

January 8th, 2024

The Honorable Director Rohit Chopra
Consumer Financial Protection Bureau
Comment Intake – LP Payment Apps Rulemaking
Legal Division Docket Manager
1700 “G” St. NW
Washington, DC 20552

RE: Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications
Docket No. CFPB-2023-0053

Dear Honorable Director Chopra:

Thank you for considering our comments on the proposal to define larger participants for payment apps and digital wallets.

The Consumer Federation of America, the National Consumer Law Center (on behalf of its low-income clients), Americans for Financial Reform Education Fund, Consumer Reports, and the National Consumers League respectfully provide these comments on the proposal.

We applaud the CFPB for taking this step to protect consumers who use emerging technologies to transfer funds and facilitate payments. We urge the CFPB to move swiftly to define larger participants in these markets so it can implement supervisory activities. By doing so, the CFPB can close loopholes that have permitted fintech companies and Big Tech firms to offer consumer financial products without submitting to the equivalent kinds of supervision as required of depositories. We also urge the CFPB to expand supervision to other larger nonbank companies that offer similar payment services accessed through debit or prepaid cards and in person.

Payment apps and digital wallets have become increasingly popular among consumers, are accepted by more retailers, demonstrate a rapid growth trajectory, are situated within platforms with other financial services, and are being structured to work with crypto, posing risks to consumers. The proposed rule should protect vulnerable consumers by including certain crypto-asset transactions and correctional money transfers and release cards as covered transactions.

We are also concerned about data privacy and protecting consumers’ information. Almost all payment app and digital wallet providers have roots in the tech industry. Many have business models built on collecting, analyzing, and monetizing consumer data. Barriers exist in banking to protect consumer financial privacy, and though the CFPB can already apply safeguards through enforcement action, supervisory authority will allow the CFPB to ensure that any problems faced by consumers, especially service members who are especially prone to threats to privacy, are quickly addressed.

Finally, the CFPB should do more. Many, indeed probably most, electronic payments made through nonbank companies today are not made through the digital applications or digital wallets covered by this rule. Consumers still have some skepticism about mobile payments. In a recent survey, many respondents said mobile payments made with debit (22 percent) and credit cards (9 percent) were less safe than if

transacted with a physical card.¹ Even when done online, those card payments apparently would not be counted under the proposed rule. As a result, the CFPB should undertake regulatory activity to supervise prepaid accounts, card payments through non-bank banking accounts, and domestic person-to-person transfers, even if they are not primarily accessed through digital applications or wallets.

I. The CFPB should move forward expeditiously, as it is vital to ensure payment apps and digital wallets operate under the same rules as traditional payment systems.

A. The Digital Payments Market is Important and Growing

The Dodd-Frank Act gives the CFPB clear authority to supervise non-banks that are larger participants in consumer payments markets. This is an important market that strongly needs supervision.

Payment apps and digital wallets have become increasingly popular among consumers, are accepted by more retailers, demonstrate a rapid growth trajectory, are situated within platforms with other financial services, and are being structured to work with crypto, posing risks to consumers.

Given consumers' rapid adoption of these services, the CFPB must supervise their providers. Over the period between March 2021 and fall 2022, the share of Americans who had used a digital wallet increased by eleven percentage points, approaching nearly 50 percent.² Seventy-six percent of households use Venmo or Cash App.³ More than 90 percent of consumers shop online, requiring them to use some form of digital payment (though not always a digital application), a development that underscores the market opportunity for the further integration of wallets.⁴

Supervision is important because these services will soon expand into providing payments at the point of sale. For the most part, merchants have lagged in adopting faster payments. However, they will inevitably move to this space because of the opportunity to avoid interchange fees. Most likely, these services will occur in wallets where payments are authorized at the point of sale using QR codes. Given that future, it is imperative for the CFPB to have the authority to supervise these entities.

The CFPB should ensure all funds transfers and digital wallets are covered by the rule, regardless of whether the provider is a bank or a non-bank. This is important to maintain regulatory parity and prevent evasions.

¹ “Are Americans Embracing Mobile Payments? Survey of Consumer Experiences Finds Greater Trust in Credit, Debit Cards.” Internet & Technology. Pew Charitable Trusts, October 2019. https://www.pewtrusts.org/-/media/assets/2019/10/mobilepayments_brief_final.pdf.

² J.D. Power. “As Mobile Wallets Gain in Popularity, Growing Number of Americans Still Prefer Convenience of Plastic.” Banking and Payments Intelligence Report, January 24, 2023. <https://www.jdpower.com/business/resources/mobile-wallets-gain-popularity-growing-number-americans-still-prefer-convenience>.

³ Anderson, Monica. “Payment Apps like Venmo and Cash App Bring Convenience – and Security Concerns – to Some Users.” *Pew Research Center* (blog), September 8, 2022. <https://www.pewresearch.org/short-reads/2022/09/08/payment-apps-like-venmo-and-cash-app-bring-convenience-and-security-concerns-to-some-users/>.

⁴ Chen, Jane, Deepa Mahajan, Marie-Claude Nadeau, and Roshan Varadarajan. “Consumer Digital Payments: Already Mainstream, Increasingly Embedded, Still Evolving.” Digital Payments Consumer Survey, October 20, 2023. <https://www.mckinsey.com/industries/financial-services/our-insights/banking-matters/consumer-digital-payments-already-mainstream-increasingly-embedded-still-evolving>.

B. Supervision will ensure enforcement of the EFTA, UDAAPs, and Other Laws

Supervisory power will complement existing enforcement authority granted to the CFPB. Emerging payment systems fulfill the same purpose as their predecessors, and nonbank entities offer many of the same consumer payment services that banks do. They should not receive different treatment from regulators, and they need the same oversight.

Payment apps and digital wallets are used for personal, family, and household purposes to exchange value linked to a deposit, stored value account, credit account, or other form of an account used by consumers to conduct transactions. To ensure parity, the CFPB must have the ability to supervise firms that facilitate consumer payment transactions for compliance.

Oversight is needed to ensure payment apps and digital wallet providers comply with the Electronic Fund Transfer Act, laws against unfair, deceptive and abusive practices, and other laws.

One example where supervision is greatly needed is in the area of payment fraud. Although payment fraud is an ever-present and increasing risk to consumers,⁵ the response to payment fraud by some of the largest players in the digital payments market is inconsistent at best and possibly non-compliant.⁶ EFTA violations are extremely common, even among banks that are closely supervised by regulators.⁷

Nonbank payment apps also pose consumer risks with respect to their use of data, as described below. Additionally, consumers are exposed to unfair, deceptive and abusive practices in the payments area, for example, when consumers are misled to believe money stored in a payment app or wallet has the same level of protection as a FDIC insured bank account.

Supervisory authority over larger nonbank participants in the consumer digital payments application marketplace will allow the CFPB to protect consumers by ensuring compliance with the EFTA, data privacy laws, and laws against unfair, deceptive and abusive practices, among others.

By assuming supervisory power over payment apps and digital wallets, the CFPB will provide regulatory consistency and certainty. The proposed rule will level the playing field between banks and non-banks.

⁵ TransUnion. “TransUnion Report Finds Digital Fraud Attempts Spike 80% Globally From Pre-Pandemic Levels,” March 15, 2023. <https://newsroom.transunion.com/transunion-report-finds-digital-fraud-attempts-spike-80-globally-from-pre-pandemic/>.

⁶ Brown, Sherrod, Elizabeth Warren, and Jake Reed. “Brown, Reed, Warren Urge Venmo, Cash App to Reimburse Victims of Fraud and Scams | United States Committee on Banking, Housing, and Urban Affairs,” December 14, 2023. <https://www.banking.senate.gov/newsroom/majority/brown-reed-warren-urge-venmo-cash-app-to-reimburse-victims-of-fraud-and-scams>.

⁷ See, e.g., Consumer Fin. Prot. Bureau, [Supervisory Highlights](#) at 15 (Summer 2021), *available at* www.consumerfinance.gov (stating that “Supervision continues to find violations of EFTA and Regulation E that it previously discussed in the Fall 2014, Summer 2017, and Summer 2020 editions of Supervisory Highlights, respectively,” (Listing several violations)); Scott Sonbuchner, Examiner, Fed. Reserve Bank of Minneapolis, *Consumer Compliance Outlook, Error Resolution and Liability Limitations Under Regulations E and Z; Regulatory Requirements, Common Violations, and Sound Practices* (2d issue 2021), *available at* www.consumercomplianceoutlook.org.

C. Providers active in the crypto asset space, who are engaged in the practices described by this rule and who are or are likely to meet the final transaction volume threshold set by the agency, should be subject to the CFPB’s supervisory authority.

Providers active in the crypto asset space, who are engaged in the practices described by this rule and who are or are likely to meet the final transaction volume threshold set by the agency, should be subject to the CFPB’s supervisory authority.

An increasing number of individuals and consumers reportedly use crypto assets for such payment purposes as would fall under the scope of this rule. Additionally, several large, well-capitalized crypto firms have made it clear that their business model is focused on making crypto and blockchain-based ledgers a mainstream payment method for American consumers. Lastly, various intermediaries active in the crypto space, including crypto wallet providers, exchanges, and others, provide services – including fund transfers – for personal, family or household use, which are the same as or equivalent to those provided by non-crypto digital wallet providers and payment apps.

For example, at least one major payment provider has created a stablecoin expressly intended to facilitate consumers’ purchase of household goods and services,⁸ while another crypto “native” firm has created a platform where retail merchants are provided crypto wallets that can receive direct crypto payments from customers, without the need to convert crypto assets into fiat currency to settle the transaction.⁹ Reports claim that the platform processes payments for thousands of merchants, for ‘on-chain’ payments worth billions of dollars.¹⁰

Crypto wallets hosted by exchanges or similar crypto platforms present a unique scenario for the purposes of this rule. Some transfers of crypto-assets will be outside of the proposed rule, either because they involve the consumer’s receipt of a different form of funds, or because the transfers are made for the purpose of buying or selling a security or commodity regulated by the Securities and Exchange Commission or the Commodity Futures Trading Commission.¹¹ Yet, as partially described above and further below, some of those exchanges offer payment services for consumer goods and services – involving the use of those same wallets. And, in some scenarios, consumers may also elect to use those wallets for other consumer transfers as well.

Ensuring supervision of payment transfers by crypto wallet providers would complement securities regulators’ existing authorities over and oversight of crypto asset issuers and intermediaries involved in crypto asset investment and trading activities. As those regulators focus on investor protection and fair

⁸ PayPal. “Designed for Payments. 1 USD : 1 PYUSD on PayPal.” PayPal Stablecoin | US Dollar Cryptocurrency. Accessed January 5, 2024. <https://www.paypal.com/us/webapps/mpp/digital-wallet/manage-money/crypto/pyusd>.

⁹ Coinbase. “A New Standard in Global Crypto Payments: Coinbase Commerce.” Accessed January 5, 2024. <https://www.coinbase.com/commerce>.

¹⁰ Akolkar, Bhushan. “New Payments Protocol for Coinbase Commerce to Facilitate Instant Crypto Settlements.” *CoinGape* (blog), November 17, 2023. <https://coingape.com/new-payments-protocol-for-coinbase-commerce-to-facilitate-instant-crypto-settlements/>.

¹¹ The CFPB has proposed to exclude transfers that are excluded from the EFTA’s definition of “electronic fund transfer,” and one of the EFTA’s exclusions is for transfers to buy or sell a regulated security or commodity. However, crypto-assets that deny being securities or commodities and are not being actively regulated by the SEC or CFTC should not be allowed to take advantage of that exemption.

market regulation, the CFPB can, as appropriate, ensure there is additional supervision over the aspects of crypto markets involving consumer payments and services.

Finally, there is ample evidence to suggest that consumers would benefit from more supervision of crypto actors involved in payments and funds transfers. For example, several crypto firms that suffered losses or became insolvent during the 2022 crash in the crypto markets engaged in practices many believe were unfair, abusive, or deceptive.¹² Additionally, as the crash ensued, there were many reports of customers of these platforms facing challenges accessing or using the digital assets these platforms had retained custody of via their hosted wallets. It's possible that broader supervisory authority over platforms with similar customer relationships could provide consumers greater protection or redress going forward.

D. Consumers would benefit from CFPB supervisory authority over larger nonbank providers of correctional money transfers and release cards. Money-transfer services available in the carceral context and release cards serve broad functions and should qualify as “general use” under the rule.

i. Overview

We urge the CFPB to finalize a rule that would establish supervisory authority over larger nonbank providers of (1) correctional money-transfer services, on which incarcerated consumers must rely to access funds for necessities like food, clothing, medication, and communications (e.g., stamps, envelopes, and electronic messaging); and (2) prepaid cards for people leaving incarceration, known as “debit release cards” or “release cards,” which many people must use to access their own money upon release.

Consumers of correctional money transfers and release cards are particularly vulnerable to abuses, justifying CFPB supervisory authority. As the CFPB recognizes in the Supplementary Information to the Proposed Rule, in addition to the very largest providers of general-use digital consumer payment applications, “other providers play an important role in the marketplace,” because “more vulnerable consumers” may transact with these other providers.

Incarcerated people and the households who send funds to them are an important segment of “more vulnerable consumers.” Justice-involved consumers must often rely on abusive money-transfer services and release cards. As the CFPB explained in a January 2022 report, fairness and competition “seldom appear in the markets for products and services that capitalize off the criminal justice system, where firms may enter into exclusive relationships with government actors, rather than competing on the basis of consumer choices.”¹³ Additionally, incarcerated people have especially limited financial resources,¹⁴ and

¹² Federal Trade Commission. “FTC Reaches Settlement with Crypto Company Voyager Digital; Charges Former Executive with Falsely Claiming Consumers’ Deposits Were Insured by FDIC.” Federal Trade Commission, October 12, 2023. <https://www.ftc.gov/news-events/news/press-releases/2023/10/ftc-reaches-settlement-crypto-company-voyager-digital-charges-former-executive-falsely-claiming>.

¹³ Consumer Financial Protection Bureau. “Justice-Involved Individuals and the Consumer Financial Marketplace.” Data and Research Reports. Consumer Education and Empowerment, January 2022. https://files.consumerfinance.gov/f/documents/cfpb_jic_report_2022-01.pdf.

¹⁴ See Wendy Sawyer, Prison Policy Initiative, How Much Do Incarcerated People Earn in Each State? (2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/> (showing average hourly wages of 14¢ to 63¢ for typical prison jobs).

the financial cost of supporting incarcerated family members tends to fall disproportionately on low-income people of color and Black women in particular.¹⁵

The prospect of potential CFPB supervisory activity could incentivize larger participants to “allocate additional resources and attention to compliance with Federal consumer financial law,” including the Consumer Financial Protection Act (CFPA), thereby reducing harm to consumers. Likewise, an actual examination could reveal past or present noncompliance, which the CFPB could correct through supervisory activity or enforcement actions. Many vulnerable consumers would benefit if the CFPB exercises supervisory authority over larger nonbank providers of correctional money transfers and release cards.

Given that money transfer services available in the carceral context serve broad functions, they should qualify as general use. Release cards serve even broader functions. We urge the CFPB to adopt a definition of “general use” that includes transactions involving incarcerated and recently incarcerated people.

ii. Correctional money transfer services should qualify as “general use” under the rule and larger providers should be subject to CFPB supervision.

Sending money to someone in prison or jail typically requires dealing with a private corporation that handles money transfers.¹⁶ Today, people can send money to an incarcerated loved one through a corporation’s website or an application.

Incarcerated consumers can use funds transferred into their accounts for a wide range of purposes, including purchasing food, hygiene products, medicine, and medical supplies from the commissary; e-messages and other communications; and books, movies, and other media items for their tablets.

Money-transfer providers often win an exclusive contract with a particular correctional facility and then take unreasonable advantage of their status as consumers’ only option to extract outrageous fees. The Prison Policy Initiative (PPI), a non-profit, non-partisan organization, recently reviewed the money-transfer setups in all state prisons and found that money transfer-related fees are alarmingly high. The average is around 20% of the principal amount in 26 states that issue monopoly contracts; the highest fees observed were 37%.¹⁷

Certain larger money-transfer providers serving incarcerated people likely satisfy the proposed “test to define larger participants.” However, to the extent they do not, we urge the CFPB to alter any definitions necessary to promulgate a final rule subjecting these entities to supervision.

¹⁵ deVuono-powell, Saneta, Chris Schweidler, Alicia Walters, and Zohrabi. “Who Pays? The True Cost of Incarceration on Families.” Ella Baker Center for Human Rights, Forward Together, and Research Action Design, September 2015. <https://ellabakercenter.org/who-pays-the-true-cost-of-incarceration-on-families/>.

¹⁶ “The Prison Industry: How It Started, How It Works, How It Harms.” Worth Rises, December 2020. <https://static1.squarespace.com/static/58e127cb1b10e31ed45b20f4/t/621682209bb0457a2d6d5cfa/1645642294912/The+Prison+Industry+How+It+Started+How+It+Works+and+How+It+Harms+December+2020.pdf>.

¹⁷ Raher, Stephen, and Tiana Herring. “Show Me the Money: Tracking the Companies That Have a Lock on Sending Funds to Incarcerated People.” Prison Policy Initiative, November 9, 2021. <https://www.prisonpolicy.org/blog/2021/11/09/moneytransfers/>.

iii. Release cards should qualify as “general use” under the rule, and larger providers should be subject to CFPB supervision.

Correctional facilities have increasingly given released people their money in the form of a prepaid debit card. These “release cards” are digitally preloaded with people’s money. Often, people have no choice but to receive their money from a release-card company that has an exclusive contract with the correctional facility from which they are being released. Many companies take unreasonable advantage of consumers’ absence of choice to force them to pay outrageous fees to access their money.

When a person leaves incarceration, any unused funds in their accounts may revert to an unrestricted account, such as a release card. Release cards themselves also have “a wide range of purposes” because they can be used anywhere in the free world where debit cards can be used.

Some of the same large corporations that provide correctional money-transfer services also provide release cards. Given the prevalence of abusive practices and the vulnerability of the consumers who must use these products, the CFPB should ensure that larger nonbank release-card issuers, servicers, and program managers are subject to supervision under the final rule.

E. Supervision will protect consumers from unreasonable and potentially dangerous collection of their personal data.

Trust is not a realistic approach for this sector. Big Tech companies rely on data collection for their sustainability.¹⁸ The latest data point illustrating this concern is the discovery that Google had actually been tracking users of its Google “incognito” browser, even though the singular reason for using the service was to escape from data surveillance.¹⁹ The power these companies exert in the market and the pressure they can exert on consumers to accept their terms and conditions call for greater supervision.

Foundationally, these firms see human experience as raw material for advancing their economic interests. They collect personal information because their platforms permit it. To compete against their peers, they race to mine the data and exploit its contents in ways consumers would not expect. But without supervisory authority, the CFPB will have to trust these firms. If there are problems, the CFPB will know only because of information it can gather from other sources. That delay is unacceptable. If left as is, it will leave consumers vulnerable to harm.

i. Payment apps permit data sharing that blurs an important firewall between banking and commerce. Non-bank payment app companies have subsidiaries that engage in commercial activity.

Banking regulators have required clear firewalls between commercial and banking activities. Bank holding companies are prevented from owning commercial firms unless the commercial firm is a non-

¹⁸ Cyphers, Bennett. “Google Says It Doesn’t ‘Sell’ Your Data. Here’s How the Company Shares, Monetizes, and Exploits It.” Electronic Frontier Foundation, March 19, 2020. <https://www.eff.org/deeplinks/2020/03/google-says-it-doesnt-sell-your-data-heres-how-company-shares-monetizes-and>.

¹⁹ Reuters. “Google Agrees to Settle \$5bn Lawsuit Claiming It Secretly Tracked Users.” *The Guardian*, December 29, 2023, sec. Technology. <https://www.theguardian.com/technology/2023/dec/29/google-lawsuit-settlement-incognito-mode>.

bank financial services provider.²⁰ With the exception of the industrial loan company charter loophole, commercial firms are prohibited from owning banks.²¹ While it is true that large non-banks play central roles in facilitating payments, the entrenched depositories do not have broad-reaching data-hungry platforms.

Payment apps and digital wallet providers can use consumer information to create new financial products. For example, Apple analyzed payment activity in Apple Pay to help it build a new buy now pay later service. It launched the service earlier this year and has incorporated it inside its digital wallet platform.²² This gives payment app and digital wallet providers advantages that are not available to banks. For example, a bank would not be able to gather and analyze a consumer's payment activities at a different depository.

ii) Supervisory authority will allow the CFPB to monitor how payment apps and digital wallet providers use consumer financial data.

Big Tech firms monetize payment data when adding it to other information already in a consumer's profile. So, even if a Big Tech firm claims it does not sell payment data, it does so indirectly when it sells information that has been enhanced by appending payment information to it. With payment data, Big Tech firms can expand the totality of their knowledge about a consumer. Furthermore, the addition of payment data adds value to pre-existing non-payment data. Search engine firms will use this information to improve advertising, using consumer information to benefit data buyers. Platforms serving small businesses may use the information to determine suitability for other services, putting them at an advantage over other service providers.

Payment data includes (but is not limited to) transaction amounts, timing, vendor, location, and type of account. There are valuable pro-consumer uses for payment data, such as informing fraud analytics.²³ However, payment apps stand to use this information in ways that pit their interests against those of consumers and small businesses.²⁴

Financial institutions that are subject to supervision have oversight to ensure that they comply with data privacy laws and are not engaging in unfair, deceptive or abusive practices. Because of their experience complying with the Gramm-Leach-Bliley Act and Regulation P, UDAAP laws and other laws, and the oversight they receive, traditional financial institutions see data privacy differently. The CFPB, the Federal Reserve, and other federal regulators have held banks accountable for protecting data. As a result, traditional financial institutions approach data with caution.

²⁰ 12 U.S.C. 1843

²¹ Federal Deposit Insurance Corporation. "The FDIC's Supervision of Industrial Loan Companies: A Historical Perspective." Supervisory Insights, 2004.
<https://www.fdic.gov/regulations/examinations/supervisory/insights/sisum04/sisummer04-article1.pdf>.

²² Apple Newsroom. "Apple Introduces Apple Pay Later," March 28, 2023.
<https://www.apple.com/newsroom/2023/03/apple-introduces-apple-pay-later/>.

²³ JPMorgan Chase. "Payments Data for Fraud Detection." Artificial Intelligence Initiatives. Accessed December 19, 2023. <https://www.jpmorgan.com/technology/artificial-intelligence/initiatives/synthetic-data/payments-data-for-fraud-detection>.

²⁴ Gam, Boaz. "The Importance of Payments Data for Businesses." Payneteas, April 19, 2023.
<https://payneteas.com/blog/why-is-payments-data-the-key-to-understanding-your-customers>.

While big tech firms may be covered by the same laws, they do not have the same oversight to ensure compliance. The CFPB can address this inconsistency by ensuring that all larger companies that collect and use consumer data when consumers use their payment ecosystems have supervision to enforce the law and prevent unfair, deceptive and abusive practices. This includes preventing firms from taking “unreasonable advantage of the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service”²⁵ in areas where oligopolies and opaque practices prevent competition and consumer choice.

iv. Supervision of payment apps will address concerns over problems encountered by service members.

Servicemembers are disproportionately more likely to use a payment app compared to other consumers. A payment app provider is more likely to be the subject of a complaint from a service member. Approximately 1.5 percent of complaints to the CFPB related to a payment app, but among the complaints filed by service members, payment apps constituted 2.2 percent of all complaints. More than half of the relevant complaints involved fraud.

Servicemembers are vulnerable to identity theft or information collection that can facilitate fraud. FTC data shows they are more likely to have their personally identifiable information (PII) stolen.²⁶ According to a recent study, data brokers maintain and sell information about the finances of active-duty service members.²⁷ Vendors sell data files appending financial information to other data covering the political preferences, health conditions, religious beliefs, and families of service members. Such fulsome information facilitates targeted scams.²⁸

With supervisory authority, the CFPB can respond more quickly to emerging problems affecting servicemembers. While there is a narrow exclusion based on the Regulation E exception for closed-loop accounts used at military facilities, the CFPB should ensure that other uses of payment services by military personnel are covered and considered “general use,” even if a product is aimed at servicemembers.

II. Definition of consumer payment transaction

The CFPB proposes supervising the larger participants that provide “a covered payment functionality through a digital application for consumers’ general use in making a consumer payment transaction.”

²⁵ 12 U.S.C. 5531(d)(2)(B)

²⁶ Miller, Terri. “Military Families Combat Identity Theft amid Life Transitions.” Federal Trade Commission. *Consumer Alerts* (blog), July 25, 2022. <https://consumer.ftc.gov/consumer-alerts/2022/07/military-families-combat-identity-theft-amid-life-transitions>.

²⁷ Sherman, Justin, Hayley Barton, Aden Klein, Brady Kruse, and Anushka Srinivasan. “Data Brokers and the Sale of Data on U.S. Military Personnel,” November 2023. <https://techpolicy.sanford.duke.edu/wp-content/uploads/sites/4/2023/11/Sherman-et-al-2023-Data-Brokers-and-the-Sale-of-Data-on-US-Military-Personnel.pdf>.

²⁸ Sherman, Justin, Hayley Barton, Aden Klein, Brady Kruse, and Anushka Srinivasan. “Data Brokers and the Sale of Data on U.S. Military Personnel,” November 2023. <https://techpolicy.sanford.duke.edu/wp-content/uploads/sites/4/2023/11/Sherman-et-al-2023-Data-Brokers-and-the-Sale-of-Data-on-US-Military-Personnel.pdf>.

Proposed 1090.109(a)(1). “Consumer payment transactions” are defined as “the transfer of funds by or on behalf of a consumer physically located in a State to another person primarily for personal, family, or household purposes,” with certain exclusions. Proposed 1090.109(a)(2).

We generally support this definition, though we object to the exemptions for transfers that are not “electronic fund transfers” within the meaning of the EFTA and for transactions conducted by the provider of a marketplace.

A. *The CFPB appropriately recognizes that “funds” may extend beyond fiat commercial bank money.*

The market definition encompasses a “transfer of funds.” We agree with the CFPB that their authority over transfers of “funds” under the Consumer Financial Protection Act “is not limited to fiat currency or legal tender, and includes digital assets that have monetary value and are readily useable for financial purposes, including as a medium of exchange. Crypto-assets, sometimes referred to as virtual currency, are one such type of digital asset.”²⁹ In two well-reasoned decisions, the Southern District of New York has found that the term “funds” in the Electronic Fund Transfer Act encompasses crypto assets,³⁰ though another decision by that court found that crypto-assets were outside of the EFTA for a different reason, that decision was both wrongly decided and less relevant to this rulemaking.³¹ As a result, the term “funds in the Consumer Financial Protection Act (CFPA) should have a meaning as broad, if not broader than, the EFTA.

The CFPB should use its authority to address several concerns associated with customers’ use of crypto “funds,” such as:

i. *Transaction errors/fraud/disputes:*

The so-called immutable nature of blockchain-recorded transactions makes it, in theory, very difficult to reverse transactions on a blockchain once they’ve occurred. Yet, such transactions can be made in error or can be unauthorized - including those that have occurred because of hacks or software exploits occurring in conjunction with the underlying code of the chain itself. And, given the high incidence of scams, theft, and other predatory behavior in the crypto space where fraudulent or erroneous transactions are a key element of such schemes, it’s important that crypto firms provide consumers with robust and equivalent protections and prevent unfair, deceptive or abusive practices. Greater supervisory authority over crypto

²⁹ 88 Fed. Reg. at 80202 (footnote omitted).

³⁰ (Rider v. Uphold HQ (Feb. 2023; SDNY) & Nero v. Uphold HQ (Aug. 2023; SDNY)

³¹ The court found that transfers of crypto-assets were for investment purposes and therefore were not for personal, family or household purposes. Yuille v. Uphold HQ Inc., No. 22cv7453 (LJL), 2023 WL 5206888, *8 (S.D.N.Y. Aug. 11, 2023). However, the court ignored the fact that both the legislative history of the EFTA and the Official Commentary to the EFTA explicitly contemplate coverage of some types of accounts, like money market funds, that are used for investment purposes. See Nero v. Uphold HQ, -- F.Supp.3rd --, 2023 WL 5426203 (S.D.N.Y. Aug. 23, 2023). Moreover, as the CFPB is excluding from the market definition transfers that are linked to the consumer’s receipt of a different form of funds, the purchase or sale of crypto-assets for investment purposes appears to be outside of this rulemaking. But non-investment use of crypto-assets in person-to-person transfers, or to purchase goods or services, would be included.

firms or service providers involved in payments would help ensure these actors provide consumers with adequate means to dispute such fraudulent or erroneous transactions.

ii. Poor or inadequate Disclosures:

The crypto industry is famous for providing incomplete, vague, and/or copious disclosure documentation to crypto customers. These documents - sometimes known as white papers, other times more often resembling Terms of Service issuances - are generally not standardized, can contain clauses or exemptions that harm consumers, and are generally inadequate. Additionally, there are instances where crypto firms have failed to honor the terms of such agreements. Supervisory authority over crypto actors in the payment space could help ensure such disclosure and agreements are timely and clear, offer fair terms for consumers, and that the service providers in question are honoring the terms of such agreements in a consistent and timely manner.

B. The Definition of “General use” in § 1090.109(a)(2) is Appropriately Broad and Appropriately Includes Transfers to Correctional Services.

The CFPB has proposed supervising “general use” payment apps and digital wallets and excluding those services that fall outside of this definition from supervision. In broad terms, it excludes applications whose functionality is limited to pay for a specific service or to repay a specific debt. We support this broad definition.

People use payment apps to make a wide variety of payments. Some companies may cater to particular markets, but their payment transfer services can still be quite voluminous and are used to transfer funds between persons or to purchase or sell a wide variety of goods and services.

We also support the CFPB’s view that transfers related to correctional services are “general use.”

It also is important to interpret “general use” to encompass most payment services used by military personnel. While there is a narrow exclusion based on the Regulation E exception for closed-loop accounts used at military facilities, the CFPB should ensure that other uses of payment services by military personnel are covered and considered “general use,” even if a product is aimed at servicemembers.

C. Some electronic transfers that are not “electronic fund transfers” within the meaning of the EFTA should be included.

The Bureau has proposed to exclude transfers that are excluded from the EFTA’s definition of “electronic fund transfer” (EFT). We disagree with this exclusion.

Bank-to-bank wire transfers, for example, are not EFTs. Yet wire transfers are increasingly used in fraud schemes that steal billions of dollars from consumers each year. Although, today, those transfers are generally made by banks, nonbank applications that access the wire transfer system may emerge.

D. The CFPB should include transactions conducted by those operating marketplaces.

We are concerned by the intention to leave out consumer payment transactions conducted by the provider of an online marketplace within that marketplace. This exclusion would permit a large loophole. One of the leading wallets was built by one of the largest online marketplaces, and until it was spun off in 2015, it remained under the same ownership.³² Even now, one of the most common ways to pay on this marketplace is with its formerly proprietary wallet. In fact, consumers' adoption of digital wallets was initially driven by the ability to make purchases inside an online marketplace, and the profits of both were inextricably supported by the other.³³ These ecosystems have demonstrated their vulnerability to anti-competitive practices.³⁴ Even though a marketplace could offer a covered functionality inside its corporate ecosystem, its uses should fall under general use and be subject to supervision.

The CFPB should reverse its intention to omit consumer payment transactions made on the same entity's online marketplaces from supervision. It should bring more types of transactions in scope, including prepaid accounts, transfers of digital assets, and other related actions into supervision.

E. The CFPB should clarify whether earned wage advance transfers are excluded as credit.

The proposed definition of "consumer payment transaction" excludes extension of credit by the provider of the digital application. We do not object to this exclusion, but the CFPB should clarify how it applies to earned wage advances (EWAs).

EWA providers have claimed that they do not provide credit. We strongly disagree, and the CFPB also recently indicated that EWAs are likely covered by the Truth in Lending Act.³⁵ But if EWAs were not credit, then they would be payment transfers that should be covered by this rulemaking. The CFPB should specifically state that EWA disbursements are part of a credit transaction and therefore not within the scope of the market of funds transfers or digital wallets.

F. The Definitions Section Should be Broken Up into Subsections

The definitions section, proposed 1090.109(a)(2), is confusing, containing multiple definitions without each having its own section number, and many definitions having (A), (B), etc. subparts without an easy way to designate which (A) one is referring to. Each definition should have its own section number, i.e., 1090.109(a)(2), (a)(3), etc.

³² eBay Inc. "eBay Inc. Board Approves Completion of eBay and PayPal Separation," June 26, 2015.

<https://www.ebayinc.com/stories/news/ebay-inc-board-approves-completion-of-ebay-and-paypal-separation/>.

³³ Dembosky, April. "PayPal's Strength Drives Growth at Ebay." *Financial Times*, January 19, 2012.

<https://www.ft.com/content/cbf677f0-422d-11e1-9506-00144feab49a>.

³⁴ Federal Trade Commission. "FTC Sues Amazon for Illegally Maintaining Monopoly Power," September 26, 2023.

<https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-sues-amazon-illegally-maintaining-monopoly-power>.

³⁵ See Seth Frotman, General Counsel and Senior Advisor to the Director, Consumer Financial Protection Bureau, Comment on Proposed Rule Addressing "Income-Based Advances" and Related Charges (Nov. 27, 2023), https://files.consumerfinance.gov/f/documents/cfpb_comment-letter-to-dfpi-2023-11.pdf.

III. The CFPB should lower the threshold for larger participant status. § 1090.109(b)

The CFPB proposes to define a payment app or digital wallet provider as a larger participant for the purposes of supervision if it facilitates five million or more consumer payment transactions per year and is not a small business concern based on the standard set by the Small Business Administration. Furthermore, covered persons would remain larger participants for two years from the first day of the year when it met the threshold test.

By its estimates, the CFPB believes seventeen entities, representing 88 percent of the market, will be covered if the threshold is set at five million. While lowering the threshold to one million would expand supervision to two additional providers, it would not raise the percentage of covered transactions by even a single percentage point.

But even if the total coverage is only minimally affected, having a lower threshold will matter for consumers forced to use a particular provider. Incarcerated individuals are one example of a population group that cannot choose its provider. Payment app providers serving incarcerated individuals are smaller in scope and could possibly be excluded by a larger threshold, even though they have a dominant position in the market they serve.

The CFPB should specify that the threshold count applies across a company's lines of business and cannot be disaggregated by product line or subsidiary. The qualifying count of transactions should be all-encompassing. If a provider operates a digital wallet capable of facilitating a transfer of five kinds of stored value, its count will not be split among those five partnerships.

IV. The proposed scope should be broader to encompass more digital payment transfer activities.

- A. The rule should include prepaid accounts, non-bank banking apps, and domestic person-to-person transfers, even if they are not heavily accessed by digital applications.*

In proposed § 1090.109(a)(2), the CFPB defines two types of functionalities to be covered in the proposed market: “funds transfer functionalities” and “wallet functionalities,” and says that an entity would be covered if it participates in either area and meets the larger participant threshold.³⁶ If it narrowly defines the market, the CFPB will omit supervision in important payment markets that are not otherwise supervised.

The proposed rule could help close an important gap in the supervision of entities that provide payment services, extending supervision to larger nonbank companies that provide many of the same services that banks do but without oversight.

As a result, the CFPB should expand the market to include larger (1) prepaid account providers, (2) servicers or program managers of nonbank banking apps, and (3) domestic person-to-person transfers, even if the bulk of their transfers are made through cards or in person.

³⁶ § 1090.109(b).

i) Prepaid accounts.

The CFPB enacted the prepaid accounts rule that went into effect in 2019 in light of the growing importance of that market to consumers and the vulnerability of consumers who use prepaid accounts. Some providers of prepaid accounts will be captured by this rule: products like PayPal, Venmo, and Cash App, where transactions are primarily conducted through digital applications.

However, many, if not most, prepaid accounts will fall outside the larger participant rule – especially if PayPal succeeds in its litigation to excise digital wallets from the prepaid rule.³⁷ For the card-based prepaid accounts that were the focus of the prepaid rule, spending is primarily through a card (physical or digital). While many prepaid cards also have a digital application, the volume of transactions through that application may not be enough to meet the threshold for being a larger participant, even if the overall volume of transactions is high. Most prepaid cards are issued by smaller banks (under \$10 billion in assets) outside the CFPB’s supervision, and the nonbank program managers are not supervised by any federal regulator.

That could leave out significant companies such as NetSpend, which offers prepaid and demand deposit debit cards through payday loan stores and has a history of predatory practices,³⁸ like engaging in manipulation to evade the overdraft fee limits of the prepaid rule,³⁹ and has been subject to enforcement actions.⁴⁰ It is inconsistent for the prepaid account market to be important enough to enact a major rule, yet not important enough to supervise, despite a history of problems that supported the rule.

In addition, several banks have partnered with companies that operate digital assets, either stablecoin or crypto tokens, to create structures that facilitate real-time exchanges of digital assets for fiat inside a debit card.⁴¹ In these systems, consumers hold value in a digital asset up until the moment of the card swipe, but merchants receive fiat. The only way to adequately supervise these arrangements is to implement a broad definition of funds that includes fiat and non-fiat forms of value, as called for in the CFPB.

ii) Government benefit cards.

Ignoring card-based transactions could also leave out nonbank program managers of major government benefits cards. Government benefit card programs have recently been the subject of two major CFPB enforcement actions due to problems that left people unable to access their own money or obtain dispute resolution required under Regulation E.⁴²

Although those actions were against large banks, banks are leaving this market. For example, the California debit card used for unemployment insurance and disability payments is transitioning from Bank of America to the nonbank Money Network.⁴³ Money Network cards are issued by Pathward

³⁷ PayPal v. CFPB, 58 F.4th 1273 (D.C. Cir. 2023).

³⁸ National Consumer Law Center, [Payday Lender Prepaid Cards: Overdraft and Junk Fees Hit Cash-Strapped Families Coming and Going](#) (July 21, 2015).

³⁹ NCLC, Press Release, [NetSpend Plans Evasions of CFPB Prepaid Rules to Preserve \\$80 Million in Overdraft Fees](#) (Oct. 28, 2016).

⁴⁰ Federal Trade Commission, Press Release, [FTC Charges Prepaid Card Company Deceptively Marketed Reloadable Debit Card](#) (Nov. 10, 2016).

⁴¹ See “Coinbase Card.” Accessed January 8, 2024. <https://www.coinbase.com/card>.

⁴² CFPB, Press Release, [CFPB Orders U.S. Bank to Pay \\$21 Million for Illegal Conduct During COVID-19 Pandemic](#) (Dec. 19, 2023); CFPB, Press Release, [Federal Regulators Fine Bank of America \\$225 Million Over Botched Disbursement of State Unemployment Benefits at Height of Pandemic](#) (July 14, 2022).

⁴³ Calif. Employment Development Department, Press Release, [New partner announced for EDD electronic benefit payments](#) (Dec. 1, 2023).

Bank,⁴⁴ a smaller bank that has a history of working with NetSpend to enable overdraft fees on prepaid cards and its payday lender prepaid cards and is not supervised by the CFPB.

Consumers who receive government benefits are among the most vulnerable consumers – they have lost their jobs, become disabled, suffered a workplace injury, or faced divorce and are receiving child support. Any disruption in access to or handling their funds can be catastrophic.

Furthermore, the consumers who use EBT cards to receive needs-based benefits like Temporary Assistance to Needy Families are the most vulnerable. They have the lowest incomes and the fewest protections, as most needs-based EBT cards are exempt from the EFTA. However, problems with unauthorized transfers and other issues have been significant.⁴⁵ While EBT cards are exempt from the EFTA, they are not exempt from the CFPB’s jurisdiction or from the Consumer Financial Protection Act’s prohibition on unfair, deceptive, or abusive practices. The nonbanks handling this market should be supervised even if most transactions happen through a card rather than an app.

iii) Nonbank banking apps.

The same vulnerability applies to consumers who hold “bank accounts” through nonbank banking apps managed by companies like Chime, Current, Aspiration, Dave, and Money Lion. These tend to be low-income consumers targeted for being unbanked, often receiving sign-up pitches focused on “fee-free” or “interest-free” overdrafts or cash advances that turn out not to be free.⁴⁶ The banks that issue these cards are typically small banks outside the CFPB’s jurisdiction,⁴⁷ and the nonbank program managers and servicers have no federal supervision. These companies, too, have faced problems⁴⁸ leading to an enforcement action.⁴⁹

Some of these companies may have enough transfers through digital applications under the proposed rule to be considered larger participants. But, other than credit transactions, also excluded from this rulemaking, it would seem that the bulk of consumer payment transactions would not go through the apps but rather through the use of a physical debit card. It is odd to have a measuring stick that measures only some of the transactions of these companies while excluding others.

The laws that apply and the problems that consumers face from companies handling their money are no different when they access their funds through a card rather than a digital application. The importance of supervision is the same. For example, there is no reason to think that the widespread EFTA violations

⁴⁴ See <https://www.moneynetwork.com/>.

⁴⁵ See U.S. Department of Agriculture, [SNAP EBT Card Skimming Scam Alert](#) (Oct. 19, 2022).

NCLC et al., Consumer Comments to the CFPB Regarding Junk Fees Imposed by Providers of Consumer Financial Products or Services (May 2, 2022), <https://www.nclc.org/resources/consumer-comments-cfpb-junk-fees-imposed-by-providers-of-consumer-financial-products-or-services/>.

⁴⁷ Consumer Financial Protection Bureau. “Institutions Subject to CFPB Supervisory Authority.” Consumer Financial Protection Bureau. Accessed January 4, 2024. <https://www.consumerfinance.gov/compliance/supervision-examinations/institutions/>.

⁴⁸ Kessler, Carson. “A Banking App Has Been Suddenly Closing Accounts, Sometimes Not Returning Customers’ Money.” ProPublica, July 6, 2021. <https://www.propublica.org/article/chime>.

⁴⁹ Smith, Mary Ann, Daniel P. O’Donnell, and Paul Yee. “Settlement Agreement with Chime Financial.” Settlement Agreement. State of California Department of Financial Protection and Innovation, April 4, 2021. <https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/04/Admin.-Action-Chime-Financial-Inc.-Settlement-Agreement.pdf>.

examiners have found at banks⁵⁰ are not occurring in an equal or even greater number at the nonbank program managers and servicers that handle card-based prepaid accounts and nonbank banking apps. All larger nonbank companies that handle consumer payments should be supervised.

As the CFPB has stepped up its enforcement of unfair, deceptive, or abusive practices involving overdraft fees and non-sufficient funds fees,⁵¹ and prepares a new rule on these topics, it will also be important to ensure that the nonbank companies that increasingly offer “bank accounts” to vulnerable consumers are supervised.

iv) Domestic person-to-person transfers.

We also believe that all domestic person-to-person money transfers should be counted, even if they happen in person. While the larger participant rule for the remittances market covers international money transfers, many money transfers are made domestically. It may be that the larger companies engaged in domestic money transfers are the same ones doing international transfers and that all their activities are being supervised. But if not, the entire market should be covered.

In addition, it is noteworthy that money transmitters are increasingly offering apps and online websites where consumers can initiate domestic money transfers instead of walking into a store. The CFPB should ensure that the proposed rule covers those apps and websites.

B. The CFPB’s Supervision Should Encompass All Transfers and Other Activities, Not Just Digital Transactions

Relatedly, we also urge the CFPB to ensure that its supervision program for the payments market encompasses the entirety of the accounts and payments these companies handle, not only the transactions through digital applications. As discussed above, many transactions will go through cards rather than applications. In addition, some problems, such as account freezes and inability to access funds, are not directly about a payment transaction.

We recognize that once a company is within the CFPB’s supervision, the CFPB has the authority to supervise all the consumer financial products and services it offers. However, it is unclear if the examination manual will only focus on the market as defined in the larger participant rule, while other activities are left unsupervised unless they happen to catch an examiner’s eye.

For this reason, it is important to define the market to include holding an account with consumer funds, not merely the digital application transaction.

Conclusion

We appreciate the opportunity to comment on this proposal. The CFPB should move forward swiftly to implement supervision of payment apps and digital wallets and should expand the proposed rule to encompass other digital payments accessed through cards, in person, and other means.

⁵⁰ See, e.g., CFPB, Supervisory Highlights at 7 (Summer 2022); Federal Reserve System, Consumer Compliance Outlook, [Error Resolution and Liability Limitations Under Regulations E and Z: Regulatory Requirements, Common Violations, and Sound Practices](#) (2d Issue 2021); Consumer Financial Protection Bureau, [Supervisory highlights](#) at 15 (Summer 2021) (stating that the CFPB has regularly found violations); Consumer Fin. Prot. Bureau, Supervisory Highlights at 10 (Fall 2014).

⁵¹ CFPB, [Supervisory Highlights: Junk Fees Update Special Edition](#), Issue 31 (Fall 2023).

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Sincerely,

Consumer Federation of America

National Consumer Law Center, on behalf of its low-income clients

Americans for Financial Reform Education Fund

Consumer Reports

National Consumers League