

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”), amendments to the remittance transfer provisions of the Remittance Rule related to reporting requirements for the disclosure of rate and fee information for international money transfers, and amendments to Regulation D related to limitations on electronic fund transfers for savings accounts.

CFPB CONSENT ORDERS AND ENFORCEMENT ACTIONS

FIFTH THIRD BANK

The CFPB sued Fifth Third Bank, N.A. (“Fifth Third”) in March 2020, alleging that Fifth Third failed to gain authorization from customers when opening accounts and enrolling them in services.¹ Fifth Third’s alleged practices violated the Consumer Financial Protection Act of 2010 (“CFPA”), the Truth in Lending Act, and the Truth in Savings Act.² The CFPB alleged that Fifth Third took the following actions without customers’ knowledge or consent: opening deposit accounts for customers, in some cases resulting in fees;³ issuing credit cards to customers, resulting in fees;⁴ enrolling customers in Fifth Third’s online banking services;⁵ and opening Early Access lines of credit for customers, which allow customers to withdraw funds from their deposit accounts before such funds have been deposited in the accounts.⁶

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1. Complaint, CFPB v. Fifth Third Bank, N.A., No. 1:20-cv-01683 (N.D. Ill. Mar. 9, 2020), https://files.consumerfinance.gov/f/documents/cfpb_fifth-third-bank-national-association_complaint_2020-03.pdf.

2. *Id.* at 2.

3. *Id.* at 5–6.

4. *Id.* at 6–7.

5. *Id.* at 7.

6. *Id.* at 7–8.

The unauthorized accounts and services were allegedly provided to allow employees “to achieve sales goals or obtain incentive rewards.”⁷ The CFPB asserted that Fifth Third was aware of this activity but “failed to take adequate steps to detect and stop these acts or practices, and to identify, notify, and remediate harmed consumers.”⁸ It seeks monetary relief, injunctive relief, and penalties.⁹ Fifth Third has moved to transfer the case from the Northern District of Illinois to the Southern District of Ohio, where its headquarters is situated.¹⁰ Both the complaint and the motion to transfer venue were pending as of this writing.

TD BANK

In August 2020, TD Bank, N.A. (“TD Bank”) entered into an administrative consent order with the CFPB regarding overdraft fees charged to customers performing ATM or one-time debit-card transactions.¹¹ The consent order focused on TD Bank’s overdraft protection service, which the CFPB found was deceptively marketed and sold.¹²

TD Bank offered “standard” overdraft protection service for check, automated clearing house (“ACH”), and recurring debit-card transactions as well as an optional service for ATM and one-time debit-card transactions.¹³ The CFPB found that TD Bank marketed the optional service in in-person settings as “a default setting required to open a new consumer-checking account” even though it was not required for account opening.¹⁴ It further found that TD Bank represented the optional service would cover recurring transactions such as mortgage payments even though the standard service would have covered such transactions without further cost.¹⁵ Moreover, TD Bank marketed the optional service as a “free” account feature despite its \$35-per-day fee.¹⁶ The consent order also stated that similar misstatements were made in enrollments to the optional service by phone and through e-mail marketing campaigns, which were deceptive acts or practices in violation of the CFPA.¹⁷ Furthermore, TD Bank’s enrollment process did not include an affirmative written opt-in, but instead provided printed forms where the service was already selected, in violation of the Electronic Fund Transfer Act (“EFTA”)¹⁸

7. *Id.* at 5.

8. *Id.*

9. *Id.* at 16–17.

10. Defendant’s Motion to Transfer Venue, CFPB v. Fifth Third Bank, N.A., No. 1:20-cv-01683 (N.D. Ill. Apr. 20, 2020).

11. Consent Order, *In re* TD Bank, N.A., No. 2020-BCFP-0007 (CFPB Aug. 20, 2020), https://files.consumerfinance.gov/f/documents/cfpb_td-bank-na_consent-order_2020-08.pdf [hereinafter TD Bank Consent Order].

12. *Id.* at 1.

13. *Id.* at 8.

14. *Id.* at 19–20.

15. *Id.* at 17–18.

16. *Id.* at 17.

17. *Id.* at 21–25 (citing 12 U.S.C. §§ 5531(a), 5536(a)(1)(B)).

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

and Regulation E.¹⁹ The consent order also identified violations of the Fair Credit Reporting Act and Regulation V for a lack of adequate policies and procedures regarding consumer-account information it furnished to consumer reporting agencies and a failure to conduct timely investigations of indirect disputes regarding its furnishing.²⁰

The consent order requires TD Bank to provide \$97 million in restitution to affected customers and to pay a civil money penalty of \$25 million.²¹ It also must take several corrective steps, such as ensuring that it does not pre-mark the “enrolled” option on its written overdraft notice and that it does not represent that the optional service is “free” or that it covers non-applicable transactions.²²

MAXITRANSFERS

In August 2019, remittance-transfer provider Maxitransfers Corporation (“Maxitransfers”) entered into a consent order with the CFPB over charges that Maxitransfers violated the EFTA and the Remittance Transfer Rule.²³ The consent order is the first enforcement action stemming from a violation of the Remittance Transfer Rule.²⁴ The consent order stated that Maxitransfers had disclosed to customers in its terms and conditions that it “would not be responsible for errors made by payment agents.”²⁵ The CFPB noted that the EFTA and the Remittance Transfer Rule “specifically provide that remittance transfer providers such as [Maxitransfers] are responsible for errors . . . by their agents.”²⁶ It further stated that this statement regarding its agents’ responsibility for errors constituted a deceptive act or practice in violation of the CFPA.²⁷

In addition to the disclosure violations, the consent order identified several other violations of the Remittance Transfer Rule, including: failing to develop written policies and procedures to ensure compliance with the error-resolution requirements of the Remittance Transfer Rule; failing to report error investigations and notify consumers of their rights after an investigation of error; and not treating international bill-pay service as remittance transfers and providing consumer disclosure accordingly.²⁸ The consent order requires Maxitransfers to pay a civil money penalty of \$500,000, to refrain from stating that it is not

19. TD Bank Consent Order, *supra* note 11, at 12.

20. *Id.* at 27–29 (citing 15 U.S.C. § 1681s-2(b)(2); 12 C.F.R. § 1022.42(b)).

21. *Id.* at 36–42.

22. *Id.* at 29–34.

23. Consent Order, Maxitransfers Corp., No. 2019-BCFP-0008 (CFPB Aug. 27, 2019), https://files.consumerfinance.gov/f/documents/cfpb_maxitransfers_consent-order_2019-08.pdf [hereinafter Maxitransfers Consent Order].

24. Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau Settles with Maxitransfers Corporation (Aug. 27, 2019), <https://www.consumerfinance.gov/about-us/newsroom/bureau-settles-maxitransfers-corporation>.

25. Maxitransfers Consent Order, *supra* note 23, at 5.

26. *Id.* (citing 15 U.S.C. § 16930-1(f); 12 C.F.R. § 1035).

27. *Id.*

28. *Id.* at 6–9.

responsible for the acts of its agents, and to improve its compliance management system to ensure adherence to the EFTA and the Remittance Transfers Rule.²⁹

FTC CONSENT ORDERS AND ENFORCEMENT ACTIONS

MADERA MERCHANT SERVICES, LLC

In June 2020, the FTC and the Ohio attorney general entered into a consent order with Madera Merchant Services, LLC (“Madera”), B&P Enterprises, LLC (“B&P”), and several individuals associated with these companies in which they agreed to be banned from payment processing.³⁰ The FTC’s complaint, filed in July 2019, alleged that Madera and B&P processed remotely created payment orders (“RCPOs”) or checks that allowed merchants to withdraw money from consumers’ bank accounts in violation of the Telemarketing Sales Rule.³¹ Under the Telemarketing Sales Rule, sellers and telemarketers may not “[c]reat[e] or caus[e] to be created . . . a remotely created payment order as payment for goods or services offered or sold through telemarketing or as a charitable contribution solicited or sought through telemarketing[.]”³² It further alleged that Madera and B&P sought merchant clients that were considered highrisk by financial institutions and card networks and opened multiple business checking accounts with different banks without informing the banks that it was processing consumer payments for third parties.³³ The complaint charged the companies with aiding and facilitating these violations of the Telemarketing Sales Act and violating the FTC Act and state law.³⁴

In addition to banning the defendants from participating in any payment processing activity, the final order entered a judgment of \$8.6 million against them as equitable monetary relief, and also prohibited them from violating the Telemarketing Sales Rule and the Ohio Consumer Sales Practices Act.³⁵

QUALPAY, INC.

The FTC announced a settlement in June 2020 with Qualpay, Inc., which allegedly acted as a payment processor for an online investment scheme called

29. *Id.* at 9–12.

30. Stipulated Order for Permanent Injunction and Monetary Judgment, *FTC v. Madera Merchant Servs. LLC*, No. 3:19-cv-00195-KC (W.D. Tex. June 4, 2020), https://www.ftc.gov/system/files/documents/cases/39_madera_stipulated_final_order_entered_6-4-2020_002.pdf [hereinafter *Madera Final Order*].

31. Complaint for Permanent Injunction and Other Equitable Relief at 14, *FTC v. Madera Merchant Servs. LLC*, No. 3:19-cv-00195-KC (W.D. Tex. July 18, 2019), https://www.ftc.gov/system/files/documents/cases/madera_complaint_for_permanent_injunction_and_other_equitable_relief.pdf [hereinafter *Madera Complaint*].

32. 16 C.F.R. § 310.4(a)(9) (2020).

33. *Madera Complaint*, *supra* note 31, at 13–14.

34. *Id.* at 22–27.

35. *Id.* at 6–9.

MOBE.³⁶ The FTC's complaint alleged that Qualpay's payment processing services were "critical to the success" of MOBE, which sold "memberships" costing "tens of thousands of dollars" to consumers for training programs that made "blatantly false and exaggerated" claims about participants' earning potential.³⁷

According to the complaint, MOBE "had a great deal of difficulty" finding payment processors prior to its relationship with Qualpay, and Qualpay's underwriting guidelines should have identified MOBE as a high-risk business.³⁸ The FTC alleged, however, that Qualpay failed to comply with its own policies and procedures for underwriting merchant accounts, neglecting such measures as examining MOBE's processing statements to determine whether MOBE was generating excessive chargebacks.³⁹ Once MOBE began using Qualpay, the MOBE accounts experienced a high volume of chargebacks, including a 12.76 percent chargeback rate for a high-cost training package it marketed, but Qualpay allegedly failed to place MOBE on a high-risk merchant list maintained by Mastercard and kept most of MOBE's accounts open.⁴⁰ MOBE's business operations ceased upon the entry of a temporary restraining order against it and the appointment of a receiver.⁴¹ The FTC alleged a violation of the FTC Act for engaging in unfair conduct by "provid[ing] payment processing services for merchants when, among other things, Defendant ignored signs indicating that the merchant was likely engaged in deceptive acts or practices."⁴²

Under the terms of the settlement, Qualpay would be prohibited from processing payments for business coaching companies or other high-risk merchants and would commit to more robust screening and monitoring of card-not-present merchants. The consent order also imposed a monetary judgment of \$46,779,358.91, which was suspended due to Qualpay's inability to pay.⁴³

CFPB REMITTANCE RULE AMENDMENTS

In May 2020, the CFPB issued a final rule amending the Remittance Rule, implementing provisions intended to ease the burden of more stringent reporting requirements for the disclosure of rate and fee information related to

36. Press Release, Fed. Trade Comm'n, Payment Processor for MOBE Business Coaching Scheme Settles FTC Charges (June 1, 2020), <https://www.ftc.gov/news-events/press-releases/2020/06/payment-processor-mobe-business-coaching-scheme-settles-ftc>.

37. Complaint for Permanent Injunction and Other Equitable Relief at 5, *FTC v. Qualpay, Inc.*, No. 6:20-cv-00945 (M.D. Fla. June 1, 2020), https://www.ftc.gov/system/files/documents/cases/qualpay_complaint.pdf.

38. *Id.* at 6.

39. *Id.* at 11–12.

40. *Id.* at 22–31.

41. *Id.* at 34.

42. *Id.* at 36 (citing 15 U.S.C. § 45(a)).

43. Stipulated Order for Permanent Injunction and Monetary Relief at 11–18, *FTC v. Qualpay, Inc.*, No. 6:20-cv-00945 (M.D. Fla. June 1, 2020), https://www.ftc.gov/system/files/documents/cases/qualpay_proposed_consent_judgment.pdf.

international money transfers.⁴⁴ The amendments became effective on July 21, 2020.⁴⁵

The Remittance Rule regulates “remittance transfers,” generally electronic transfers of funds requested by a consumer for personal, family, or household purposes to a designated recipient in a foreign country and sent by a remittance transfer provider.⁴⁶ Prior to the amendment’s enactment, the Remittance Rule set a July 21, 2020, deadline for financial institutions to begin disclosing certain information to consumers who send remittance transfers to implement an EFTA requirement.⁴⁷ As of the July 21, 2020, deadline, remittance transfer providers generally must disclose information about transfers such as the exact exchange rate, the exact amount of any covered-third-party fees, and the exact amount that will be received by the designated recipient.⁴⁸ However, as a result of new exceptions in the amendment to the final rule, financial institutions will be allowed to use estimates of certain third-party fees rather than use exact amounts for these fees under certain conditions.⁴⁹

Under the amended rule, a remittance transfer provider is permitted to estimate the exchange rate for transfers to a specific country if: it is an “insured institution” under the rule’s definition; it cannot determine the exact exchange rate at the time disclosures are to be provided under the Remittance Rule; it did not send more than 1,000 remittance transfers to the country in the prior calendar year; and the transfer is sent from the sender’s account with the institution.⁵⁰ If the exchange rate used for the pre-payment disclosure is estimated as a result of this exception, other amounts in the disclosure, the “Transfer Amount,” “Other Fees,” and “Total to Recipient,” may be estimated as well.⁵¹ The amended rule also permits remittance transfer providers to estimate the total of third-party fees for a remittance transfer if it is an “insured institution” under the rule’s definition; it cannot determine the exact third-party fees at the time disclosures are to be provided under the Remittance Rule; it did not send more than 500 remittance transfers to the recipient’s financial institution in the prior calendar year, or a federal statute or regulation would prevent the remittance transfer provider from determining exact third-party fees; and the transfer is sent from the sender’s account with the institution.⁵² If third-party fees are estimated as a result of this exception, the Total to Recipient amount in the pre-payment disclosure may be estimated as well.⁵³

44. Remittance Transfers Under the Electronic Fund Transfer Act (Regulation E), 85 Fed. Reg. 34870 (May 6, 2020) (to be codified at 12 C.F.R. pt. 1005) [hereinafter Remittance Rule Final Amendment].

45. *Id.* at 34870.

46. 12 C.F.R. § 1005.30(e) (2020).

47. *Id.* § 1005.32(a); see 15 U.S.C. § 1693o-1(a)(4)(B) (2018).

48. 12 C.F.R. § 1005.31(b) (2020).

49. Remittance Rule Final Amendment, *supra* note 44, at 34870.

50. 12 C.F.R. § 1005.32(b)(4)(i) (2020).

51. *Id.* § 1005.32(b)(4)(ii).

52. *Id.* § 1005.32(b)(5)(i).

53. *Id.* § 1005.32(b)(5)(ii).

The amended rule also includes makes permanent a safe harbor for businesses that perform a limited number of remittance transfers on an annual basis.⁵⁴ Previously, if a person provided 100 or fewer remittance transfers annually, it did not meet the definition of a “remittance transfer provider” subject to the Remittance Rule.⁵⁵ Under the amended rule, the safe harbor is expanded to exempt persons who provide 500 or fewer remittance transfers annually, which may be determined based on the previous and current calendar years.⁵⁶ If a person that qualified for the safe harbor in the prior calendar year provides more than 500 remittance transfers in the course of the subsequent calendar year and is otherwise subject to the Remittance Rule, it has a reasonable period of time not exceeding six months to begin complying with the rule.⁵⁷

Finally, the CFPB in the preamble to the final rule implementing the Remittance Rule amendments stated that it plans to “update the process it uses to consider requests to add or remove countries” from a list of “safe harbor countries.”⁵⁸ The list contains countries whose laws the CFPB determined “prevent remittance transfer providers from determining, at the time the required disclosures must be provided, the exact exchange rate on the date of availability for a transfer involving a currency exchange.”⁵⁹ Remittance transfer providers are permitted to disclose estimates instead of exact amounts for such countries.⁶⁰ While it committed to updating the process for adding countries to this list, it did not do so in the amendments published in 2020.⁶¹

AMENDMENT TO REGULATION D

In April 2020, the Federal Reserve Board (“FRB”) issued an interim final rule amending Regulation D⁶² to remove numerical limits on certain types of transfers and withdrawals from savings deposits.⁶³ As explained in the supplementary information accompanying the interim final rule, Regulation D distinguishes between “transaction accounts,” on which depository institutions historically have been required to pay reserves to the FRB, and non-reservable “savings deposits” based on the ease with which the depositor may make transfers (payments to third parties) or withdrawals (payments directly to the depositor) from the account.⁶⁴ Prior to the interim final rule, Regulation D limited the number of certain convenient kinds of transfers or withdrawals that an account holder may

54. Remittance Rule Final Amendment, *supra* note 44, at 34870.

55. *Id.*

56. 12 C.F.R. § 1005.30(f)(i) (2020).

57. *Id.* § 1005.30(f)(i).

58. Remittance Rule Final Amendment, *supra* note 44, at 34893.

59. *Id.* at 34892.

60. 12 C.F.R. § 1005.32(b)(1)(ii) (2020).

61. Remittance Rule Final Amendment, *supra* note 44, at 34893.

62. 12 C.F.R. pt. 204 (2020).

63. Regulation D: Reserve Requirements of Depository Institutions, 85 Fed. Reg. 23445 (Apr. 28, 2020) [hereinafter Regulation D Amendment].

64. *Id.* at 23445.

make from a “savings deposit” to not more than six per month.⁶⁵ Similarly, prior to the interim final rule, Regulation D also imposed requirements on depository institutions to either prevent such convenient transfers in excess of the six-transfer limit or to monitor such transfers for violations of the limit and take appropriate action to prevent additional violations.⁶⁶ In light of the recent action by the FRB’s Federal Open Market Committee to eliminate reserve requirements for transaction accounts,⁶⁷ and due to concerns that financial disruptions resulting from the novel coronavirus pandemic have caused many depositors to have an urgent need to access deposited funds by remote means, the FRB eliminated the six-transfer limit.⁶⁸ The amendment was immediately effective on April 24, 2020.⁶⁹

The FRB included additional guidance concerning the amendment in a “frequently asked questions” format.⁷⁰ This guidance clarifies that depository institutions are free to suspend enforcement of the six-transfer limit but does not require them to do so.⁷¹ The guidance also addresses depository institution reporting requirements for transaction accounts and savings deposits.⁷²

The FRB also requested comment on all aspects of the interim final rule, including considerations that may lead depository institutions to choose, or to be required, to retain a numeric limit on the number of convenient transfers that may be made each month from a savings deposit.⁷³ Comments were due on or before June 29, 2020.⁷⁴

65. 12 C.F.R. § 204.2(d)(2) (2019). Prior to the interim final rule, “convenient” transfers or withdrawals for purposes of this limitation included preauthorized or automatic transfers (such as overdraft protection transfers or arranging to have bill payments deducted directly from the depositor’s savings account), telephonic transfers (made by the depositor telephoning or sending a fax or online instruction to the bank and instructing the transfer to be made), and transfers by check, debit card, or similar order payable to third parties. *Id.*

66. 12 C.F.R. § 204.2(d)(2) & n.4 (2019).

67. Press Release, Fed. Reserve Bd., Federal Reserve Issues FOMC Statement (Mar. 15, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/monetary20200315a.htm>.

68. Regulation D Amendment, *supra* note 63, at 23446 (to be codified at 12 C.F.R. § 204.2(d)(2)).

69. *Id.* at 23445.

70. *Id.* at 23446. These FAQs are also available at <https://www.federalreserve.gov/supervisionreg/savings-deposits-frequently-asked-questions.htm>.

71. *Id.*

72. *Id.*

73. *Id.* at 23447.

74. *Id.* at 23445.