

November 17, 2023

CFPB Proposes Rule to Supervise Digital Consumer Payment Application Providers

Proposal Would Subject at Least 17 “Larger” Providers of General-Use Digital Consumer Payment Applications to CFPB Supervision

SUMMARY

On November 7, 2023, the Consumer Financial Protection Bureau released a proposed rule that would expand the CFPB’s supervisory and examination authority to cover, for the first time, “larger” providers of general-use digital consumer payment applications.¹ Under the proposal, the market for these types of applications would include, at a minimum, “digital wallets,” “payment apps,” “funds transfer apps,” “person-to-person payment apps” and “P2P apps.”² A “larger” provider under the proposal would be a nonbank entity that facilitates at least five million consumer payment transactions a year by providing general-use digital consumer payment applications.

Although the CFPB already has enforcement authority over all providers of consumer financial products and services in respect of Federal consumer financial laws, not every provider of a consumer financial product or services is subject to ongoing supervision and examination by the CFPB. The proposal would subject covered providers to ongoing supervision and examination by the CFPB for the first time, which would involve ongoing and regular access by the CFPB to internal materials and other information of the provider. The CFPB states that exercising this supervisory authority would help to ensure these larger participants (which the CFPB states represent a “substantial portion” of the market’s overall activity) are “complying with applicable requirements of Federal consumer financial law,” enable the CFPB to monitor for emerging risks to consumers and the market,³ and level the playing field between nonbanks and depository institutions that provide general-use digital consumer payment applications.⁴

Comments on the proposed rule are due by January 8, 2024.

BACKGROUND

In respect of Federal consumer financial laws, the CFPB has principal supervisory authority over not only depository institutions (e.g., banks) with over \$10 billion in total assets, but also certain “nonbank covered persons.” Under the Consumer Financial Protection Act (the “CFPA”), in addition to providers of certain lending products, the CFPB may supervise “larger participant[s] of a market for other consumer financial products or services,” as the CFPB defines by rule.⁵ The CFPA provides limited parameters regarding the definition of new markets or whether a nonbank covered person is a “larger participant” in such markets. Between 2012 and 2015, the CFPB defined five markets pursuant to this authority covering such areas as consumer reporting, consumer debt collection and international money transfers.⁶ The proposed rule would add general-use digital consumer payment applications as the CFPB’s sixth defined market.

For nonbank persons subject to CFPB supervision, the agency may require reports and may conduct examinations for purposes of assessing compliance with Federal consumer financial law, obtaining information about the activities and compliance systems or procedures of supervised persons, and detecting and assessing risks to consumers and consumer financial markets.⁷ CFPB examinations may be performed on-site or remotely, and may result in the issuance of confidential examination reports, supervisory letters or compliance ratings.⁸

OVERVIEW OF THE PROPOSED RULE

At its core, the proposed market of “general-use digital consumer payment applications” would encompass providers of digital applications that provide either (or both) funds transfer or wallet functionalities for consumers’ general use in making “consumer payment transactions” to others for personal, family or household purposes. Consistent with the CFPA, the CFPB would limit its supervisory authority to “larger participants” in this market, defined in part by the number of such transactions facilitated per year.⁹ The proposed rule would be effective 30 days after the final rule’s publication in the *Federal Register*.

A. DEFINITION OF THE MARKET

The proposed market for “general-use digital consumer payment applications” would be defined as “providing a covered payment functionality through a digital application for consumers’ general use in making consumer payment transactions.”¹⁰ The new market would encompass general-use digital applications that provide funds transfer functionality or wallet functionality, or both, in relation to consumer payment transactions. Key to the definition of this market are the terms “consumer payment transaction” and “general purpose.”

“Consumer payment transaction.” This term would be defined as a transfer of funds by or on behalf of a consumer physically located in a State to another person primarily for personal, family or household purposes.¹¹ This proposed definition focuses on the sending (not the receipt) of a payment,¹² and encompasses a consumer’s transfer of his or her own funds (e.g., funds held in a linked deposit account)

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as well as a creditor's transfer of funds to another person on behalf of the consumer as part of a credit transaction (e.g., a purchase made by a credit card stored in a digital wallet).¹³ The definition would, however, exclude the following types of transactions¹⁴:

- International money transfers, which are covered by a separate market previously defined by the CFPB.¹⁵
- Any transfer of funds by a consumer that is "linked to the consumer's receipt of a different form of funds," such as a foreign exchange transaction or a purchase or sale of digital assets using fiat currency.
- Any transfer of funds for the primary purpose of purchasing or selling a security or commodity, subject to requirements in the CFPB's Regulation E.¹⁶
- Any payment transaction conducted by a person for the sale or lease of goods or services that a consumer selected from an online or physical store or marketplace operated prominently in the name of such person or its affiliated company. This exclusion would cover a consumer paying for goods or services in a store or on a website operated in a merchant's name or in an online marketplace using account or payment credentials stored by the merchant or marketplace operator (or an affiliate). It, however, would not apply when a consumer uses a payment or account credential stored by a general-use consumer payment application provided by a person unaffiliated with the merchant or marketplace operator or if a merchant or marketplace operator stores, transmits or processes payments or financial data for any purpose other than paying for goods or services (e.g., targeted marketing, data monetization or research).¹⁷
- Any extension of consumer credit made using a digital application provided by the person who is extending the credit or that person's affiliate. This exclusion would not apply if a provider of consumer credit "engages in covered payment-related activities beyond extending credit to the consumer."¹⁸

"General use." The proposed market would be narrowed by the "general use" requirement, which for this purpose would be defined as the absence of significant limitations on the purpose of consumer payment transactions facilitated by the covered payment functionality provided through the digital consumer payment application. This definition is intended to "confine the market definition to those digital payment applications that consumers can use for a wide range of purposes."¹⁹ Applications that facilitate person-to-person or peer-to-peer transfers of funds would qualify as having general use, even if transfers can be made only to recipients that register with the application provider and even if the universe of potential recipients for a funds transfer is fixed, such as when transfers can be made only to friends or family located in a prison.²⁰ The proposed rule would include several examples of limitations that exclude an application from having "general use," which would include if the payment functionality may be used solely to: (1) purchase or lease a specific type of services, goods or property (e.g., transportation, food, an automobile or a consumer financial product or service); (2) use certain accounts that are excluded from the definition of "prepaid accounts" under the CFPB's Regulation E (e.g., health spending accounts and many gift cards); (3) pay a specific debt or type of debt (e.g., a consumer mortgage lender's or debt collector's website or app that provides functionality to pay a loan or other debt); or (4) split a charge for a specific type of goods or services (e.g., restaurant or similar bill splitting).²¹

B. IDENTIFICATION OF LARGER PARTICIPANTS

To be a larger participant in the market, and therefore subject to supervision under the proposed rule, a nonbank covered person would be required to satisfy two tests during the preceding calendar year:

- **Transaction Volume.** The nonbank covered person and its affiliates must have facilitated at least five million consumer payment transactions by providing general-use digital consumer payment applications.²²
- **Small Business Concern.** The nonbank covered person must not be a “small business concern” as defined in the Small Business Act and the Small Business Administration’s implementing rules.²³

The CFPB estimates that the proposed rule would bring approximately 17 entities within the CFPB’s supervisory authority. The CFPB did not name the entities it identified, but estimates they comprise about 9% of all known nonbank covered persons in the proposed market, and are responsible for approximately 88% of known transactions in the nonbank market for general-use digital consumer payment applications (12.8 billion transactions in 2021 with a total dollar value of about \$1.7 trillion).²⁴

OBSERVATIONS

The proposed rule reflects a significant recent focus by the CFPB on payment applications and the role that “Big Tech” plays in the payments market. In 2021, the CFPB ordered six technology companies offering payment services (Amazon, Apple, Facebook (now Meta), Google, PayPal and Square) to turn over information regarding their payment-related business activities.²⁵ In June of this year, the CFPB highlighted the availability of deposit insurance for funds held through popular payment applications operated by several of those companies and related implications for consumers.²⁶ Also in June, the CFPB’s Office of Servicemember Affairs published a report describing the unique risks that members of the military face with respect to payment applications.²⁷ In addition, in September 2023, the CFPB released a report “highlighting the impacts of Big Tech companies’ policies and practices that govern tap-to-pay on mobile devices like smartphones and watches.”²⁸

Although the CFPB already has enforcement authority over all providers of consumer financial products and services, including the providers of general-use digital consumer payment applications that would be subject to supervision under the proposed rule, not every provider of a consumer financial product or services is subject to ongoing supervision and examination by the CFPB.²⁹ Under the proposal, covered entities would be carefully and, presumably, regularly subject to the CFPB’s supervisory review, including the ongoing review of extensive nonpublic information, records and other internal materials that would not ordinarily be provided on an ongoing basis to the CFPB. Moreover, any deficiencies, which may not rise to the level of an enforcement action, may be subject to information supervisory requirements, just as with any supervised entity. Moreover, any issues identified based on this ongoing review could substantially increase the risk that the CFPB exercises its enforcement authority in respect of newly covered entities.

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Increased CFPB scrutiny would also impose substantial burdens, including with respect to the development of any necessary additional policies and procedures and ongoing engagement with supervisory staff.

The proposal also raises an issue of potential agency overlap. Some of the potentially covered providers are already be subject to Federal and/or State supervision in some respects. Indeed, some may be subject to examination by one or more Federal banking agencies as service providers to an insured depository institution³⁰ or to State supervision as licensed money transmitters. Although the CFPB describes that it would “coordinate with appropriate State regulatory authorities in examining” supervised entities,³¹ it does not explain how this coordination would operate in practice and whether it would extend to coordination with any other applicable Federal agencies.

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ENDNOTES

- 1 Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications, 88 Fed. Reg. 80,197 (Nov. 17, 2023).
- 2 Proposed Rule, 88 Fed. Reg. at 80,198. Based on sources cite in the preamble, products that could be included in the newly-defined market include payment applications and digital wallets such as Apple Pay, Cash App, Google Pay, Meta Pay, PayPal, Venmo and Zelle.
- 3 Proposed Rule, 88 Fed. Reg. at 80,201.
- 4 Proposed Rule, 88 Fed. Reg. at 80,201.
- 5 12 U.S.C. § 5514(a)(1)(B). The CFPB is expressly authorized to supervise payday, private education and mortgage lenders, and may also issue an order subjecting a nonbank covered person to CFPB supervision when the CFPB has reasonable cause to determine that the person is engaging or has engaged in conduct that poses risks to consumers with regard to offering or providing consumer financial products or services. 12 U.S.C. § 5514(a)(1)(A), (C), (D), (E).
- 6 See 77 Fed. Reg. 42,874 (July 20, 2012) (consumer reporting); 77 Fed. Reg. 65,775 (Oct. 31, 2012) (consumer debt collection); 78 Fed. Reg. 73,383 (Dec. 6, 2013) (student loan servicing); 79 Fed. Reg. 56,631 (Sept. 23, 2014) (international money transfers); 80 Fed. Reg. 37,496 (June 30, 2015) (automobile financing).
- 7 12 U.S.C. § 5514(b).
- 8 See Proposed Rule, 88 Fed. Reg. at 80,198. As the CFPB noted in previous rulemakings, its supervisory authority “is not limited to the products or services that qualified the person for supervision, but also includes other activities of such a person that involve other consumer financial products or services or are subject to Federal consumer financial law.” 77 Fed. Reg. at 42,880; see Proposed Rule, 88 Fed. Reg. at 80,198 n.7.
- 9 Persons subject to supervision under the proposed rule would be subject to the CFPB’s existing larger participant rule, which prescribes definitions and procedures for assessing and/or disputing a person’s status as a larger participant in a defined market. 88 Fed. Reg. at 80,198.
- 10 Proposed section 1090.109(a)(1).
- 11 Proposed Rule, 88 Fed. Reg. at 80,201. In the preamble, the CFPB observes that this definition is narrower than the CFPB’s authority under the CFPA, which can extend to payment transactions excluded from the definition of “consumer payment transaction” that are conducted by merchants or online marketplaces for sales through their own platforms under certain circumstances. Proposed Rule, 88 Fed. Reg. at 80,204. The proposed rule would define “State” to mean any State, territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico or any political subdivision thereof. Proposed Rule, 88 Fed. Reg. at 80,208. According to the preamble, if a consumer is physically located outside of any State at the time of engaging in a payment transaction, then the payment transaction would not be covered by the proposed rule. Proposed Rule, 88 Fed. Reg. at 80,202. The CFPB describes that it expects participants in the proposed market “will generally be aware of indicators regarding the consumer’s location at the time of a transaction (e.g., based on the point of sale, the location of the consumer’s device or the consumer’s residence).” Proposed Rule, 88 Fed. Reg. at 80,202.
- 12 Proposed Rule, 88 Fed. Reg. at 80,202.
- 13 Proposed Rule. 88 Fed. Reg. at 80,202. Notably, the term “funds” (which is not defined in the CFPA) would include fiat currency, legal tender *and* digital assets that have monetary value and are readily useable for financial purposes (e.g., virtual currency). Proposed Rule, 88 Fed. Reg. at 80,202.
- 14 Proposed Rule, 88 Fed. Reg. at 80,203-04.
- 15 See 12 C.F.R. § 1090.107.

ENDNOTES (CONTINUED)

- 16 See 12 C.F.R. § 1005.3(c)(4).
- 17 Proposed Rule, 88 Fed. Reg. at 80,203-04.
- 18 Proposed Rule, 88 Fed. Reg. at 80,204.
- 19 Proposed Rule, 88 Fed. Reg. at 80,207.
- 20 Proposed Rule, 88 Fed. Reg. at 80,207.
- 21 Proposed Rule, 88 Fed. Reg. at 80,207-08.
- 22 Proposed Rule section 1090.109(b)(1), (3), (4).
- 23 Proposed Rule section 1090.109(b)(2). According to the CFPB, this criterion is intended to focus the CFPB’s “limited supervisory resources” on larger entities. Proposed Rule, 88 Fed. Reg. at 80,209.
- 24 Proposed Rule, 88 Fed. Reg. at 80,210.
- 25 See CFPB Orders Tech Giants to Turn Over Information on their Payment System Plans (Oct. 21, 2021), *available at* <https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-tech-giants-to-turn-over-information-on-their-payment-system-plans/>; CFPB Director Rohit Chopra, Statement Regarding the CFPB’s Inquiry into Big Tech Payment Platforms (Oct. 21, 2021), *available at* <https://www.consumerfinance.gov/about-us/newsroom/statement-regarding-the-cfpbs-inquiry-into-big-tech-payment-platforms/>.
- 26 See CFPB Office of Competition and Innovation and Office of Markets, Analysis of Deposit Insurance Coverage on Funds Stored Through Payment Apps (June 1, 2023), *available at* <https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-analysis-of-deposit-insurance-coverage-on-funds-stored-through-payment-apps/full-report/>.
- 27 CFPB, Office of Servicemember Affairs Annual Report, January – December 2022 (June 2023), *available at* https://files.consumerfinance.gov/f/documents/cfpb_osa-annual-report_2022.pdf.
- 28 See CFPB Report Highlights Role of Big Tech Firms in Mobile Payments (Sept. 7, 2023), *available at* <https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-highlights-role-of-big-tech-firms-in-mobile-payments/>.
- 29 *Compare, e.g.*, 12 U.S.C. §§ 5531(a), 5564(a), *with* 12 U.S.C. § 5514(a).
- 30 See 12 U.S.C. § 1867(c).
- 31 Proposed Rule, 88 Fed. Reg. at 80,198 n.12.

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