers. But they do this to try to get past the motion to dismiss stage or to try to allow for class certification. Their argument also ignores the fact that the processors are providing the service of expedited payments of a bill.

(13:46):

I am one of those that is old enough to have written checks when I was in college and also in law school to pay my bills, right? And the analogy is the following. Sending something by US

Mail first class is a lot less expensive than paying my bills and sending it by UPS or FedEx. Right? If you send something by UPS or FedEx as opposed to US first class mail, the payment will get there more quickly when I am paying my bills and you are paying for that convenience. Same thing with respect to the convenience fees that are charged by the money transmitters and the processors. The point there is the money is getting there more quickly and they are paying for the service. But that argument has not fully been conceptualized in the litigation, simply because of the manner in which the plaintiff's lawyers have been framing the issue to the court. So hopefully moving forward in 2026 and beyond, the courts will see this for what it is. But at least as we stand now, litigation is a trend in convenience fees for 2025, and I see that going forward for 2026. And so for those of you who are in the payments industry, if you are a processor money transmitter that is charging convenience fees, you should pay attention to these federal and state law cases concerning plaintiff's lawsuits with respect to convenience fees. With that, I will turn it over to Jason to talk about MCA.

Jason Cover (15:18):

Thanks, Keith. MCA and sales-based financing has been another interesting story in 2025, in the last year or so, and I think what we are seeing again is sort of a tale of two states, if you will, and the approaches the states take to these types of products. So I think legislation enacted in late 2025 in Louisiana, HB470, mirrors what we have seen for the most part, states do, and that is treating commercial financing products, generally speaking, including MCA and sales-based financing, sort of as a quasi-consumer product. So these states generally have enacted laws that require some sort of disclosure, something TILA-like, but not quite TILA. They may have registration requirements or things of that nature, but mainly something that is a cost comparison or cost shopping tool for folks in the small business lending industry to implement. But something new happened last year in Texas in the form of HB700, which applies to sales-based financing. And the statute defines sales-based financing as repayment to the provider as a percentage of sales or revenue, which may increase or decrease according to the volume of sales, or a fixed payment mechanism that is subject to a reconciliation process.

(16:11):

So for those of you kind of in the sales-based financing world or the MCA world, that sounds pretty familiar how these products work. It is clearly meant to capture those. But while the Texas statute does some of the things that other states like Louisiana have done, like create a registration requirement and a disclosure requirement, they go a step further here, and they prohibit the establishment of an automatic debit mechanism from a merchant's deposit account unless the finance company holds a valid perfected security interest in that account. And this has a practical effect of making sales-based financing extremely difficult in Texas. So if you are not familiar with these products, this is how they work. They are repaid through sales based on the provider taking usually an ACH authorization that debits the merchant's account on a periodic basis in an attempt to mirror what they expect the future receivables or sales to be.

(17:30):

So if you take that repayment mechanism away, it sort of makes those products somewhat obsolete in Texas. So we have had lots of calls and lots of discussion with clients about what this means for the industry, workarounds, what to do in lieu of it, but obviously a pretty big

hurdle. I have not seen any further action in other states that mirror this Texas legislation. It will be interesting to see if that kind of Louisiana model continues to ring true or folks go one step further into this Texas model. Moving on to something entirely different. Many of you are probably processing payments for fintechs and banks working with bank programs, some on a 50-state basis. And we continue to see states increasingly exercising oversight of these bank programs, attempting to make them subject to state law. One implementation of this was originally a law passed by Colorado in 2023. And what that did at the federal level, the way state-chartered banks can export their rates is established by the Depository Institutions Deregulation and Monetary Control Act of 1980. We call this DIDMCA around here, but sometimes you will see it DIDA or folks use other abbreviations, but I use DIDMCA because that is what I do.

(18:46):

But in any event, DIDMCA allows states to export their rates without regard to state law in similar fashion to the National Bank Act for national banks. But there is an important caveat in DIDMCA, and that is Section 525, which allows a state to opt out of DIDMCA's rate exportation as the loans made in such state, meaning the state of the opt-out. But it is not entirely clear what it means for a loan to be made in a state. So when Colorado opted out in 2023, this question was wide open, and the legislation was quickly met with industry litigation to argue over what this means. Where is the loan made? In 2024, a district court in Colorado had granted a preliminary injunction based on the plaintiff industry argument that the loan is made where the lender is located or performs its non-ministerial loan functions, which mirrors the federal requirements for where a loan is made for rate exportation purposes. But late last year, the 10th Circuit overturned that argument and instead said the loan is made in the state which either the lender or the borrower is located if it is in the opt-out state. So this would mean using the industry's argument, it would have meant that so long as you are a Utah state-chartered bank and all of your non-ministerial functions are performed in Utah, you can still go ahead and export those rates.

(20:06):

The impact would have primarily have been on a Colorado state-chartered bank because it would have been stuck with the loan being made in Colorado. But now this brings in the consumer sitting in Colorado, which means that Utah State-Chartered bank can no longer export its Utah rate authority to Colorado if the 10th Circuit's ruling is upheld. The plaintiffs have filed for rehearing en banc, the industry trade group rather, and I highly suspect even if the rehearing is not approved, that the industry plaintiffs will continue to appeal this as far as they can get it up into the Supreme Court if it goes that way. So if you are a payment processor and you have folks that you are working with that either a state-chartered bank independently makes loans to Colorado or a fintech that is partnering with the bank for a loan program in Colorado, this is really something to keep an eye on because for your diligence purposes and whatnot, it is going to affect or potentially affect whether or not that state-chartered bank can charge the rates of its home state or has to follow Colorado.

Carlin McCrory (21:13):

Thanks, Jason. Keith and I are now going to talk a little bit about money transmission. And if you've been a listener for some time, you've certainly heard us talk about the Money Transmission Modernization Act, the MTMA, and how states have begun to adopt either pieces of or in full the MTMA. And at this time, talking specifically about the agent of the payee exemption, 39 states now recognize the exemption, which is great. And so what is the agent of the payee exemption? It generally requires a written agreement between the agent and the payee directing the agent to collect payments on the payee's behalf. The payee must hold out the agent to the public as accepting payment, and payments must be treated as received by the payee upon receipt by the agent, so there is no risk of loss to the payor. So while we have 39 states that recognize this exemption, if you are trying to get into the market and you are a money transmitter looking for an exemption, we don't have all 50 states recognizing this. So you need to have other exemptions in place or another solution to avoid any money transmission problems. And since there are no uniform all 50 state exemptions applicable to most financial technology companies, many fintechs tend to partner with a financial institution to conduct money transmission.

(22:51):

So in doing this, the fintechs negotiate agreements with financial institutions for the financial institutions to hold what we call FBO accounts for the benefit of accounts where the account is held in the financial institution's name and tax identification number. And some states have specifically recognized and issued public opinions stating that a money transmission license is not necessary if an entity is removed from the flow of funds such that the financial institution is conducting all money transmission. However, we are seeing some states start to push back on this fintech model, even though it is very common, very widespread. So it will be interesting to see where that takes us in 2026 with the FBO accounts. Most of the state statutes don't address the notion that the fintech isn't actually touching the funds at all. And so the bank is touching the funds and they are the ones who are the money transmitters under this model. Keith, do you think that we will see any states adopt MTMA or the agent of the payee exemption in 2026?

Keith Barnett (24:13):

Yeah, I assume. Look, the trend over the past several years is for more states to propose implementing or approval of the MTMA. As we sit here now, there are probably another five or six states that have something in the hopper related to MTMA, and the Conference on State Banking Supervisors, they are the ones that drafted the MTMA. Their goal was to have all 50 states adopt the MTMA whole cloth. That has not been the case. Some states have chosen bits and pieces or large parts of the MTMA and have implemented it. One of the trends that has nothing to do with agent of the payee, but one of the more recent trends over the past couple of years is that states have not been adopting the part of the MTMA that requires payroll processors to have licenses. And in fact, these states have provided exemptions for payroll processors over the past couple of years. Another part of the MTMA is an express agent of the bank exemption. And under the agent of the bank exemption, you could have a fintech payment processor or whatever. They would be exempt from obtaining a money transmitter license under state money transmitter laws.

(25:32):

Now, we've been mentioning MTMA, but this really, this agent of the bank exemption would fall into two buckets. One bucket is the CSBS exemption through the MTMA. And as of this recording, there are about 25 states that have adopted the agent of the bank exemption as written by the MTMA. And then in the second bucket, you have states that have enacted an agent of the bank exemption without expressly enacting the MTMA. And as of this recording, there are probably about eight states that fall within that bucket. If someone wants an exemption under the agent of the bank exemption with respect to the MTMA, there is required a written agreement between the entity seeking the exemption and the actual bank. And the written agreement must state the specific functions that the agent is to perform and that the bank will assume all risk of loss and all legal responsibility for satisfying the outstanding money transmission obligations owed upon the agent's receipt of the money. So it operates almost like an FBO account, but not quite, because with an FBO account, as Carlin mentioned, an FBO account is in the bank's name and tax identification number, whereas with respect to the agent of the bank exemption, the bank account would still be in the fintech or processor's name and tax identification number.

(27:08):

One other thing to add to that before I wrap up. I mentioned earlier that there are several states that have an agent of the bank exemption that's not under MTMA. That's also something that's important to look at. The states that come to mind immediately are California, Delaware, Louisiana, Ohio, and Oklahoma. And I also believe New York has it by no action letter, and I believe Nebraska as well. But the point that I want to make here is that in these particular states, it's kind of like a two-step process. One, each of these states expressly will exempt a bank from compliance with their state money transmitter statute. And then in the second piece of their exemption, it will say, "We, state A, B, C, D, or E, also exempt an agent of the person either licensed under our statute or exempt from licensure." So for those of you who are seeking some sort of agent of the bank exemption, you want to make sure that it's a state that recognizes such exemption and the agreement between the fintech processor or whomever and the bank includes the language that's necessary to take advantage of the exemption.

(28:27):

And that's all I have on that piece of it. And I believe that's all we have for episode two. So thank you again, Carlin and Jason for joining me today. And also thanks to our audience for listening to today's episodes. And once again, don't forget to visit our blog, [TroutmanFinancialServices.com](https://www.troutmanfinancialservices.com) and subscribe so you can get the latest updates. And also please be sure to subscribe to this podcast via Apple Podcast, Google Play, Stitcher, or whatever platform you use. And we look forward to the next time and updating you on everything in 2026 as it occurs.

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