

ALERTS

CFPB Proposes Rule Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications

November 16, 2023

On Nov. 7, 2023, the Consumer Financial Protection Bureau (“CFPB”) issued a proposed rule (“Proposed Rule”) which would establish the CFPB’s supervisory authority over nonbank covered persons that are larger participants in the market for general-use digital consumer payment applications.[1] Covered persons would be subject to supervision for compliance with federal consumer financial laws, such as the Consumer Financial Protection Act and its prohibition against unfair, deceptive and abusive acts or practices, the privacy provisions of the Gramm-Leach-Bliley Act and Regulation P, and the Electronic Fund Transfer Act and Regulation E.[2]

The issuance of this Proposed Rule is the CFPB’s latest effort to supervise nonbank providers of consumer financial products and services and is targeted at certain popular consumer payment applications, like Apple Pay, Google Pay and Venmo. While some providers captured by the Proposed Rule may already be subject to supervision by the CFPB for other products and services, like international remittance transfer services, the Proposed Rule would bring certain payments companies not otherwise subject to CFPB supervision directly under its examination and supervisory authority. The Proposed Rule would be the sixth in a series of CFPB rulemakings to define larger participants operating in markets for consumer financial products and services.[3]

Key Terms

“Market” Definition. The Proposed Rule would define a market for consumer financial products or services as providing a *covered payment functionality* through a digital application for consumers’ *general use* in making *consumer payment transactions*.^[4]

“Covered Payment Functionality” Definition. The Proposed Rule would cover two types of payment functionalities: funds transfer functionality and wallet functionality. The Proposed Rule clarifies that a nonbank’s level of involvement in the market would not be based on which covered payment functionality is used. Rather, the CFPB would base it on the annual covered payment transaction volume.^[5] The Proposed Rule would treat the two payment functionalities as a single market for general-use digital consumer payment applications because these two payment functionalities serve the same common purpose for consumers.^[6]

The Proposed Rule would define funds transfer functionality as receiving funds for the purpose of transmitting them, or accepting and transmitting payment instructions.^[7] These types of transactions are often referred to as peer-to-peer or P2P transfers. A wallet functionality would include a product or service that stores account or payment credentials, and transmits, routes or processes stored account or payment credentials to facilitate a consumer payment.^[8]

“General Use” Definition. The Proposed Rule would define general use as digital applications without significant limitations on the purpose of consumer payment transactions facilitated by the covered payment functionality. The Proposed Rule would seek to confine the market to digital payment applications that consumers can use for a wide range of purposes.^[9] The Proposed Rule notes that a general use digital application allows consumers to complete broad functions, such as sending funds to friends and family, buying a wide range of goods and services at different stores, or both.^[10] The Proposed Rule explains the term general use will even apply to digital applications that have a fixed universe of potential recipients. Under the Proposed Rule, general use includes digital applications that allow consumers to transfer funds to friends or family in jail because the recipient can use the funds for a variety of purposes, such as purchasing food, toiletries, medical supplies or phone credits.^[11] The Proposed Rule excludes from the general use definition digital applications solely to purchase or lease a specific type of service, good or other property, such as: transportation, lodging, food, an automobile, real property, or consumer financial products and services.

[12] The Proposed Rule also excludes accounts that are expressly excluded from the definition of “prepaid account” as defined in Regulation E, such as tax-advantaged health medical spending accounts and gift cards,[13] applications to pay a specific debt or type of debt, and applications for bill splitting. [14]

“Consumer Payment Transactions” Definition. The Proposed Rule would define covered payment transaction to mean the transfer of funds on behalf of a consumer physically located in a state to another person primarily for personal, family or household purposes.[15] Consumer payment transactions encompass consumer funds transfers and transfers made by extending consumer credit as a part of a consumer credit transaction.[16] For purposes of the Proposed Rule, funds would include crypto-assets that “can be easily purchased in exchange for ordinary currency, acts as a denominator of value, and is used to conduct financial transactions.”[17]

In addition, the transfer of funds must be made to another person besides the consumer, such as another consumer or business.[18] This component of the Proposed Rule would exclude transfers between a “consumer’s own deposit accounts, transfers between a consumer deposit account and the same consumer’s stored value account held at another financial institution.”[19] The consumer must also be physically located in a State at the time of the payment transaction. Thus, the proposed market definition does not include payments initiated by a consumer physically located in a foreign country.[20]

The Proposed Rule clarifies the scope of the proposed market by exempting the following types of transactions: (i) an international money transfer; (ii) a transfer of funds that is either (a) linked to the consumer’s receipt of a different form of funds, such as a currency exchange transaction, or (b) excluded from the definition of “electronic fund transfer”; (iii) a payment transaction for the sale or lease of goods or services that a consumer selected from an online or physical store or marketplace; and (iv) an extension of consumer credit made using a digital application.[21]

The Proposed Rule notes the online marketplace exclusion in subparagraph (iii) is “descriptive of the narrow role that many merchants play in processing consumer payments or financial data.”[22] Notably, the online marketplace exclusion does not apply if a merchant or online marketplace uses consumer financial data for any purpose other than

initiating a payments transaction, such as data monetization, targeted marketing or research purposes.[23] The online marketplace exclusion also does not apply “if an online marketplace operator’s digital consumer application processes payments or other financial data associated with the consumer’s purchase of goods or services at unaffiliated online or physical stores or third-party goods or services on the operator’s online marketplace.”[24] Since many online marketplaces sell third-party goods or services, clarification appears necessary to ensure that the online marketplace exclusion is properly tailored and available to e-commerce marketplace operators with third-party sellers.

Larger Participants Test. The Proposed Rule would establish a two-part test to determine whether a nonbank covered person is a larger participant in the market for general-use digital consumer payment applications. The nonbank covered person and its affiliated companies must: (1) provide covered consumer payment transactions of at least five million transactions in the preceding calendar year by providing general-use digital consumer payment applications, and (2) during the preceding calendar year, the nonbank covered person was not a small business concern.[25] A nonbank covered person would be a small business concern if its size were at or below the standard for its primary industry as defined by the Small Business Administration.[26] As prescribed by existing regulation, nonbank covered persons that qualify as a larger participant would remain a larger participant until two years from the first day of the tax year in which the person last met the larger-participant test. [27]

Persons interested in submitting a comment to address the Proposed Rule must submit the comment on or before Jan. 8, 2024, or 30 days after publication of the Proposed Rule in the *Federal Register*, whichever is later.

Schulte Roth & Zabel's lawyers are available to assist you in preparing a comment or addressing any questions you may have regarding these developments. Please contact the Schulte Roth & Zabel lawyer with whom you usually work, or any of the following attorneys:

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[1] Available here.

[2] Proposed Rule at 14-15.

[3] The CFPB issued 12 CFR § 1090.104 regarding the consumer reporting market; 12 CFR § 1090.105 regarding the consumer debt collection market; 12 CFR § 1090.106 regarding the student loan servicing market; 12 CFR § 1090.107 regarding the international money transfer market; and 12 CFR § 1090.108 regarding the automobile financing market.

[4] Proposed Rule at 15.

[5] *Id.* at 27.

[6] *Id.*

[7] *Id.* at 28.

[8] *Id.* at 29.

[9] *Id.* at 34.

[10] *Id.*

[11] *Id.* at 35-36

[12] *Id.* at 68.

[13] 12 CFR 1005.2(b)(3)(ii).

[14] *Id.* at 68.

[15] *Id.* at 16.

[16] *Id.* at 18.

[17] *Id.* at 18-19.

[18] *See, e.g.*, Proposed Rule at 20.

[19] *Id.* at 20.

[20] *Id.*

[21] *Id.* at 17.

[22] *Id.* at 25.

[23] *Id.*

[24] *Id.* at 26.

[25] *Id.* at 68-67.

[26] *Id.* at 43; The Small Business Administration establishes size standards by considering “economic characteristics comprising the structure of an industry, including degree of competition, average firm size, start-up costs and entry barriers, and distribution of firms by size.” 13 CFR 121.102.

[27] Proposed Rule at 8; *see also* 12 CFR 1090.102.

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