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A Consumer Finance Newsletter

Explainer Things: Episode 1

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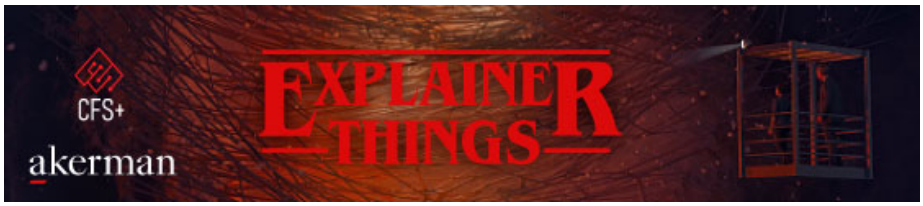

Welcome to the first edition of Explainer Things! It will be released monthly, covering the latest news in financial services law, regulation, and policy. Expect blurbs on payments, crypto, fintech, cards, and more, with our quick analysis (aka "scoops" and "takes") on why that news matters to you. If you have suggestions or questions about the newsletter, email us at explainerthings@akerman.com.

Prudential Regulators Throw Shade on Banks Dealing in Crypto

The Federal Reserve, FDIC, and OCC released a joint statement warning banks that handling crypto assets or dealing with crypto-focused companies puts bank safety and soundness at risk, while noting banks are not "discouraged from providing banking service to customers of any specific class or type." The regulators advised banks to ensure appropriate risk

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management and to be aware of potential fraud, scams, money laundering, and terrorism financing.

TL;DR: the regulators remind banks they should comply with laws and regulations but still do business, if you must.

The Empire State of Mind (at Least as Far As Crypto is Concerned)

New York DFS and Coinbase recently settled a 2021 enforcement suit DFS filed to address alleged lapses in Coinbase's compliance and sanctions controls systems. Coinbase agreed to pay a $50 million fine to the state and invest another $50 million in its compliance program. The lawsuit followed a 2020 DFS exam and determination that Coinbase's compliance system was in a "critical stage" despite Coinbase's remediation efforts.

On the heels of the Coinbase settlement, the New York Attorney General sued Celsius Network founder Alex Mashinsky. The AG alleges that Mashinsky misled and defrauded investors by concealing his cryptocurrency lending platform's losses all the while touting Celsius as a safe bank alternative. The lawsuit seeks to ban Mashinsky from conducting business in New York. Oh, and imposes big damages.

The Golden State Take on Crypto – Consistently Inconsistent

In early December, California's DFPI, in partnership with Governor Newsom's office, released a report on the implementation of the Governor's Blockchain and Web3 Technologies Executive Order. The order reflects the state's efforts since May 2022 to create a stable and predictable business environment for blockchain companies and consumers. But recent DFPI decisions seem to make California anything but predictable for those companies. In rapid succession between November and December, the DFPI launched investigations into several blockchain

companies including, seeking restrictions on their ability to conduct business in the state or with its residents (see, e.g., MyConstant and SALT Lending). The state was a top destination for crypto and blockchain companies only a short time ago, but California may quickly be morphing into a bastion for crypto regulation and litigation.

*Akerman **Hot Take**: The hits seem to keep coming for the crypto industry. Some question crypto's ability to live up to the hype as the youthful and agile market disrupter. Is it really poised to be a viable long-term alternative, or even replacement, to centralized currencies? Or is it loud and flashy but short on substance? We suspect the hysteria will wane as the investigations into FTX and others fall out of the headlines and progress into "business as usual" status. If you're an existing crypto company or are contemplating entering the market, your best bet for long-term success is to use that time away from the hype to establish internal oversight and regulatory compliance programs robust enough to meet market and regulatory scrutiny. Now is the time to review and perhaps bolster your due diligence plans.*

Nonbanks Get Side-Eye from CFPB

The CFPB is proposing two different regulations targeted at nonbanks that would require registration of information in public databases maintained by the agency. The first proposal would require nonbanks to register with the CFPB when subject to orders from local, state, or federal consumer financial protection agencies or court orders concerning consumer financial products and services. The CFPB further proposed to publish the orders in an online database. The second proposal would require nonbanks to provide information to the CFPB about use of certain terms and conditions in standard-form user agreements, such as arbitration agreements, forum selection clauses, and conditions that limit a consumer's ability to post comments or review. The agency is not proposing to ban the use of these terms and conditions; instead, it seeks to

publish the information to "facilitate public awareness and oversight by other regulators."

CFPB Still Hating on "Junk Fees"

The CFPB is also exploring new regulations concerning overdraft and nonsufficient funds fees, and credit card late fees. In its unified regulatory agenda, the CFPB listed three different regulatory proposals under consideration that would address fees for both deposit accounts and credit cards. The specifics of the proposals have not yet been released, but the agenda targets January for a proposal addressing credit card "penalty fees" (such as late fees). That proposal could revoke an existing safe harbor relied upon by the majority of credit card issuers. Another rule being considered appears to target whether overdraft fees are considered "finance charges" such that they are counted in the APR disclosed to the consumer – this would change a rule that has been in place since 1969! Lastly, the agency is considering new rules for insufficient funds fees on deposit accounts.

*Akerman **Scoops**: Director Chopra likes to talk about "leveling the playing field" in the consumer finance market. It appears the agency is walking the walk in this latest regulatory agenda. They announced several new rulemakings aimed at banks and credit card issuers to curtail what the agency likes to call "junk fees," including late fees, overdraft fees, and insufficient funds fees. But the agency also appears to be increasing its focus on nonbanks (such as fintechs) with two new proposals aimed exclusively at nonbanks. Neither proposal would be particularly burdensome for nonbanks, as they are essentially "sunshine" laws aimed at consolidating and publishing information about nonbanks and their products. But these sunshine laws would likely provide information that would allow the agency to more easily bring enforcement actions against nonbanks.*

Times May Be A-Changin' for the Remittance Rule

A story in the *Wall Street Journal* summarized a letter (available here) from CFPB Director Chopra to Senator Elizabeth Warren. In the letter, obtained by CFS+, Director Chopra expressed two different concerns about the remittance transfer market. First, he said he believes there is "significant noncompliance of the Remittance Rule by nonbanks," and second, he said that the existing rule results in a lack of transparency about fees, exchange rates, and taxes. Director Chopra was writing in response to an October 2022 letter he received from Senator Warren (and several other senators) encouraging the Bureau to require remittance companies to disclose the purported exchange rate markup.

*Akerman **Hot Take**: We're skeptical of both the policy and legal justifications for any changes to the Remittance Rule. It's not clear to us that disclosure of a markup would be helpful to consumers or that markups could be easily disclosed in any event. Nor do we think the CFPB can mandate such a disclosure unless Congress changes EFTA, which is exceedingly unlikely. That said, Director Chopra may feel he can exercise his discretion to add an additional disclosure requirement notwithstanding the legal risk of doing so.*

Mastercard Forced to Play Nice with Competing Networks

The FTC entered into a settlement with Mastercard for violations of the Durbin Amendment, as implemented by the Federal Reserve in Regulation II (this is one part of EFTA not implemented by the CFPB). The consent order (which provides a great summary of how debit card transactions are processed) alleges that Mastercard did not allow competing debit card networks to process card-not-present (CNP) transactions, as required by Regulation II. For these transactions, Mastercard did

not "detokenize" the transactions, which made it practically impossible for other networks to process CNP transactions on Mastercard's network. According to the FTC, Mastercard had "no process by which a merchant's acquirer...can...obtain the 'permanent account number'...associated with an ewallet token used in a [CNP] debit transaction, as it can in a card-present transaction." The consent order requires Mastercard to provide this access to competing networks for CNP transactions, as is required by the Durbin Amendment.

*Akerman **Hot Take**: This settlement makes clear the FTC is now a player in the ongoing interchange drama, in addition to the prudential regulators. More broadly, we expect Durbin Amendment issues are likely to persist into 2023, including with continued focus on the exemptions provided to small issuers who often partner with fintechs. Additionally, Senator Durbin recently introduced bipartisan legislation to extend the Durbin Amendment (which currently covers only debit cards) to credit cards. And on the technology side, some large retailers are moving to products that may not involve interchange fees at all, such as Buy Now Pay Later and their own payment rails (e.g., Amazon Pay).*

One of These Things is Not Like the Others: Earned Wage Access Edition

In December, the Arizona Attorney General determined Earned Wage Access (EWA) products are not loans in Arizona and therefore are not subject to Arizona's licensing and usury laws. The Arizona AG's opinion found that EWA products are generally not loans under that state's law because they are "non-recourse," meaning the provider has no contractual right to repayment from the employee and does not engage in debt collection activity. Separately, the opinion also found that EWA products are not loans because they do not impose finance charges on consumers. The Arizona opinion cited 2020 guidance from the CFPB (that the CFPB

may be revisiting), as well as a recent decision from the California DFPI under that state's law.

*Akerman **Scoops**: While there remains ambiguity in most jurisdictions about the application of state lending laws to EWA products, those regulators that have analyzed these products have all found they are not loans and therefore it would not make sense to apply traditional lending laws to them. As state legislative activity increases, we expect to hear more from other states on EWA. While we doubt all states will reach the same conclusion, we think that any regulator that dispassionately analyzes these products will understand why many consumers and employers view them more favorably than competing small dollar liquidity products.*

Explainer Things is brought to you by the Consumer Financial Services, Data & Technology Practice Group (CFS+) at Akerman LLP.

For questions about the items in this issue, please contact us at explainerthings@akerman.com.

Explainer Things Cast:

Bill Heller

Eric Goldberg

Tom Kearney

Tyler Engar **Nora Rigby** **Christy Hawkins**