

Current Developments in Bank Deposits and Payment Systems

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INTRODUCTION

This survey summarizes several recent developments affecting bank deposits and payment systems. These include payments-related consent orders and enforcement actions by the Consumer Financial Protection Bureau (“CFPB”) and the Federal Trade Commission (“FTC”), recent case law developments regarding the ability of national banks to assess overdraft fees, and amendments to Regulation CC related to inflationary adjustments and to its application to U.S. territories.

CFPB CONSENT ORDERS AND ENFORCEMENT ACTIONS

USAA FSB

In January 2019, the CFPB announced a settlement with USAA Federal Savings Bank.¹ The consent order stated that USAA violated the federal Electronic Funds Transfer Act (“EFTA”)² and Regulation E³ by failing to properly honor consumers’ requests to stop payment on preauthorized electronic fund transfers and by failing to complete reasonable error resolution investigations.⁴ The consent order identified the following practices as violations of the EFTA and Regulation E:

- refusing to enter stop payment orders after account holders notified USAA of their desire to stop payment on preauthorized electronic fund transfers;

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1. Consent Order, USAA Fed. Sav. Bank, CFPB No. 2019-BCFP-0001 (Jan. 3, 2019), https://files.consumerfinance.gov/f/documents/bcfp_usaa-federal-savings-bank_consent-order.pdf [hereinafter USAA Consent Order].

2. Pub. L. No. 90-321, tit. IX, 92 Stat. 3728 (1978) (codified as amended at 15 U.S.C. §§ 1693–1693r (2018)).

3. 12 C.F.R. pt. 1005 (2019).

4. USAA Consent Order, *supra* note 1, at 2, 6–13. Note that USAA neither admitted nor denied any of the CFPB’s findings of fact or conclusions of law, other than the facts necessary to establish the CFPB’s jurisdiction over USAA and the subject matter of the action. *Id.* at 2–3.

- requiring consumers to contact the merchants initiating electronic fund transfers as a prerequisite to implementing stop payment orders;
- failing to consistently honor oral stop payment requests for fourteen days;
- failing to identify and block recurring debit card transactions;
- failing to investigate reported errors unless the consumer submitted a completed and signed written statement of unauthorized debit within ten days of USAA sending the form to the consumer, and requiring that such statements be notarized;
- requiring consumers to dispute transactions with payday lenders;
- threatening to terminate the customer's USAA membership and warning of potential criminal liability for making false statements to a bank if the investigation determined that there was no error; and
- concluding that no error had occurred based on the existence of previous transactions with the same merchant without considering other evidence in the bank's own files.⁵

The CFPB also concluded that USAA engaged in unfair acts or practices by re-opening consumer deposit accounts previously closed by the account holders in order to process subsequent credit and debits without obtaining prior authorization from or providing notice to the affected consumers.⁶ In addition to prohibiting the identified acts and practices, the consent order required USAA to pay \$12 million in restitution⁷ and imposed a civil money penalty of \$3.5 million.⁸

ENOVA INTERNATIONAL, INC.

The CFPB also announced a settlement with Enova International, Inc., an online payday and installment loan lender, in January 2019.⁹ Among other violations described in the consent order, the CFPB determined that Enova engaged in unfair acts or practices by debiting consumers' bank accounts without authorization.¹⁰ The CFPB found that Enova purchased loan applications from lead generators and that such applications typically included bank account information that Enova used to overwrite the bank account information provided by consumers to Enova when the consumers authorized recurring electronic fund

5. *Id.* at 6–13.

6. *Id.* at 2, 13–14.

7. *Id.* at 21–27.

8. *Id.* at 27–29.

9. Consent Order, Enova Int'l, Inc., CFPB No. 2019-BCFP-0003 (Jan. 25, 2019), https://files.consumerfinance.gov/documents/cfpb_enova-international_consent-order_2019-01.pdf.

10. *Id.* at 1, 4–6. Note that Enova neither admitted nor denied any of the CFPB's findings of fact or conclusions of law, other than the facts necessary to establish the CFPB's jurisdiction over Enova and the subject matter of the action. *Id.* at 2.

transfers. Enova allegedly used such information to debit the consumer deposit accounts even though Enova did not have authorization from the consumers to debit such accounts.¹¹ The consent order imposed a civil money penalty on Enova of \$3.2 million.¹²

FTC CONSENT ORDERS AND ENFORCEMENT ACTIONS

PRIORITY PAYOUT CORP.

In April 2019, the FTC announced a settlement with Thomas Wells and his payment processing company Priority Payout Corp., as successor to Interbill Ltd.¹³ The FTC alleged that Wells and Priority repeatedly violated a 2009 court order issued against Wells and Interbill¹⁴ by providing and procuring payment processing for merchants engaged in fraud, failing to conduct a reasonable investigation of prospective merchants, and failing to monitor merchant transaction activity to ensure that merchants were not engaged in deceptive, unfair, or abusive practices in violation of section 5 of the Federal Trade Commission Act¹⁵ and the FTC's Telemarketing Sales Rule.¹⁶ Pursuant to the stipulated final order, Wells and Priority were permanently enjoined from directly or indirectly acting as a payment processor, an independent sales organization (i.e., a person who enters into an agreement or contract with a payment processor to sell or market payment processing services to a merchant), a sale agent (i.e., a person who matches, arranges, or refers prospective applicants for merchant processing services to a payment processor or independent sales organization), or an agent or employee of any such company.¹⁷ In addition, judgment was entered against Wells and Priority for \$1,812,204 as compensatory contempt relief.¹⁸

AVANT, LLC

The FTC also announced a settlement with online lending company Avant, LLC in April 2019.¹⁹ The FTC alleged that Avant engaged in unfair and deceptive practices by, *inter alia*, requiring consumers to agree to automatic payments; initiating payments without authorization, including multiple payments in a

11. *Id.* at 4–6.

12. *Id.* at 10–11.

13. Stipulated Final Judgment, Order for Compensatory Contempt Relief, and Supplemental Order for Permanent Injunction and Other Equitable Relief as to Defendants Thomas Wells, Interbill, Ltd., and Its Successor, Priority Payout Corp., *FTC v. Interbill, Ltd.*, No. CV-S-01644-JCM-PAL (D. Nev. Apr. 10, 2019), https://www.ftc.gov/system/files/documents/cases/interbill_final_order_as_to_tom_wells.pdf [hereinafter Priority Final Order].

14. *Id.* at 2–3; see Final Judgment and Order for Permanent Injunction and Other Equitable Relief, *FTC v. Interbill, Ltd.*, No. CV-S-01644-JCM-PAL (D. Nev. Apr. 30, 2009).

15. 15 U.S.C. § 45 (2018).

16. 16 C.F.R. § 310 (2019).

17. Priority Final Order, *supra* note 13, at 4.

18. *Id.* at 5.

19. Stipulated Order for Permanent Injunction and Monetary Judgment, *FTC v. Avant, LLC*, No. 19-CV-2517 (N.D. Ill. Apr. 15, 2019), https://www.ftc.gov/system/files/documents/cases/162_3090_avant_llc_proposed_stipulated_order_4-15-19.pdf [hereinafter Avant Final Order].

single day; refusing to provide refunds; failing to credit payments in a timely fashion; and providing inaccurate payoff quotes.²⁰ The FTC's complaint also included allegations that Avant violated the Telemarketing Sales Rule ("TSR") by accepting payments by remotely created check,²¹ which the TSR prohibits telemarketers like Avant from doing.²² Interestingly, the FTC then alleged that Avant violated the EFTA and Regulation E by effectively requiring loan repayment in the form of preauthorized electronic fund transfers because the only available alternative to preauthorized EFTs was remotely created checks, which would be prohibited by the TSR.²³ Judgment was entered against Avant for \$3.85 million.²⁴

Not all FTC Commissioners agreed with the EFTA allegations against Avant. Commissioner Phillips dissented from the EFTA count of the complaint, stating as follows:

I believe the Commission could reach the same relief obtained in its settlement with Avant by pleading only a TSR violation. Doing so would avoid the use of novel pleading based on the facts of a particular case to rewrite a statute based on our policy preferences. EFTA does not prohibit the use of RCCs as an alternative to EFTs, and we should not pretend it does.²⁵

Commissioner Wilson also dissented from the EFTA count, stating that

[h]ere, the majority uses an alleged violation of the TSR to prohibit behavior the agency could not reach under EFTA alone.

....

The complaint bootstraps Avant's liability under the EFTA to its alleged violations of the TSR. Because the TSR prohibits telemarketers from using RCCs, the complaint alleges that Avant provided only one legal repayment method: an ACH. But applying prohibitions under the TSR to create prohibitions for certain payment methods under EFTA is a troubling form of regulation by enforcement.²⁶

20. Complaint for Permanent Injunction and Other Equitable Relief at 3–10, *FTC v. Avant, LLC*, No. 19-CV-2517 (N.D. Ill. Apr. 15, 2019), https://www.ftc.gov/system/files/documents/cases/162_3090_avant_llc_complaint_4-15-19.pdf [hereinafter *Avant Complaint*].

21. *Id.* at 13–14.

22. 16 C.F.R. § 310.4(a)(9) (2019).

23. *Avant Complaint*, *supra* note 20, at 14–15.

24. *Avant Final Order*, *supra* note 19, at 6.

25. Separate Statement of Commissioner Noah Joshua Phillips Concurring in Part and Dissenting in Part, *FTC v. Avant, LLC*, Matter No. 1623090 (Apr. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1514066/avant_inc_1623090_separate_statement_of_commissioner_noah_joshua_phillips_4-15-19.pdf.

26. Separate Statement of Commissioner Christine S. Wilson Concurring in Part and Dissenting in Part, *FTC v. Avant, LLC*, Matter No. 162-3090 (Apr. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1514073/avant_inc_1623090_separate_statement_of_christine_s_wilson_4-15-19.pdf.

ALLIEDWALLET, INC.

In May 2019, the FTC announced a settlement with payment processor AlliedWallet, Inc. and various related parties.²⁷ As in the Priority Payout settlement, the FTC alleged that AlliedWallet; various related entities, including AlliedWallet, Ltd., GTBill, LLC, and GTBill, Ltd.; and officers and owners of the companies committed unfair acts and practices by processing payments for numerous merchants engaged in fraudulent activities; submitting merchant applications containing false information; and actively working with Thomas Wells and Priority Payout, the defendants in the Priority Payout settlement, to circumvent card network rules and transaction monitoring designed to prevent fraud.²⁸ Pursuant to one of the final orders, Ahmad Khawaja (the founder, CEO, director, and owner of AlliedWallet; a director and the sole shareholder of AlliedWallet Ltd.; and the sole principal of both GTBill, LLC and GTBill, Ltd.) and the companies were permanently enjoined from directly or indirectly acting as a payment processor for a variety of high-fraud-risk businesses and from engaging in a number of other unfair activities.²⁹ In addition, judgment was entered against them for \$110,050,941.³⁰ A separate final order entered against Amy Rountree, AlliedWallet's vice president of operations, imposed a \$320,429.82 equitable monetary judgment.³¹ A third final order entered against Mohammed Diab, AlliedWallet's chief operations officer, permanently banned him from payment processing and required him to pay \$1 million to the FTC in equitable monetary relief.³²

CASE LAW DEVELOPMENTS

OVERDRAFT FEES

In *Fawcett v. Citizens Bank, N.A.*,³³ the First Circuit considered whether a defendant bank's fee for a "sustained overdraft" is a usurious interest charge under the National Bank Act.³⁴ This putative class action arose from a claim that the plaintiff was charged a \$30 "sustained overdraft fee" three times within ten

27. Stipulated Final Order for Permanent Injunction and Monetary Judgment Against Ahmad ("Andy") Khawaja, No. 19-CV-4355 (C.D. Cal. June 7, 2019), https://www.ftc.gov/system/files/documents/cases/alliedwallet_stipulated_final_order_re_allied_7-3-19.pdf [hereinafter AlliedWallet Final Order]; Stipulated Final Order for Permanent Injunction and Monetary Judgment Against Amy Rountree, FTC v. AlliedWallet, Inc., No. 19-CV-4355 (C.D. Cal. July 3, 2019), https://www.ftc.gov/system/files/documents/cases/alliedwallet_final_order_re_rountree_7-8-19.pdf [hereinafter Rountree Final Order]; Stipulated Final Order for Permanent Injunction and Monetary Judgment Against Mohammad Diab, FTC v. AlliedWallet, Inc., No. 19-CV-4355 (C.D. Cal. June 21, 2019), https://www.ftc.gov/system/files/documents/cases/alliedwallet_redacted_sealed_stipulated_final_order_re_diab_7-3-19.pdf [hereinafter Diab Final Order].

28. Complaint for Permanent Injunction and Other Equitable Relief, FTC v. AlliedWallet, Inc., No. 19-CV-4355 (C.D. Cal. May 28, 2019), https://www.ftc.gov/system/files/documents/cases/alliedwallet_complaint_7-3-19.pdf.

29. AlliedWallet Final Order, *supra* note 27, at 8–17.

30. *Id.* at 17.

31. Rountree Final Order, *supra* note 27, at 16.

32. Diab Final Order, *supra* note 27, at 6–8.

33. 919 F.3d 133 (1st Cir. 2019).

34. *Id.* at 134.

business days after she did not cover an initial overdraft, which the plaintiff alleged was not permitted under the National Bank Act.³⁵ The three “sustained” fees came in addition to an initial \$35 “overdraft fee” charged when the overdraft occurred.³⁶ The district court dismissed the action for failure to state a claim.³⁷

As the *Fawcett* court noted, the National Bank Act permits national banks to charge “interest at the rate allowed by the laws of the State . . . where the bank is located[.]”³⁸ The Office of the Comptroller of the Currency (“OCC”) defined the term “interest” in its regulations as including “any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended.”³⁹ The regulation specifically refers to the following fees as those constituting interest: “numerical periodic rates, late fees, creditor-imposed not sufficient funds (NSF) fees charged when a borrower tenders payment on a debt with a check drawn on insufficient funds, overlimit fees, annual fees, cash advance fees, and membership fees.”⁴⁰ By contrast, the regulation permits national banks to impose a “deposit account service charge” at its discretion and in an amount of its choice, provided that it acts with “sound banking judgment and safe and sound banking principles.”⁴¹ The court cited a 2007 OCC interpretive letter in which the OCC took no issue with the assessment of a \$5-per-day “continuous overdraft charge” from the fourth through the eleventh day an account is overdrawn and stated that “[c]reating and recovering overdrafts have long been recognized as elements of the discretionary deposit account services that banks provide.”⁴²

The First Circuit affirmed the district court’s ruling.⁴³ The plaintiff argued that “a flat excess overdraft fee . . . is not associated with the provision of any deposit account service, but . . . is more of a charge in consideration for the time value of money[.]”⁴⁴ The court rejected that argument, stating that “flat excess overdraft fees compensate a bank for its deposit account services,” such as “continuing to hold open an overdrawn checking account” and monitoring such an account to protect against further losses.⁴⁵ While the plaintiff argued that some interest charges could “have a flat amount as opposed to being a rate attached to an amount owed[.]” the court countered that “the fact some flat fees may be ‘interest’ is no proof that it is invalid for OCC to classify the flat fees here as something

35. *Id.* at 136.

36. *Id.*

37. *Id.* at 134.

38. *Id.* (citing 12 U.S.C. § 85).

39. *Id.* at 134–35 (citing 12 C.F.R. § 7.4001(a)).

40. *Id.* at 135 (citing 12 C.F.R. § 7.4001(a)).

41. *Id.* (citing 12 C.F.R. § 7.4001(a)).

42. *Id.* (citing Office of the Comptroller of the Currency, Interpretive Letter No. 1082 (May 17, 2007), <https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2007/int1082.pdf>).

43. *Id.* at 134.

44. *Id.* at 139 (citations omitted).

45. *Id.*

other than ‘interest.’”⁴⁶ Notably, the court declined to issue a ruling that no fee connected to an overdraft is interest under the OCC’s regulation.⁴⁷ It cited the OCC’s characterization of overdraft fees as “complex and fact-specific” and stated that a broader ruling was not necessary to resolve the case.⁴⁸

FEDERAL REGULATORY DEVELOPMENTS

REGULATION CC

In July 2019, the Federal Reserve Board and the CFPB jointly published final amendments to Regulation CC⁴⁹ that adjust the regulation’s dollar amount thresholds for inflation and extend its application to certain U.S. territories.⁵⁰ Regulation CC implements the Expedited Funds Availability Act (“EFA Act”).⁵¹ The Dodd-Frank Wall Street Reform and Consumer Protection Act amended the EFA Act to put in place inflationary adjustments for Regulation CC’s dollar thresholds for several portions of the regulation.⁵² The EFA Act’s dollar thresholds must be adjusted every five years based on changes in the Consumer Price Index for Urban Wage Earners and Clerical Workers and rounded to “the nearest multiple of \$25.”⁵³

Accordingly, as of July 1, 2020,⁵⁴ the following changes to Regulation CC will take effect:

- The minimum amount of deposited funds that banks must make available for withdrawal by the opening of the next business day for certain check deposits is increased from \$100 to \$225.⁵⁵
- The amount a bank must make available for withdrawals in cash or by other means is increased from \$400 to \$450.⁵⁶
- The amount deposited in a new account by way of certain checks that is subject to next-day availability is increased from \$5,000 to \$5,525.⁵⁷

46. *Id.*

47. *Id.*

48. *Id.* at 140.

49. 12 C.F.R. pt. 229 (2019).

50. Availability of Funds and Collection of Checks (Regulation CC), 84 Fed. Reg. 31687 (July 3, 2019) (to be codified at 12 C.F.R. pt. 229) [hereinafter Funds Availability Final Rule].

51. Pub. L. No. 100-86, tit. VI, 101 Stat. 635 (1987) (codified as amended at 12 U.S.C. §§ 4001–4010 (2018)).

52. 12 U.S.C. § 4006(f).

53. *Id.*

54. The Funds Availability Rule’s amendments to enact inflation adjustment take effect as of this date. Funds Availability Final Rule, *supra* note 50, at 31687.

55. *Id.* at 31696 (to be codified at 12 C.F.R. § 229.10(c)(1)(vii)).

56. *Id.* (to be codified at 12 C.F.R. § 229.10(d)).

57. *Id.* at 31697 (to be codified at 12 C.F.R. § 229.13(a)).

- An exception to funds availability schedules for the aggregate amount of checks that may be deposited by one depositor across the depositor's accounts is increased from \$5,000 to \$5,525.⁵⁸
- The threshold amount by which it is determined that an account has been repeatedly overdrawn is increased from \$5,000 to \$5,525.⁵⁹
- The maximum amount (in addition to actual damages) for which a bank may be liable in an individual civil action for violation of the EFA Act is increased from \$1,000 to \$1,100, while the minimum amount remains \$100.⁶⁰ The maximum total amount (including actual damages) for which a bank may be liable in a class action is increased from \$500,000 to \$552,500 (or, if less, 1 percent of a bank's net worth).⁶¹

The Economic Growth, Regulatory Relief, and Consumer Protection Act ("EGRRCPA")⁶² enacted in 2018 amended the EFA Act to extend its funds availability, payment of interest, and disclosure provisions to the U.S. territories of American Samoa, the Commonwealth of the Northern Mariana Islands, and Guam.⁶³ Before the EGRRCPA's enactment, the EFA Act applied only to the fifty states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.⁶⁴ Effective September 3, 2019, the Regulation CC final amendments implemented the EGRRCPA's extension of Regulation CC's provisions to the three territories.⁶⁵

58. *Id.* (to be codified at 12 C.F.R. § 229.13(b)).

59. *Id.* (to be codified at 12 C.F.R. § 229.13(c)).

60. *Id.* (to be codified at 12 C.F.R. § 229.21(a)(1)(i)).

61. *Id.* (to be codified at 12 C.F.R. § 229.21(a)(1)(ii)).

62. Pub. L. No. 115-174, tit. II, § 208, 132 Stat. 1296 (2018) (codified as amended at 12 U.S.C. §§ 4001-4002 (2018)).

63. 12 U.S.C. § 4002(d)(2)(A).

64. Funds Availability Final Rule, *supra* note 50, at 31687.

65. *Id.* at 31687, 31696 (to be codified at 12 C.F.R. § 229.12(e)).