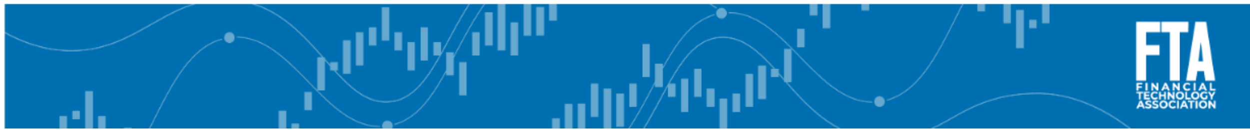


Submitted electronically
January 8, 2024

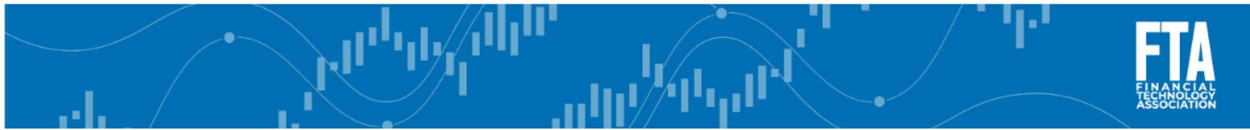
Consumer Financial Protection Bureau
c/o Legal Division Docket Manager
1700 G Street NW
Washington, DC 20552

FTA Comment on the CFPB's Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications Proposal (Docket No. CFPB-2023-0053)

The Financial Technology Association ("FTA") appreciates the opportunity to provide feedback on the Consumer Financial Protection Bureau's (the "CFPB" or the "Bureau") proposed rule on "Defining Larger Participants of a Market for General-Use Consumer Payment Applications" (the "Proposed Rule"). FTA represents industry leaders shaping the future of finance, champions the power of technology-centered financial services, and advocates for the modernization of financial regulation to support inclusion and responsible innovation.

The current consumer payments ecosystem is highly diversified. Companies in the ecosystem play widely varying roles, each serving different markets and offering different functionalities. Rather than completing the required analysis to define the markets and identify the one ripe for larger participant rulemaking, the Proposed Rule conflates different markets and proposes a one-size-fits-all approach for much of the digital payments ecosystem. This approach deviates from history and the legal standard for defining markets. Over the past century, federal and state laws have been tailored to different types of consumer financial products, such as small-dollar loans, installment loans, student loan servicing, mortgages, and open-end lines of credit. The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"), and the Bureau's other larger market participant rules, have followed that precedent. The Bureau's Remittance Transfer Rule, for example, focuses on international money transfers and the risks to consumers specific to that industry. It does not attempt to capture domestic money transfers, which is an entirely different market. The Proposed Rule deviates from that well-established and sensible approach, and instead, conflates distinct payments markets without justification.

Under the Act, the Bureau must conduct thorough due diligence before issuing a proposed rule. The Proposed Rule falls well short of satisfying this requirement because it fails to focus on a specific market, fails to identify specific consumer harms in that market, and fails to adequately address the costs and benefits of its attempt to combine disparate markets. For example, companies offering digital applications for person-to-person ("P2P") transfers are fundamentally different from companies that process payments for merchants. The risk profiles consequently differ depending on where a product or service is situated in the payments ecosystem. The Proposed Rule fails to properly identify and assess the consumer harms it seeks to address in any particular market, much less the arbitrary "general-use" payments market it seeks to capture. It also fails to adequately analyze the costs for the wide array of companies within the purview of the Proposed Rule and the related consumer benefits. These deficiencies render the Proposed Rule unsupported



by reliable data and defective as a matter of law. The CFPB should pause the rulemaking process, reconsider the Proposed Rule in its entirety, and conduct the analysis required by the Act.

While the Bureau estimates that only 17 companies will fall within the Proposed Rule's purview,[1] if finalized as written, the Proposed Rule will encompass—for the reasons discussed below—far more companies, often without an adequate basis to justify their inclusion. Many of the companies, for example, are already licensed and supervised by state and local authorities. Many are also subject to federal supervision, often as service providers for banks and other financial institutions. The Proposed Rule does not explain how consumers, companies, or the markets will benefit from this duplication, while downplaying the significant additional costs resulting from the overlap.[2] That is why the Proposed Rule needs (1) re-working to appropriately define the various consumer payment markets, and (2) more rigorous, data-driven analysis to identify the market that lacks supervision and poses the greatest risk to consumers.

For these reasons, it is critical that the CFPB more precisely and narrowly define the consumer payments market that it seeks to supervise and conduct the empirical analysis required in the rulemaking process. FTA respectfully submits the following considerations and recommendations to assist the Bureau:

- "General-use digital consumer payment applications" is not a market. It is an arbitrary conflation of different digital products and services. The CFPB should narrowly define the particular consumer payments market that it seeks to supervise through rigorous, data-driven analysis to identify the area that is inadequately supervised and poses the greatest risk to consumers.

- The Bureau must complete a cost-benefit analysis that adequately considers companies that may fall within the purview of the Proposed Rule, analyze the costs to the companies rather than using conservative estimates, and determine the costs that may be passed on to consumers.[3]

- The Bureau should reconsider expanding the scope of examinations beyond the payment-related products and services captured by the Proposed Rule. Examinations should be limited to the "relevant product market[]" under the Proposed Rule.

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[1] Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications, 88 Fed. Reg. 80197, 80210 (proposed Nov. 17, 2023).

[2] *Id.* at 80201. The Proposed Rule states that it "can help level the playing field between nonbanks and depository institutions, which the CFPB regularly supervises and which also provide general-use digital consumer payment applications," *id.*, which insinuates that the Bureau assumes that many of these companies are not subject to supervision, whether directly or indirectly, through any federal regulator. That suggestion is wrong because many companies are subject to supervision by the Bureau or a prudential regulator, such as the Office of the Comptroller of the Currency ("OCC") or the Federal Deposit Insurance Corporation ("FDIC").

[3] *See id.* at 80211–14.

- The definitions in the Proposed Rule should be narrowed and clarified to establish clear parameters for the companies, products and services, and functionalities that will be covered.

- The minimum transaction threshold should be increased, and the Bureau should consider incorporating dollar amounts into, or in addition to, the transaction threshold.

Moreover, the Bureau, at a minimum, should consider revising the definitions within the Proposed Rule because the definitions are confusing as drafted.

- The definition of "general use" is extremely broad, and the background set forth in the Proposed Rule does not provide sufficient detail for companies to determine what the Bureau will include within this term.

- The Proposed Rule defines "covered payment functionality" to include both "funds transfer functionality" and "wallet functionality." The scopes of these covered payment functionalities should be reconsidered to exclude functionalities that pose minimal risk to consumers.

- "Consumer payment transaction" should be refined to eliminate transactions facilitated by financial technology companies ("fintechs") who partner with federally regulated financial institutions. Moreover, the definition must exclude "digital assets" because the Commodity Futures Trading Commission ("CFTC") and the Securities and Exchange Commission ("SEC") have stated that certain digital assets are within their respective jurisdictions. And the Act precludes the Bureau from supervising entities already regulated by the CFTC or SEC.[4]

- The definition of "digital application" is vague, and the Proposed Rule does not provide sufficient detail to allow companies to comprehend what the Bureau will consider a "digital application."

I. The Bureau Must Reconsider the Arbitrary "General-Use Digital Consumer Payment Applications" Market

The Act authorizes the Bureau to supervise "larger participant[s] of a market for . . . consumer financial products or services."[5] Before issuing a proposed rule, the Bureau must consult with the Federal Trade Commission ("FTC") to get its input regarding the market to be defined in the rulemaking and the larger participants in the market.[6] Congress included that requirement because

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[4] 12 U.S.C. § 5517(i)–(j).
[5] 12 U.S.C. § 5514(a)(1)(B).
[6] 12 U.S.C. § 5514(a)(2).

the FTC analyzes market concentration and enforces federal antitrust laws. With that in mind, the Bureau's requirement to consult with the FTC clearly indicates that the FTC should provide a check on the CFPB's determination of the market at issue.

Defining a "market" is the fundamental prerequisite to determining who is a larger participant within the defined market.[7] Products are in the same "market" if they are "reasonably interchangeable by consumers for the same purposes."[8] Whether two products are in the same market depends on "a factual inquiry into the commercial realities faced by consumers,"[9] "tak[ing] account of the factors that influence consumer choices, including product function, price, and quality."[10] In response to the statutory requirement to consult with the FTC about the scope of the Proposed Rule, the Bureau states that it "consulted with *or provided an opportunity for consultation*."[11] The Act plainly provides that the Bureau "shall consult" with the FTC to define the covered persons subject to larger participant rules.[12] Subsequently, the Proposed Rule lacks any discussion about the factors determining which products and services should be included within the same payments market.[13]

Without that essential market-defining discussion, the Proposed Rule summarily concludes that "general-use digital consumer payment applications" is a single, coherent market. As an example, the Proposed Rule includes both "funds transfer functionality" and "wallet functionality" within the definition of "covered payment functionality."[14] The Proposed Rule "treat[s] these two covered payment functionalities as part of a single market for general-use digital consumer payment applications" even though the Bureau concedes that the "technological and commercial processes these two payment functionalities use to facilitate consumer payments may differ in some ways."[15] The overbroad market definition potentially conflates companies as disparate as, for example, (1) a company that allows consumers to make payments using a stored balance held by that company; (2) a company that routes funds from a consumer's bank account for transmission to a third party; (3) a company that offers payment methods to facilitate the purchase of goods and services from merchants, which is generally exempt from regulated money transmission by the states because of the minimal risk posed to consumers; and (4) a company that merely holds and passes payment information, such as card numbers, but never participates in the flow of funds from the consumer to the third-party recipient.

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[7] Although the term "market" is not defined, *see* 12 U.S.C. § 5481, other text within Title X of the Act suggests that the term "market" must be read by reference to the applicable *product*, *see id.* § 5514 ("The Bureau shall exercise its authority under paragraph (1) in a manner designed to ensure that such exercise, with respect to persons described in subsection (a)(1), is based on the assessment by the Bureau of the risks posed to consumers in the *relevant product* markets and geographic markets . . . ." (emphasis added)).

[8] *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956).

[9] *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482 (1992) (internal quotation marks omitted).

[10] *United States v. Visa U.S.A. Inc.*, 163 F. Supp. 2d 322, 335 (S.D.N.Y. 2001).

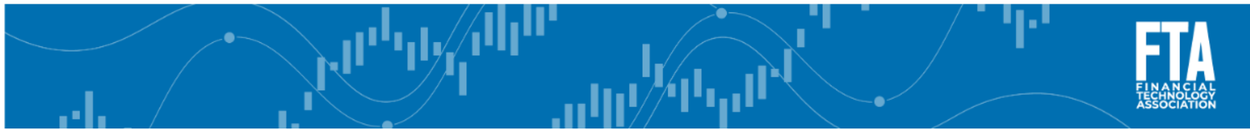
[11] 88 Fed. Reg. at 80199.

[12] 12 U.S.C. § 5514(a)(2).

[13] *Id.*

[14] *See id.* at 80204.

[15] *Id.*



The Act requires the Bureau to define a "market," and it is contrary to that statutory mandate to conflate products that do not meet similar needs, do not have similar use cases, and are not reasonably substitute products. The Proposed Rule appears to violate the requirements in the Act to save the Bureau from the inconvenience of multiple rulemakings. That shortcut deprives stakeholders and the public of a meaningful opportunity to participate in the rulemaking process.

II. The Bureau Must Obtain Additional Information to Perform an Adequate Cost-Benefit Analysis

The Bureau has a statutory obligation to properly analyze the costs and benefits of a rule before promulgating it, which it failed to complete in the Proposed Rule. For the reasons discussed below, the CFPB should set aside the Proposed Rule and fulfill this duty imposed by the Act by conducting additional cost-benefit analysis and incorporating the analysis into a new payments larger participant proposed rule.

Under the Act, the Bureau must consider "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule."[16] Generally, "reasoned decisionmaking" demands "consideration of [all] the relevant factors" underlying agency action,[17] and "an agency may not 'entirely fai[l] to consider an important aspect of the problem.'"[18] It follows that an agency typically must "pay[] attention to the advantages *and* the disadvantages of [its] decisions."[19] Thus, "cost-benefit analysis is a central part of the administrative process."[20]

An agency violates its cost-benefit-analysis obligations when it "opportunistically frame[s] the costs and benefits of [a] rule; . . . neglect[s] to support its predictive judgments; [and] contradict[s] itself."[21] Uncertainty "does not excuse the [agency] from its statutory obligation . . . to apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation before it decides whether to adopt the measure."[22]

A. The Proposed Rule Must Assess the Risks to Consumers that Warrant Supervision

The Act requires the Bureau to exercise its supervisory authority based on "the risks to consumers created by the provision of such consumer financial products or services."[23] But the Proposed Rule dismisses this mandate:

[16] 12 U.S.C. § 5512(b)(2)(A)(i).

[17] *MetLife, Inc. v. Fin. Stability Oversight Council*, 177 F. Supp. 3d 219, 230 (D.D.C. 2016) (alteration in original) (quoting *Michigan v. Env't Prot. Agency*, 576 U.S. 743, 750 (2015)).

[18] *Michigan v. Env't Prot. Agency*, 576 U.S. 743, 752 (2015) (alteration in original) (quoting Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

[19] *Id.* at 753 (emphasis in original).

[20] *Metlife, Inc.*, 177 F. Supp. 3d at 240.

[21] *Bus. Roundtable v. Sec. & Exch. Comm'n*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011).

[22] *Chamber of Com. of the U.S. of Am. v. Sec. & Exch. Comm'n*, 412 F.3d 133, 144 (D.C. Cir. 2005).

[23] 12 U.S.C. § 5514(b)(2)(C).

> [T]he CFPB is *not* proposing to determine the relative risk posed by this market as compared to other markets. As explained in its previous larger participant rulemakings, "[t]he Bureau need *not* conclude before issuing a [larger participant rule] that the market identified in the rule has a higher rate of non-compliance, poses a greater risk to consumers, or is in some other sense more important to supervise than other markets."[24]

Although consumer protection is central to the Proposed Rule, it fails to identify specific harms to consumers that it seeks to address. Rather than conducting the required analysis, the Proposed Rule surmises that "as a result of supervisory activity, the CFPB and an entity *might* uncover compliance deficiencies indicating harm or risks of harm to consumers."[25] This speculation is plainly insufficient under the Act.

The Proposed Rule also lacks any analysis explaining why vastly different payments markets have been grouped together under the same Proposed Rule, and why transaction volume is the best method for identifying the larger participants for any particular market, much less the broad universe of "general-use" applications under the Proposed Rule. Transaction volume does not necessarily correlate to potential consumer harm, and there are a host of other factors that have not been considered. The risks of processing transactions with small dollar amounts are significantly lower than lower transaction volumes with higher dollar amounts. Furthermore, a company merely sending payment messages or instructions poses significantly less risk to consumers than companies that hold, transmit, or receive money. Similarly, companies that provide merchant payment processing fall within the Proposed Rule, even though they are lower risk to consumers. There are many more examples, and it is unclear why the Proposed Rule does not analyze the potential consumer harms relating to varying business activities and how they correspond to transaction volume.

The Bureau also fails to assess the potential costs to consumers resulting from increased prices and the stifling of innovation caused by companies unwilling to pursue new products that may benefit consumers due to the costs and burdens associated with supervision by the Bureau, which may duplicate supervision by other federal agencies and the states.

While the FTA and its members understand that consumer protection regulations must evolve with new technology, the Bureau must nonetheless identify and assess the consumer harms that it perceives in the precise market at issue before it proposes a larger participant rule.

B. The Bureau Selectively Frames the Potential Costs and Benefits of the Proposed Rule

The Proposed Rule conducts a perfunctory analysis of the benefits of increased supervision for larger participants versus the corresponding costs. While the Proposed Rule claims that increasing supervision will benefit consumers and the consumer financial market by mandating compliance

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[24] 88 Fed. Reg. at 80200 n.24 (second and third alterations in original) (emphasis added).
[25] *Id.* at 80212 (emphasis added).

with laws such as the Electronic Fund Transfer Act and the Gramm-Leach-Bliley Act and by examining for any unfair, deceptive, or abusive acts or practices, it notes only two costs associated with being supervised by the Bureau.[26]

The Proposed Rule discusses two categories of costs: costs incurred in preparing for an examination and the cost of supporting the examination. The CFPB estimates that a supervisory examination will last only eight weeks and require two weeks of preparation.[27] The Proposed Rule also estimates that a company needs only one full-time compliance officer and one-tenth of the time of a full-time attorney to support an examination.[28] The CFPB estimates the wages of a compliance officer at $37 per hour, and the national average hourly wage for an attorney is $71.[29] Based on these estimates, the Bureau calculates a total cost of $25,001.[30]

Those figures grossly underestimate the actual costs of preparing for and supporting an examination by the CFPB, which typically include voluminous information requests and multiple rounds of follow-up requests. The full examination process, including responding to the Bureau's follow-up requests, typically spans multiple months and oftentimes longer than a year. The CFPB expects prompt and thorough responses throughout the supervisory process, and meeting the Bureau's expectations will cost multiples of $25,000. It often takes dozens of employees, who must set aside their primary business or operational duties, to assist in preparing examination responses because responses often require collaboration across departments, the creation of new reports and data fields, and engineers building new code. The Bureau has this information from conducting numerous examinations, but fails to analyze the actual costs in the Proposed Rule.

The Bureau and the prudential regulators also expect companies to have robust compliance management systems ("CMS") and personnel qualified and trained in applicable consumer compliance areas.[31] The CFPB claiming that responsible, compliant companies only need one full-time compliance officer and one-tenth of a full-time attorney defies the CFPB's own expectations. Moreover, to recruit and retain people qualified for these positions requires salaries much higher than the "estimated" compensation in the Proposed Rule.

The Act prohibits agencies from taking a selective approach to assessing costs. The CFPB must properly assess costs based on the actual costs incurred during the numerous examinations the Bureau has conducted since 2011, rather than the "estimates" in the Proposed Rule, which the CFPB describes as conservative.[32]

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[26] *Id.* at 80212–14.

[27] *Id.* at 80213.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *See* TMX Fin. LLC, CFPB No. 2023-CFPB-0001 (Feb. 23, 2023) (requiring TMX Finance LLC to establish a compliance committee); *CFPB Supervision and Examination Manual*, CMR 1–19 (Sept. 2022), https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual_2022-09.pdf.

[32] 88 Fed. Reg. at 80213.

The Proposed Rule overstates the compliance benefits of supervision. The Proposed Rule also fails to acknowledge that many companies within the purview of the Proposed Rule are not "financial institutions" under the applicable definitions in Regulation E and the Gramm-Leach-Bliley Act. And therefore, the Proposed Rule has overstated the benefits of being supervised by the CFPB.

C. The Bureau Fails to Recognize that the Ambiguity of the Proposed Rule Will Cause Many Businesses to Incur Costs for Supervision

The Bureau expects 17 companies to fall within the scope of the Proposed Rule. Based on the ambiguity of the Proposed Rule and the CFPB's admitted uncertainty about who it actually intends to supervise, however, many companies will unnecessarily expend significant resources to prepare for supervision. The Bureau ignores this uncertainty in its analysis. Moreover, in creating the list of 17 entities, the Bureau notes that it believes 190 entities provide general-use digital consumer payment applications, but after considering the small business exclusion, the Bureau concludes that only 17 companies will be supervised.[33] But the CFPB admits that it excludes from the 17 companies "entities where either (1) available information indicates that the small entity exclusion applies *or (2) the CFPB lacks sufficient information regarding the entity's size to assess whether the small entity exclusion applies*."[34] Accordingly, it remains unclear which entities the Bureau thinks will be within the purview of the Proposed Rule because it appears that at least hundreds of companies are within the scope.[35]

The Proposed Rule adds to the uncertainty about its admittedly ambiguous scope by stating that while the CFPB "would be authorized to undertake supervisory activities with respect to a nonbank covered person who qualified as a larger participant," this "would not necessarily mean that the CFPB would in fact undertake such activities regarding that covered person in the near future. Rather, supervision of any particular larger participant as a result of this rulemaking would be probabilistic in nature."[36] This ambiguity about the Bureau's supervisory activity, or lack thereof, over covered companies does not give companies sufficient notice about whether they fall within the purview of the Proposed Rule or if the CFPB plans to supervise them.

The Proposed Rule attempts to minimize the uncertainty and the substantial costs that it will unnecessarily create by claiming that "[e]ach entity that believed it qualified as a larger participant would know that it might be supervised and might gauge, given its circumstances, the likelihood

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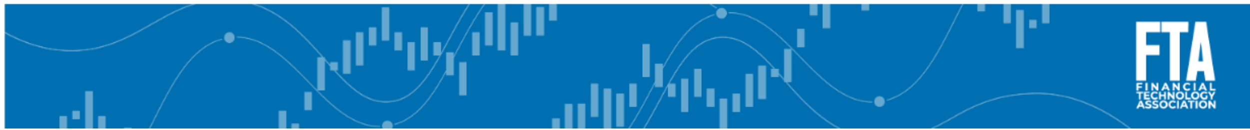
[33] *Id.* at 80210 n.88.

[34] *Id.* at 80210 n.89 (emphasis added).

[35] Because of the overly broad and unclear language in the Proposed Rule, many companies believe that they fall within the scope of the Proposed Rule. For example, the Bureau's inclusion of companies that simply send payment instructions received from consumers without a requirement that the companies receive, hold, or send funds will have the effect of causing more than 17 companies to believe that they fall within the scope of the Proposed Rule. This preparation will create inefficiencies for companies. Ambiguity will stifle innovation because resources will need to be allocated to preparing for supervision rather than innovation. These costs, both figurative and literal, will be passed onto consumers.

[36] *Id.* at 80211.



that the CFPB would initiate an examination or other supervisory activity."[37] It is unclear how this statement can be substantiated when the Bureau itself is unsure of who it may supervise.

D. The Bureau Dismissed the Potential Costs, Including the Costs of Duplicative Supervision, but Nonetheless Issued the Proposed Rule

Although the CFPB has voluminous data from the numerous examinations it has conducted over the years, the Bureau admits that it did not attempt to calculate the Proposed Rule's potential costs to companies and consumers. The Proposed Rule attempts to explain its failure to comply with the cost-benefit-analysis requirements by claiming that "[t]he CFPB lacks detailed information with which to predict the extent to which increased costs would be borne by providers or passed on to consumers, to predict how providers might respond to higher costs, or to predict how consumers might respond to increased prices."[38] The Proposed Rule also admits that:

> [t]he CFPB notes at the outset that limited data are available with which to quantify the potential benefits, costs, and impacts of the Proposed Rule. . . . [T]he CFPB lacks detailed information about their rate of compliance with Federal consumer financial law and about the range of, and costs of, compliance mechanisms used by market participants. Further, as noted above in the section-by-section analysis of the proposed threshold, the CFPB lacks sufficient information on a substantial number of known market participants necessary to estimate their larger-participant status.[39]

The uncertainty about the costs and the non-existent cost-benefit analysis contravenes the Act's requirements. The inadequate analysis also fails to consider how the uncertainty about the costs will discourage some companies from offering payments products and services. That reduced competition in the marketplace will stifle innovation, limit choices, and ultimately harm consumers.

Despite the inadequate cost-benefit analysis, the Proposed Rule claims that it will "level the playing field between nonbanks and depository institutions, which the CFPB regularly supervises and which also provide general-use digital consumer payment applications."[40] The Bureau also notes in the Proposed Rule that states have supervisory programs related to money transfers, but "there is no Federal program for supervision of nonbank covered persons in the market for general-use digital consumer payment applications with respect to Federal consumer financial law compliance."[41]

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[37] *Id.*
[38] *Id.* at 80212.
[39] *Id.* at 80211.
[40] *Id.* at 80201.
[41] *Id.* at 80211.

Those statements ignore the host of fintechs partnering with financial institutions, who would be covered under the Proposed Rule, but are already subject to examinations by the CFPB or the banks' prudential regulators under the Bank Service Company Act.[42]

On May 16, 2012, the CFPB and the prudential regulators entered into a Memorandum of Understanding ("MOU").[43] The MOU's objectives include minimizing "unnecessary regulatory burden" on covered financial institutions, avoiding "unnecessary duplication of effort," and ensuring that the CFPB and the prudential regulators "effectively and efficiently carry out their respective responsibilities."[44] Many aspects of the Proposed Rule contradict the MOU. The companies that partner with financial institutions that are already subject to CFPB or prudential regulator oversight would be subjected to duplicative supervision because of the Proposed Rule.

The Proposed Rule also glosses over and minimizes robust state and federal supervision over money transmitters.[45] Many companies covered by the Proposed Rule are currently supervised by multiple states. State law and federal regulations have carefully assessed which activities require licensing and supervision for transmitting money.[46] The Proposed Rule does not mention how the Bureau intends to address the existing federal and state oversight over certain payments-related activities or overlapping authority or multiple supervisory examinations on the same subject matter, such as CMS, which will happen under the Proposed Rule. It also fails to address how the CFPB's examinations will add value beyond the examinations already being conducted by the federal prudential regulators and the states, while downplaying the significant additional costs resulting from the duplication.

The Proposed Rule states that the frequency of examinations will depend on a number of factors and such factors are expected to change over time.[47] However, the Proposed Rule fails to estimate how many examinations the CFPB will undertake each year for larger participants. Companies therefore cannot adequately prepare or plan for the potential costs that may be incurred by supervision.

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[42] 12 U.S.C. § 1867.

[43] Memorandum of Understanding on Supervisory Coordination (May 16, 2012), https://files.consumerfinance.gov/f/201206_CFPB_MOU_Supervisory_Coordination.pdf.

[44] *Id.* at 2.

[45] Federal law defines "money transmission services" as (A) "the acceptance of currency, funds, or other value that substitutes for currency from one person and the transmission of currency, funds, or other value that substitutes for currency to another location or person by any means. 'Any means' includes, but is not limited to, through a financial agency or institution; a Federal Reserve Bank or other facility of one or more Federal Reserve Banks, the Board of Governors of the Federal Reserve System, or both; an electronic funds transfer network; or an informal value transfer system; or (B) Any other person engaged in the transfer of funds." 31 C.F.R. § 1010.100(ff)(5)(i).

[46] For example, many states have decided not to supervise companies that meet the agent of the payee exemption due to the low risks that these companies pose. Similarly, under federal law, the definition of "money transmission services" contains exclusions, including, but not limited to, an exclusion for payment processors in addition to an exclusion for companies that "[a]ccept[] and transmit[] funds only integral to the sale of goods or the provision of services, other than money transmission services, by the person who is accepting and transmitting the funds." 31 C.F.R. § 1010.100(ff)(5)(ii)(F).

[47] 88 Fed. Reg. at 80213.

Lastly, the Bureau did not consider its potential impact on small businesses. For example, because larger participants offer payments-related products and services to small businesses, the companies within the scope of the Proposed Rule may stop or significantly reduce their offerings to these small businesses, or significantly increase the costs for these products and services charged to small businesses.

III. Examinations Should be Limited to the Payments Activity Covered by the Proposed Rule

As set forth in the Act, the CFPB can promulgate a larger participant rule (after consulting with the FTC) only if the Bureau defines the particular "market."[48] The Act also provides that "[t]he Bureau shall exercise its authority . . . based on the assessment by the Bureau of the risks posed to consumers in the *relevant product markets* and geographic markets."[49] These statutory limitations narrow the scope of the supervision resulting from any larger participant rule to the activity addressed in the rule, and exclude products and services outside of the rule. The Proposed Rule deviates from this limitation and asserts that "the CFPB's 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.'"[50]

The CFPB's position violates the major questions doctrine. Congress is expected "to speak clearly when authorizing an agency to exercise powers of 'vast "economic and political significance.'"[51] Under the major questions doctrine, an agency must have "clear congressional authorization" to wield substantial authority over a matter of vast economic and political significance.[52] The argument that the Bureau may exercise authority over the "entire entity" is not clearly authorized in the Act. Certain companies within the purview of the Proposed Rule offer a wide variety of products and services in various markets beyond payments. There is no clear authorization in the Act allowing the Bureau to supervise *all* aspects of a company merely because the Bureau has authority to supervise *one* activity.

The risk profile and potential harm to consumers is typically proportionally smaller when the company is a smaller market participant for any particular product or service. The CFPB has tools at its disposal to address legitimate concerns for smaller market participants, such as enforcement civil investigative demands and its "dormant" supervisory authority. To impose supervision upon all facets of a business when only one part of the business qualifies as a larger market participant is unjustifiably costly and unduly burdensome. And it is outside the Bureau's statutory authority.

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[48] 12 U.S.C. § 5514(a)(1)(B), (a)(2).

[49] 12 U.S.C. § 5514(b)(2) (emphasis added).

[50] 88 Fed. Reg. at 80198 n.7 (citation omitted).

[51] *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (quoting *Util. Air Regul. Grp. v. Env't Prot. Agency*, 573 U.S. 302, 324 (2014)).

[52] *See West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2609 (2022).

IV. Definitions from the Proposed Rule Must Be Clarified

The definitions within the Proposed Rule do not provide meaningful parameters around the Proposed Rule's scope. This ambiguity will: (1) result in confusion and unnecessary costs for companies, and (2) cause confusion relating to CMS requirements and preparation for supervision due to the one-size-fits-all treatment for high- and low-risk activities. The Bureau should not proceed with the Proposed Rule unless it includes the appropriate level of clarity and detail for companies to meaningfully prepare for supervision.

A. The Definition of "General Use" is Overly Broad

The Proposed Rule's conflation of different payments markets is reflected in its arbitrary definition of "general-use" payment applications. 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"[53] does not provide sufficient guidance to ascertain the scope of "general use." Due to the wide and varying nature of the products and services within the scope of the Proposed Rule, the Bureau should take a fresh approach to defining the particular payments market(s) that should be covered by the Proposed Rule. The few examples in the Proposed Rule do not provide meaningful guidance about how the Bureau will interpret "general use." The current definition should be narrowed and clarified beyond the example of P2P payment applications being included and the limited exclusions mentioned in the analysis. Without additional clarification or limitations, the definition is overly broad, ambiguous, and lacks meaningful parameters.

For example, the CFPB should exclude closed-loop transactions from the definition of general use. Digital payment applications that can be used by consumers for a "wide range of purposes" are included within the scope including "sending funds to friends and family, buying a wide range of goods or services at different stores, or both."[54] The Bureau notes that a payment application may still have general use if the application is used by a limited group of consumers, such as individuals in jail or prison, because it may be used for a wide range of purposes, albeit within a closed environment (e.g., the prison where the person is incarcerated) while the person is incarcerated.[55] In contrast, the Bureau has defined "closed-loop prepaid cards" in the Prepaid Rule as "a card you can only use at certain locations. For example, a closed loop card might be good only at a specific store or group of stores, or on your public transportation system."[56] We note that the Proposed Rule is not limited to payments via card, but the parameters around closed-loop prepaid card systems are instructive. Transactions that may only occur at a finite group of merchants should be excluded from the Proposed Rule because these payments are not for "general use." As used by the Bureau, the universe of potential participants in a closed-loop P2P system is infinite.

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[53] 88 Fed. Reg. at 80216.

[54] *Id.* at 80207.

[55] *Id.*

[56] *See Prepaid Cards Key Terms*, Consumer Fin. Prot. Bureau, https://www.consumerfinance.gov/consumer-tools/prepaid-cards/answers/key-terms/.

Ultimately, the broad nature of this definition should be reconsidered for the varying payment industries (i.e., P2P transfers, wallet functionalities, and purchases made with digital assets) and tailored to each of these distinct markets.

B. Covered Payment Functionality

The definition of "funds transfer functionality" is one of the components that falls within a covered payment functionality. Accepting and receiving payment instructions is currently defined as a funds transfer functionality. We recommend excluding accepting and receiving payment instructions from the definition of "funds transfer functionality."

Many payments companies facilitate funds transfers by sending payment instructions. For example, some payments companies, acting as a service provider for a financial institution that holds a customer's account, are only providing payment instructions to facilitate transactions that are occurring to and from customer accounts held by federally-regulated financial institutions. Sending payment instructions is not money transmission under state laws because there is no receipt, transfer, or holding of funds. Accordingly, there is significantly lower risk of loss to consumers relating to the company sending payment instructions. As previously discussed, the states and federal law have carefully considered this type of money transmission and it is oftentimes exempt from licensing and supervision. Thus, we recommend excluding this from the definition of "funds transfer functionality."

Moreover, there is great uncertainty regarding whether the Bureau intended to include traditional third-party payment processing, entities that enable merchants to accept payments, within the scope of the Proposed Rule. To clarify the uncertainty, third-party payment processors should be expressly excluded from the Proposed Rule.

As an example, the Bureau should consider excluding payment instructions to and from a for-the-benefit-of ("FBO") account. Many payments companies enter into relationships with financial institutions whereby the financial institution holds an account in its name and tax identification number, and a payments or fintech company has an agreement with the financial institution to send payment instructions to the FBO account. The payments or fintech company never holds, transmits, or receives any funds. Financial institutions are regulated entities, and this type of relationship does not require any further oversight by the CFPB.

In addition, "wallet functionality" is defined under the Proposed Rule to mean "a product or service that: (1) Stores account or payment credentials, including in encrypted or tokenized form; and (2) Transmits, routes, or otherwise processes such stored account or payment credentials to facilitate a consumer payment transaction."[57]

The Proposed Rule does not consider that pass-through wallets are merely a record of the underlying provider's account, and that record is not related to the product or service being

[57] 88 Fed. Reg. at 80216.

provided to the consumer. As an example, the CFPB includes "wallet functionality through a digital application that stores payment credentials for a credit card through which an unaffiliated depository institution or credit union extends consumer credit."[58] A pass-through wallet should not be considered a covered payment functionality within the Proposed Rule because the company providing this type of wallet is not involved in the holding, transmission, or receipt of funds and is merely a record holder.

A covered person under the Act must offer or provide a consumer financial product or service.[59] The Act excludes "electronic conduit services" from the definition of "financial product or service."[60] "Electronic conduit services":

> (A) means the provision, by a person, of electronic data transmission, routing, intermediate or transient storage, or connections to a telecommunications system or network; and
> (B) does not include a person that provides electronic conduit services if, when providing such services, the person—
>> (i) selects or modifies the content of the electronic data;
>> (ii) transmits, routes, stores, or provides connections for electronic data, including financial data, in a manner that such financial data is differentiated from other types of data of the same form that such person transmits, routes, or stores, or with respect to which, provides connections; or
>> (iii) is a payee, payor, correspondent, or similar party to a payment transaction with a consumer.[61]

Pass-through digital wallets are electronic conduit services as they merely pass through information received, and no funds actually flow through this type of wallet. Accordingly, pass-through digital wallets should be excluded from the definition of a "covered payment functionality" in the Proposed Rule.

Again, we recommend that the Bureau consider the definition of "covered payment functionality" in conjunction with the specific product offering based on the differing nature of every market covered within the Proposed Rule.

C. Consumer Payment Transactions

The Proposed Rule should be reconsidered to identify and address the differing types of transactions that occur within the payments ecosystem and address the varying risks to consumers. At a minimum, the exclusions under a "consumer payment transaction" should include additional limitations.

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[58] *Id.* at 80204.
[59] 12 U.S.C. § 5481(6).
[60] 12 U.S.C. § 5481(15)(C)(ii).
[61] 12 U.S.C. § 5481(11).

As an example, the definition of "consumer payment transaction" excludes "[a]n extension of consumer credit that is made using a digital application provided by the person who is extending the credit or that person's affiliated company."[62] As presently written, this exclusion from the Proposed Rule does not include fintechs that partner with a financial institution.

The section-by-section analysis recognizes "that the payment transaction must result in a transfer of funds by or on behalf of the consumer," which "focuses on the sending of a payment, and not on the receipt."[63] Notwithstanding, a fintech may assist with transfers of funds on behalf of the consumer or process payments by the consumer.

It should be clarified that fintechs partnering with financial institutions to offer credit products are excluded from coverage. In these situations, the financial institutions issue the credit extended to consumers and the fintech is typically not involved in the receipt, storing, or transmission of funds related to the issuance of the credit. This appears to be clearly excluded from the coverage of the Proposed Rule as the financial institution is extending consumer credit by transferring funds directly to the consumer. However, the fintech may provide a mobile application whereby the consumer can make payment. While the fintech may be involved in the receipt of funds, which is excluded from the Proposed Rule, it may also provide the mobile application to facilitate the consumer's sending of payment.

Moreover, the exclusions from the definition of "consumer payment transaction" do not consider fintechs that partner with financial institutions to offer deposit products. These fintechs may have digital applications that utilize covered payment functionality. The analysis states that taking deposits is not covered by the Proposed Rule, but it is unclear whether this statement applies to fintechs.[64]

Financial institutions' regulators examine relationships with fintechs as part of financial institutions' engagement in these partnerships. The financial institutions are responsible monitoring their service providers and properly managing third-party risk. Moreover, many of the fintechs are also regulated under other state regimes such as money transmission, brokering, lending, servicing, and collection laws. As such, bringing fintechs partnering with financial institutions within the scope of the Proposed Rule duplicates oversight and enforcement.

Portions of the payments process that involve exclusively business-to-business transactions should be excluded from the Proposed Rule, as the business-to-business activity does not directly involve consumers. A payment lifecycle may go through many steps. Some of those steps are solely business-to-business, even though the end result may be by or on behalf of a consumer. We recommend excluding from the definition of a "consumer payment transaction" any portions of the payment lifecycle that are business-to-business.

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[62] 88 Fed. Reg. at 80215.
[63] *Id.* at 80202.
[64] *Id.* at 80202–03.

Further analysis should also be performed to ascertain whether digital assets must be excluded from the Proposed Rule. Congress has yet to give authority to any regulatory body to govern digital assets. Moreover, both the CFTC and SEC have stated that certain digital assets are within their respective jurisdictions.

The commentary surmises that the use of the term "funds" within the definition of "financial product or service" within the Consumer Financial Protection Act ("CFPA") in section 1002(15)(A)(iv) includes digital assets.[65] The Bureau cites that some courts have found that certain crypto assets constitute "funds" because they can be used to "conduct financial transactions."[66] The supposition that some courts have held that "funds" include crypto-assets should be bolstered with additional analysis and support to determine that digital assets should fall within the purview of the Proposed Rule.

Both the SEC and CFTC have stated that digital assets are securities and commodities, respectively.[67] The CFPB does not have authority over entities regulated by the CFTC and SEC under the Act.[68] For these reasons, the Bureau's conclusive statement that some digital assets are "funds" based on decisions from a limited number of courts should be reconsidered.

D. Digital Application

The definition of "digital application" is vague, and the examples of "an application a consumer downloads to a personal computing device, a web site a consumer accesses by using an internet browser on a personal computing device, or a program the consumer activates from a personal computing device using a consumer's biometric identifier, such as a fingerprint, palmprint, face, eyes, or voice"[69] do not sufficiently narrow the scope.

At a minimum, the definition of "digital application" should be clarified to exclude covered payment functionalities that technology providers may supply to their merchant-customers that may then be used for those merchants to offer to consumers. These functionalities are business-to-business offerings where a consumer may use the end product. Any facilitation of application functionality between businesses should be excluded from the coverage of the Proposed Rule.

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[65] *Id.* at 80202.

[66] *United States v. Faiella*, 39 F. Supp. 3d 544, 545 (S.D.N.Y. 2014) (citing examples of financial transactions that can be conducted using Bitcoin, including purchases of goods and services).

[67] *See* Complaint at 15, *Sec. & Exch. Comm'n v. Payward, Inc.*, No. 3:23-cv-06003 (N.D. Cal. Nov. 20, 2023) ("Throughout the Relevant Period, Kraken has made available for trading many 'crypto assets securities.' These crypto asset securities are investment contracts represented by the underlying crypto asset."); *In re Opyn, Inc.*, CFTC No. 23-40, at 4 (Sept. 7, 2023) ("Ether and stablecoins such as USDC are encompassed in the definition of 'commodity' in Section 1a(9) of the [Commodity Exchange] Act . . . ."); *Commodity Futures Trading Comm'n v. McDonnell*, 287 F. Supp. 3d 213, 228 (E.D.N.Y. 2018) ("'Virtual currencies are 'goods' exchanged in a market for a uniform quality and value. They fall well-within the common definition of 'commodity' as well as the CEA's definition of 'commodities' as 'all other goods and articles . . . in which contracts for future delivery are presently or in the future dealt in.'" (alteration in original) (citation omitted)).

[68] 12 U.S.C. § 5517(i)–(j).

[69] 88 Fed. Reg. at 80216.

V. Transaction Thresholds

The Proposed Rule considers different transaction volumes to define larger participants, but it ultimately sets the transaction threshold at a mere five million.[70] This threshold is strikingly low and does not attempt to target larger participants, because many smaller to medium-size businesses have tens and sometimes hundreds of thousands of transactions per day. Transaction volume should be increased to properly capture only larger participants. Without appropriately adjusting the threshold to capture *bona fide* larger participants, the CFPB proposal could stymie the ability of newer market entrants to emerge and increase competition in the payments ecosystem.

The Bureau also fails to acknowledge the varying risks to consumers for smaller transactions versus larger-dollar transactions, and, instead, takes a one-size-fits-all approach. We recommend that the Bureau consider implementing a dollar amount of transactions processed.

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FTA appreciates the Bureau's consideration of its comments and would be happy to discuss the issues raised in this letter further. Please contact the undersigned at penny@ftassociation.org for additional information.

Sincerely,

Penny Lee
President and Chief Executive Officer
Financial Technology Association

[70] *See id.* at 80210, 80214.