TECHNET
THE VOICE OF THE INNOVATION ECONOMY

1420 New York Avenue NW, Suite 825
Washington, D.C. 20005
www.technet.org | @TechNetUpdate

January 8, 2024

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

Submitted electronically via: 2023-NPRM-PaymentApps@cfpb.gov

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

To whom it may concern:

TechNet 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"). Technology is removing barriers to financial access and empowering Americans of all backgrounds to better manage their financial lives through safe, secure, inclusive, and reliable financial tools, including digital wallets and payment applications. Policymakers should adapt and update outdated laws and regulations to meet the growing demand from consumers and businesses for these innovative financial technology (fintech) products. Any regulations focused on fintechs must ensure consumers are protected while continuing to allow for innovation to flourish. The CFPB's proposed rule takes a one-size-fits-all approach that deviates from past precedent. If enacted, it would introduce tremendous complexity and uncertainty into digital payments markets, to the detriment of consumers and businesses across our economy.

TechNet is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet's diverse membership includes dynamic American businesses ranging from startups to the most iconic companies on the planet and represents over 4.2 million employees and countless customers in the fields of information technology, artificial intelligence, e-commerce, the sharing and gig economies, advanced energy, transportation, cybersecurity, venture capital, and finance.

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 historic precedent 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 and the *Administrative Procedure Act* ("APA"), 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 misguided desire 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 and the APA.

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, which includes companies partnering with 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.

---

[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").

TechNet 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 should 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.

- The Bureau has committed a "serious procedural error" in contravention of the APA by failing to make portions of the data it relied upon in drafting the Proposed Rule available for public inspection and comment.

- 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.

I. The Proposed Rule Fails to Satisfy Mandatory Rulemaking Requirements

The Proposed Rule does not satisfy the legal requirements to proceed with a final rulemaking.

First, it is unclear whether the Bureau met its obligation to confer with the Federal Trade Commission ("FTC").[4] The Bureau states that it "consulted with *or provided an opportunity for consultation*" with the FTC in creating the Proposed Rule.[5] The statutory requirement states that the CFPB "shall consult" with the FTC.

Second, 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."[6] Generally, "reasoned decision making" demands "consideration of [all] the relevant factors" underlying agency

[3] *See id.* at 80211–14.
[4] 12 U.S.C. § 5495.
[5] 88 Fed. Reg. at 80199.
[6] 12 U.S.C. § 5512(b)(2).

action,[7] and an agency "may not 'entirely fai[l] to consider an important aspect of the problem.'"[8] It follows that an agency typically must "pay[] attention to the advantages *and* the disadvantages" of its decisions.[9] The Proposed Rule fails to sufficiently address the costs and benefits of the additional supervision.

Third, 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.[10] The Proposed Rule's position that the CFPB can exercise its supervisory authority over an entire entity is not grounded in any statutory authority. There is no clear mandate permitting the Bureau to supervise *all* aspects of a company merely because the Bureau has authority to supervise *one* activity.

Fourth, the Bureau violated its obligations under the APA by failing to make portions of the data it relied upon in drafting the Proposed Rule available for public inspection and comment.[11]

II. 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."[12] Before issuing a proposed rule, the Bureau must consult with the FTC to get its input regarding the market to be defined in the rulemaking and the larger participants in the market.[13] Congress included that requirement because 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.[14] Products are in the same "market" if they are "reasonably interchangeable by consumers for the same purposes."[15] Whether two products are in the same market depends "on a factual inquiry into the commercial realities faced by consumers"[16] and "tak[ing] account of the factors that influence consumer choices, including product function, price, and quality."[17] In response to the statutory requirement

[7] *Metlife, Inc. v. Fin. Stability Oversight Council*, 177 F. Supp. 3d. 219, 230 (D.D.C. 2016) (quoting *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015)).
[8] *Michigan*, 135 S. Ct. at 2707.
[9] *Id.*
[10] *See West Virginia* v. *EPA*, 142 S. Ct. 2587, 2595 (2022).
[11] *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199 (D.C. Cir. 2007) (citing *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991).
[12] 12 U.S.C. § 5514(a)(1)(B).
[13] 12 U.S.C. § 5514(a)(2).
[14] Although the term "market" is not defined, *see* 12 U.S.C. § 5481, other text within 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).
[15] *United States v. E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 395 (1956).
[16] *Eastman Kodak Co. v. Image Tech. Servs., Inc.,* 504 U.S. 451, 482 (1992) (internal quotation marks omitted).
[17] *United States v. Visa U.S.A., Inc.,* 163 F. Supp. 2d 322, 335 (S.D.N.Y. 2001).

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.*"[18] That carefully-worded sentence suggests the CFPB may have avoided the requirement. The Act plainly provides that the Bureau "shall consult" with the FTC to define the covered persons subject to larger participant rules.[19] Moreover, the Proposed Rule lacks any discussion about the factors determining which products and services should be included within the same payments market.[20]

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."[21] 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."[22] 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.

The Act requires the Bureau to define a "market," and it is contrary to the 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.

III. The Proposed Rule 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 fails 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."[23] Generally, "reasoned decision

[18] 88 Fed. Reg. at 80199.
[19] 12 U.S.C. § 5514(a)(2).
[20] *Id*.
[21] *See id*. at 80204.
[22] 88 Fed. Reg. 80204-80205.
[23] 12 U.S.C. § 5512(b)(2)(A)(i).

making" demands "consideration of [all] the relevant factors" underlying agency action,[24] and "an agency may not 'entirely fai[l] to consider an important aspect of the problem.'"[25] It follows that an agency typically must "pay[] attention to the advantages *and* the disadvantages of its decisions."[26] Thus, "cost-benefit analysis is a central part of the administrative process."[27]

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."[28] 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."[29]

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."[30] But the Proposed Rule dismisses this mandate:

> [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."[31]

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."[32] 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 instructions poses significantly less risk to consumers than companies that hold, transmit, or receive money. Similarly,

---

[24] *MetLife, Inc.*, 177 F. Supp. 3d at 230 (alteration in original) (quoting *Michigan*, 135 S. Ct. at 2706).
[25] *Michigan*, 135 S. Ct. at 2707 (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)).
[26] *Id*. at 2707 (alteration in original).
[27] *Metlife, Inc.*, 177 F. Supp. 3d at 240.
[28] *Bus. Roundtable v. SEC,* 647 F.3d 1144, 1148-49 (D.C. Cir. 2011).
[29] *Chamber of Comm. of the U.S. of Am. v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005).
[30] 12 U.S.C. § 5514(b)(2)(C).
[31] 88 Fed. Reg. at 80200 n.24 (second and third alterations in original) (emphasis added).
[32] *Id.* at 80212 (emphasis added).

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 failed to 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 of 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 TechNet 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 Opportunistically Frames the Potential Costs and Benefits of the Proposed Rule

The Proposed Rule conducts a perfunctory analysis of the putative 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 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.[33]

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.[34] 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.[35] The CFPB estimates the wages of a compliance officer at $37 per hour and the national average hourly wage for an attorney is $71.[36] Based on these estimates, the Bureau calculates a total cost of $25,001.[37]

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.[38] 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

[33] *Id.* at 80212–14.
[34] *Id.* at 80213.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] For example, the costs of compliance with the orders issued by the CFPB to large technology companies under Section 1022(c)(4) of the *Consumer Financial Protection Act* ("CFPA"), were, at a minimum, $1 million per company.

collaboration across departments, the creation of new reports and data fields, and engineers building new code. Companies also hire consultants and outside counsel to help support examinations. 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.[39] 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 an opportunistic (*i.e.*, 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.[40]

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.[41] 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."*[42] 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.[43]

---

[39] *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.
[40] 88 Fed. Reg. at 80213.
[41] *Id.* at 80210 n.88.
[42] *Id.* at 80210 n.89 (emphasis added).
[43] 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

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."[44] 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 that the CFPB would initiate an examination or other supervisory activity."[45] It is unclear how this statement can be substantiated when the Bureau is unsure of who it may supervise.

D. The Bureau Dismisses 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."[46] 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.[47]

The uncertainty about the costs and the perfunctory 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.

---

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.

[44] 88 Fed. Reg. at 80211.

[45] *Id.*

[46] *Id.* at 80212.

[47] *Id.* at 80211.

The Proposed Rule also glosses over and minimizes robust state and federal supervision over money transmitters.[48] 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.[49] 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.[50] 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.

Lastly, the Proposed Rule 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.[51]

---

[48] 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).

[49] For example, many states have decided 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).

[50] 88 Fed. Reg. at 80213.

[51] The Proposed Rule discloses that, "[t]he Director of the CFPB certifies that the Proposed Rule, if adopted, would not have a significant economic impact on a substantial number of small entities and that an [initial regulatory flexibility analysis] IRFA therefore is not required." 88 Fed. Reg. at 80215. The IRFA exempts an agency from the requirement to publish an IRFA and convene a review panel to review the IRFA and collect advice and recommendations from affected small entity representatives if the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities[,]" and publishes the certification in the Federal Register at the time of publication of the general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification. 5 U.S.C. § 605(b). The Proposed Rule does not consider any impact on small businesses because the Bureau asserts that an IRFA is not required. 88 Fed. Reg. at 80215. The *Small Business Regulatory Enforcement Fairness Act* requires the CFPB to ensure that small entities are given an opportunity to participate in proposed agency regulations that are likely to have a "significant economic impact on a substantial number of small entities." 5 U.S.C. § 609(a). Despite the Director's certification, the Proposed Rule would benefit from an IRFA because there may be costs impacting small businesses, and an IRFA would assess such costs. For example, larger participants may decide to no longer offer

IV. 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."[52] 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."[53] 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.'"[54]

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.'"[55] 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.[56] 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.

V. Contrary to the APA's Requirements, the Proposed Rule Does Not Make Data the CFPB Relied Upon Available to the Public

The Bureau has committed a "serious procedural error" by failing to make portions of the data it relied upon in drafting the Proposed Rule available for public inspection and comment.[57] More specifically, the Bureau "access[ed] nonpublic transaction and revenue data for potential larger participants from the Nationwide Mortgage Licensing System & Registry ("NMLS")."[58] The NMLS is "a centralized licensing database used by many States

products and services to small businesses or larger participants may pass along their additional costs to small businesses.

[52] 12 U.S.C. § 5514(a)(1)(B), (a)(2).
[53] 12 U.S.C. § 5514(b)(2) (emphasis added).
[54] 88 Fed. Reg. at 80198 n.7 (citation omitted).
[55] *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.,* 141 S. Ct. 2485, 2489 (2021) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).
[56] *See West Virginia*, 142 S. Ct. at 2609.
[57] *Owner-Operator Indep. Drivers Ass'n, Inc.,* 494 F.3d at 199 (D.C. Cir. 2007) (citing *Solite Corp.,* 952 F.2d at 484.
[58] 88 Fed. Reg. 80210.

to manage their license authorities with respect to various consumer financial industries."[59] The Bureau says it relied upon "quarterly 2022 and 2023 filings from nonbank money transmitters in the Money Services Business (MSB) Call Reports."[60] Yet it has not made this data available for public inspection and comment. Instead, the Bureau has provided "a description of the types of data reported in the MSB call reports."[61] This is plainly insufficient. If the Bureau used proprietary or confidential information, it was obligated to make a sanitized version of the data available as part of its rulemaking.[62]

The CFPB relied on the NMLS data in its estimate of the percentage of the market that comprises supervised entities, making it critical data for parties to provide meaningful commentary. As the D.C. Circuit has explained, an "integral" component of the APA's requirement of a notice of proposed rulemaking and opportunity for comment is "the agency's duty to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules."[63] That means the agency *must* "reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary."[64] The Bureau's "failure to provide an opportunity for comment on the [data] . . . therefore constitutes a violation of the APA's notice-and-comment requirements."[65]

The Proposed Rule also concedes that its data is inapplicable in critical respects. For example, the Proposed Rule's data grossly overestimates the volume of covered market activity by including transactions where businesses sent funds to consumers or in which consumers transferred funds from one consumer-held account to another.[66] The Bureau also admits that its data is incomplete with respect to certain entities participating in the market.[67]

VI. 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.

---

[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Window Covering Manufacturers Ass'n* v. *Consumer Prod. Safety Comm'n*, 82 F.4th 1273, 1284 (D.C. Cir. 2023) (explaining that it is arbitrary and capricious when an agency "'possessed the underlying data but failed to include it in the rulemaking record'" and admonishing that the agency "could have redacted sensitive information from the reports before releasing them" (quoting *Coalition of Battery Recyclers Ass'n* v. *EPA*, 604 F.3d 613, 623 (D.C. Cir. 2010)).
[63] *Owner-Operator*, 494 F.3d at 199; *see also Air Transp. Ass'n of Am. v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999) ("[T]he most critical factual material that is used to support the agency's position on review must have been made public in the proceeding and exposed to refutation." (citing *Association of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Reserve Sys*., 745 F.2d 677, 684 (D.C. Cir. 1984))).
[64] *Owner-Operator*, 494 F.3d at 199.
[65] *Id.* at 201.
[66] 88 Fed. Reg. at 80209 n.86.
[67] 88 Fed. Reg. at 80209 n. 91.

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

The Proposed Rule's misguided 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"[68] 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."[69] 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.[70] 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."[71] 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.

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.

---

[68] 88 Fed. Reg. at 80216.
[69] *Id.* at 80207.
[70] *Id.*
[71] *See generally*, Prepaid cards key terms, CFPB, https://www.consumerfinance.gov/consumer-tools/prepaid-cards/answers/key-terms/.

Many payments companies facilitate funds transfers by sending payment instructions. 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."

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."[72]

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 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."[73] 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. There are some wallets operated by third party payment processors where such processor is in the funds flow, but these companies may take advantage of state and federal law exemptions previously discussed.

A covered person under the Act must offer or provide a consumer financial product or service.[74] The Act excludes "electronic conduit services" from the definition of "financial product or service."[75] "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.[76]

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.

---

[72] 88 Fed. Reg. at 80216.
[73] *Id.* at 80204.
[74] 12 U.S.C. § 5481(6).
[75] 12 U.S.C. § 5481(15)(C)(ii).
[76] 12 U.S.C. § 5481(11).

The Proposed Rule indicates that the market is limited to providing certain services *to consumers*, so the definition of "covered payment facility" must be similarly limited to avoid an unintended expansion of the scope of the proposed rule to back-office service providers or other vendors who can be captured by the Proposed Rule without this important limitation. 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.

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.

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 Commodity Futures Trading Commission ("CFTC") and Securities and Exchange Commission ("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 CFPA in section 1002(15)(A)(iv) includes digital assets.[77] The Bureau cites that some courts have found that certain crypto assets constitute "funds" because they can be used to "conduct financial transactions."[78] 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.[79] The CFPB does not have authority over entities regulated by the CFTC and

[77] 88 Fed. Reg. at 80215. at 80202.
[78] *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).
[79] *See* Complaint at 15, *SEC 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 . . ."); *CFTC 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 . . . [t]hey fall well-within the common definition of 'commodity' as well as the CEA's definition of 'commodities' as 'all

SEC under the Act.[80] 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"[81] 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.

VII. 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.[82] 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. For context, in 2022, the average *daily* volume of automated clearinghouse transactions processed by the Federal Reserve was 74.07 million.[83] In 2021, the total of number of noncash payments was 204.5 billion transactions.[84]

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. Relying on transaction threshold alone is overly-simplified. We recommend that the Bureau consider implementing a gross dollar volume of transactions processed in addition to a transaction threshold to properly capture only larger companies.

VIII. Conclusion

The Proposed Rule fails to comply with mandatory rulemaking requirements necessary to proceed with a final rulemaking. The Proposed Rule does not identify an appropriate market, does not identify specific consumer harms in the market, and fails to properly conduct the required cost-benefit analysis. The CFPB should pause the rulemaking process,

---

other goods and articles . . . in which contracts for future delivery are presently or in the future dealt in.'") (alteration in original) (citation omitted).
[80] 12 U.S.C. § 5517(i)–(j).
[81] 88 Fed. Reg. at 80216.
[82] *See id.* at 80210, 80214.
[83] Federal Reserve, Commercial Automated Clearinghouse Transactions processed by the Federal Reserve – Annual Data, https://www.federalreserve.gov/paymentsystems/fedach_yearlycomm.htm.
[84] Federal Reserve, Federal Reserve Payments Study (FRPS), https://www.federalreserve.gov/paymentsystems/fr-payments-study.htm.

reconsider the Proposed Rule in its entirety, and conduct the analysis required by the Act and the APA.[85]

Thank you for your attention to our views. We appreciate the opportunity to submit comments and provide feedback on the Bureau's Proposed Rule and stand ready to serve as a resource to you in your review.

Sincerely,

Carl Holshouser
Executive Vice President and Corporate Secretary

[85] The Bureau should also suspend the rulemaking process pending the United States Supreme Court's decision in *CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd.,* No. 22-448 (U.S. *argued* Oct. 3, 2023).