***The Consumer Finance Podcast*: Understanding the CFPB's Payday Loan Rule: Implications and Compliance**
Hosts: Chris Willis and Josh McBeain
Guests: Mark Furletti and Jason Cover
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Chris Willis:

Welcome to this special crossover edition of *The Consumer Finance Podcast* and the *Payments Pros* Podcast. I'm Chris Willis, the co-leader of Troutman Pepper's Consumer Financial Services Regulatory Practice. I, along with Josh McBeain, who is one of the hosts of *Payments Pros*, are teaming up today to bring you this special edition of the podcast that we're posting to both feeds about the CFPB's Payday Loan Rule, now that it's set to become effective again following the Supreme Court's decision in the CFSA case.

Before we jump into that topic, let me remind you to visit and subscribe to our blogs, TroutmanPepperFinancialServices.com and ConsumerFinancialServicesLawMonitor.com. Don't forget to check out our other podcasts. We have the *FCRA Focus*, about all things credit reporting, *The Crypto Exchange*, which is our crypto podcast, and *Unauthorized Access*, which is our privacy and data security podcast. Look out soon for the launch of our brand-new podcast all about the auto finance Industry, called *Moving the Metal*, which is going to be debuting soon. All those podcasts are available on all popular podcast platforms.

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Now, as I said, Josh and I are teaming up today to talk about the CFPB's newly revived, yet again, payday lending rule, which is set to go into effect soon after the Supreme Court's decision has now come out. Joining us today are our colleagues, Mark Furletti and Jason Cover, who've been following the payday lending rule since its very inception, which seems like a whole lifetime ago. Jason, Mark, welcome to the podcast today.

Mark Furletti:

Thanks, Chris.

Chris Willis:

Josh, since you're co-hosting today, why don't I hand it off to you to ask some questions of Jason and Mark about the payday lending rule?

Josh McBeain:

Thank you very much, Chris. I think right out of the gate, Mark and Jason, it's called the payday lending rule. But what does it really cover? Is it really limited to just payday loans?

Mark Furletti:

Yeah. Thanks, Josh and Chris. It's pretty interesting. If you go to the Code of Federal Regulations, it says that part 1041, they call it the Payday Vehicle Title and Certain High-Cost Installment Loans Rule. Then, they also call it, alternatively, the Payday Lending Rule. I guess, Jason and I have long thought that calling the rule that is totally misleading, and in fact, what we want to talk about mostly today is how it applies to a much broader scope of products than those that are enumerated in that list that's in the code of federal regulations.

To start, what we're going to do is go through the elements of the definitions of covered loans. Then, Jason, I'm going to go through the statutory, or the regulatory definition. Then, Jason is going to explain how this can cover a much broader product than maybe your typical payday loan, or high-cost installment loan. The first prong of the definition covers loans that are repayable within 45 days of consummation.

There's no cost analysis here, or cost prong. It doesn't have to cost a certain amount of money. It could probably be a no-cost loan, or a very low-cost loan, right? This is not a 200% APR concept. It's just, if it's closed-end credit and there's not multiple advances, if the loan is required to be repaid within 45 days, then it's subject to this. If it's an open-end loan and you have to substantially repay in advance within 45 days, you're within the first prong of this. Jason, can you think of any products that are not payday loans, or that are not triple-digit, let's say, APR lines of credit that might be swept up by this first prong of the definition?

Jason Cover:

Yeah, Mark. I think the biggest use case here and maybe one of the most – one of the industries that will be very surprised to find out that they are “payday loans” is buy now, pay later. The traditional pay-in for payment, no-finance charge, buy now, pay later product is typically due within 45 days or less. Query whether that is now a payday loan covered by this rule.

There's also some exceptions for earn-wage-income and similar products, but they're very detailed. I fear many of the products out there that are billed as earn-weight access, or similar could also potentially be caught up in there if their dots and Cs aren't crossed.

Mark Furletti:

Okay. Jason, could you tell us about the extensive research the CFPB did into the buy now, pay later industry in connection with the promulgation of this rule, the payday loan rule?

Jason Cover:

It was quite extensive in that the research was exclusively done on actual payday loans before really the buy now, pay later industry existed. Zero is the answer, Mark.

Mark Furletti:

Got it. Okay. That's what I thought. Okay. The first prong brings in some people who would offer a product that is like, no cost to consumer. It somewhat blows your mind that that product could be swept in. Moving on, Jason, to the next prong of the definition for hidden traps. The next prong of the definition is where there's a repayment in a single – where the loan has a term of more than 45 days, but it has to be repaid in either one payment, or where there is any payment in the stream of payments due that is twice as large as another payment.

Again, no cost. This isn't related to the cost of the loan. It's just any loan. If you have a loan that has a single payment that's due more than 45 days after consummation, or that you have to repay the loan where any payment under the loan is more than two times the size of any other prior, any payment actually prior, or subsequent, you're covered by this prong of the definition. Jason, what kind of loans here might get swept in that you wouldn't necessarily have expected that the CFPB, of course, would not have considered and did not, in fact, consider in any way?

Jason Cover:

Mark, there's a number of exceptions in this rule, but banks are not excluded from the rule. We've found that clients who are major financial institutions are often surprised that their loans and lines of credit made high-net-worth individuals, and there's notably no cap on the amount of the loans. So, a loan of $500,000 technically falls under the rule. Many of those products are interest-only payments with a bullet at the end, which would typically be covered by this definition of a payday loan.

Mark Furletti:

Sure. I'm concerned, Jason. There's some products out there that have – and a number of them are directed at high-net-worth individuals that could have these payments streams that are not even. I guess, that a standard auto loan is going to have normally substantial equal payments throughout the term, that's not going to get picked up here, but have you seen any products that might get picked up, whether offered by a bank or somebody else?

Jason Cover:

Anything that's interest-only payments would typically vary from payment to make payment as the principal increases or decreases, like on a line of credit to a high-net-worth individual that many banks would offer. Those are irregular payment streams, and then they're often callable at will, or with a bullet, like a double whammy there in both instances.

Mark Furletti:

Jason, surely, before seeking to cover securities-backed lines of credit for high-net-worth individuals, the CFPB thought about that and articulated why those people need these protections in this rule.

Jason Cover:

Yes. Oddly enough, Mark, I don't think they did that study. At one point, the CFPB had at least somewhat admitted, hey, maybe at least the TLA upper limit for reg Z disclosures should apply. They told us they'd get back to us on that, but it's been many years since that public information was made available. As of today, there is still no limit on the cap either.

Mark Furletti:

Sure. Just for those listening, Truth and Lending Act has a cap. It gets inflation adjusted every year. It started at $50,000 a while back. It's probably now closer to $60,000. I don't know exactly what it is, but it's somewhere in that range.

Okay. Jason, moving on, now we finally get to a prong of the definition that has a cost component, and this is the only one that has the cost component of the three major categories of loans that are covered. This category sweeps in any loan that has a cost of credit in excess of 36% per annum, and that's measured at the time of consummation for closed-end credit, and then there's a slightly different rule for opening credit. But you have to have two things to be true. Cost of credit in excess of 36%, and the lender has to obtain what's called a leveraged payment mechanism. Jason, do you want to elaborate on what that's sweeping in generally and what products might be there? I think there's some products even in there that might be a little surprising.

Jason Cover:

Sure. I guess, to belabor that leveraged payment mechanism point, that is essentially any payment mechanism that a lender might get where they pull the funds from a consumer's account. ACH, debit card, RCC, RCPO. If you can think of it, then it's probably a leveraged payment mechanism. To belabor your point again, Mark, the studies were all done on payday loans, not high APR installment loans, not high APR open-end credit. This wasn't something that was thought out, I think, in the context of the rulemaking, or at least not as part of a study. Those would be your two most common use cases, I believe.

Mark Furletti:

Jason, if there was a product, let's take an open-end product that had a stated APR, open-end APR, of, let's say, 36% or just under 36%, but then, let's just say it had some fees associated with that product, could that product be subject to this rule, even though?

Jason Cover:

The CFPB has cleverly snuck in a expansive definition for open-end credit that would include various types of fees that might not typically be disclosed as APR on an open-end account opening disclosure. Yes, is your answer.

Mark Furletti:

Got it. Okay, so I think that's – just to conclude this, there are a few exceptions. There's an exception for certain purchase money, security interest loans, so that would probably get out a

lot of auto-related loans, for example. We're going to soon have another episode on the buy now, pay later interpretive rule that the CFPB put out in which it says that digital user accounts are credit cards, but they're actually not the kinds of credit cards that are exempt from, in all cases, exempt from the payday rule.

There are student loans are out, non-recourse, pawn loans are out, and certain wage-advanced programs are out. Then, no cost advances in certain cases also are out. In any event, I think the bottom line, the key takeaway is for folks listening who might be facilitating, they might be fintechs, facilitating loans, or they might be lenders making loans, they should probably pull out 12 CFR part 1041, look at 1041.3, and see if the loans you are facilitating are making or covered, and confirm that they are or are not, because it is not just something that you need to worry about if you are a “payday lender.” Josh, I'll send it back to you.

Josh McBeain:

Well, thank you both. It sounds like a careful analysis of current products and a parsing of the definition. Definitions is important to determine whether this rule covers your products or not. Let's say, someone has conducted that work and concluded that their product may be covered. What does a covered lender need to do to comply with the rule?

Jason Cover:

Josh, I think in some sense it may be important to state what isn't required by the law anymore. This really, to Mark's point, these studies were done nearly at the inception of the CFPB. This rule really dates many, many, many years now over a decade, and was originally issued in the waning days of the Cordray administration in November of 17. That original rule required ability to repay analysis that was very draconian, and I think by the CFPB's own methodology, they estimated that it would, essentially, put out a business 60% to 80% of true regular course payday lenders, not some of the other institutions we're talking about.

That rule, the ATR provisions, was rescinded during the Kraninger administration. While this has been litigated over the years, that was really a crucial change. What's left are two primary provisions. The first of which, I would call the payment provisions. That's a blanket rule that says, once you're a covered lender under the payday rule, you can't continue with the payment authorization after two consecutive failed payment transfers from the same account. It's an account-based rule.

Once that happens, you have to jump through a bunch of hoops to obtain a new authorization. Otherwise, you have to stop. Then there's a series of notice provisions. There's an initial notice that's sent to tell someone when their first payment is. There's additional notices that are required for what they call unusual payment withdrawals, so that would be a change in amount, a change in date, a change in payment method, or for reinitiated payments. Those can get a little tricky and create a somewhat hectic timeline. Then there's a remaining requirement to adopt policies and procedures. The real meat here is the payment provisions and the notice provisions.

Josh McBeain:

Well, thank you, Jason. It sounds like, in the first instance, the big challenge is determining if your product is subject to the rule. Once that's been done, you want to comply with the payment provisions. In doing that, are there any other challenges presented by the rule when you're trying to comply with those payment provision requirements?

Jason Cover:

Yeah, Josh. I have a lot of clients that I talk to, and they say, “Well, gee Jason, you just summarize this in about 30 seconds. It can't be that complex, right? I stopped after two payments and send some notices.” Then the more they get into the details of this, it creates a number of challenges, some of which are technical in nature. Just by way of example, I'll use those notice provisions again. If you make a change in the type of payment you're using, and it can even be at the customer's request. Like, “I want to use a different account now, so I change my account, or provide new payment information, my card changed,” whatever it is, I have to provide a notice. There's very specific timing requirements on that notice.

There's a window that the payment can occur. If I don't comply with that window, even if the customer initiates the payment, or I'm sorry, initiates the change, you literally can't make it. It's really, it can be very difficult and lead to unintended consequences. The other issues that you'll find are where the – I would call them regulatory issues, I guess. There's a lot of open-ended questions in the rule, and some of the drafting isn't that great. Just following through with that same idea of the notice timing, all of it's predicated on a business day. But the rule doesn't define what a business day means. Is that a business day in the sense that we all show up to work for, Monday through Friday? Is it banking days? Is it the business days, the covered lender itself is actually open? No one knows. But you're nevertheless forced to provide these notices on a business day timetable.

I know we've written comment letters. I'm sure others have, getting to all of these unknown issues with questions that haven't been answered. There hasn't been a lot of movement on the part of the CFPB, whether it's because of the litigation, or otherwise, to resolve them. Again, just to your initial point of everyone should look and see whether they're subject to the rule. Once you've decided you're subject to the rule, you really need to take a closer look at them, because they're quite complex with lots of holes in them.

Josh McBeain:

That's extremely helpful, Jason. How long does everyone have to conduct these exercises of whether they’re subjects and how to comply?

Jason Cover:

The CFPB recently announced that compliance deadline will be March 30th, 2025. There is in theory, ample time. I would just emphasize again, this is not something where you want to be the proverbial ostrich with its head in the sand. It can be quite tricky and quite difficult once you're in to comply. I think some of the – whether it's drafting new payment authorizations, adjusting your actual policies and procedures and practices, it's really much more complex, I think, than one might initially anticipate.

Josh McBeain:

Thank you very much, Jason.

Chris Willis:

Yeah. Josh, thank you very much for co-hosting this episode with me. Thanks for Jason and Mark's participation to share their very enlightening take on what's going on with the payday lending rule, and particularly, the fact that it covers a lot of things that most of us would not think of as payday lending.

Thank you also to our audience for tuning in to today's episode. Don't forget to visit and subscribe to our blogs, TroutmanPepperFinancialServices.com and ConsumerFinancialServicesLawMonitor.com. While you're at it, why not head over to Troutman.com and add yourself to our Consumer Financial Services email list. That way, we can send you copies of the alerts and advisories we send out, as well as invitations to the industry-only webinars that we put on from time to time.

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