



February 6, 2024

Information Technology and Innovation Foundation  
700 K Street NW  
Washington, DC  
20001

Consumer Financial Protection Bureau  
1700 G Street NW  
Washington, DC  
20552

Re: Defining Larger Participants of a Market for General-Use Digital Consumer Payment

Dear Mr. Young,

On behalf of the Center for Data Innovation ([datainnovation.org](http://datainnovation.org)), I am pleased to submit this response to the Consumer Financial Protection Bureau's (CFPB) proposed rule on subjecting large non-bank participants in the general-use digital consumer payment application industry to CFPB supervision.<sup>1</sup> The CFPB has the authority to supervise non-bank financial services to protect consumers from financial harm. Historically, the CFPB has used this authority to oversee industries with evidence of consumer harms, like the student loan lending industry, the auto lending industry, and the debt collection industry.

The Center for Data Innovation studies the intersection of data, technology, and public policy. The Center formulates and promotes pragmatic public policies designed to maximize the benefits of data-driven innovation in the public and private sectors. It educates policymakers and the public about the opportunities and challenges associated with data, as well as technology trends such as open data, artificial intelligence, and the Internet of Things. The Center is part of the Information Technology and Innovation Foundation (ITIF), a nonprofit, nonpartisan think tank.

The Center commends the CFPB for recognizing innovation and technology's role in advancing digital consumer financial products. However, the proposed regulation's broad scope will limit

---

<sup>1</sup> 88 Fed. Reg. 80197



the ability of non-bank firms to continue offering innovative products and services. The rule covers several different types of consumer products, including peer-to-peer payment applications, stored-value wallets, pass-through wallets, neo-banks, cryptocurrency exchanges, and money transfer providers.<sup>2</sup> The proposed rule puts these products into a single regulatory process, despite their different uses, different customers, and different potential consumer harms. To prevent limiting consumer access to consumer payment applications and stymying innovation in the digital payments industry, the CFPB should alter the rulemaking to treat each listed product as an individual market. Specifically, the CFPB should:

- Conduct a consumer harm risk assessment for each product type and publicize findings. The Bureau should investigate and enumerate the potential risk to consumers in collaboration with the Federal Trade Commission to understand the need for oversight of each consumer financial product.
- Redefine “large participant.” The CFPB's definition of “large participants” in the proposed rule is based on a \$5 million transaction threshold, potentially encompassing nearly every firm in the market. The CFPB should provide a more detailed justification for this threshold and consider a tailored approach for different products and providers.
- Tailor rulemaking to each product type, instead of creating a single rule for all consumer products within the payment application industry. Currently, the draft rule encompasses products with different consumer uses. Historically, the CFPB has adopted tailored rules for different markets and product providers. The CFPB should continue this approach to effectively supervise each distinct product by undertaking individual rulemakings for each type of product included in the current proposed rule.
- Remove language that nullifies the retailer carve-out for financial service data storage and usage in the Consumer Financial Protection Act. The proposed rule may nullify a statutory carve-out for retailers offering financial services during checkout. This could lead to retailers avoiding data usage to escape CFPB supervision, potentially harming consumer benefits like anti-fraud technologies and targeted advertising.

Please find the complete comments below.

Sincerely,

Becca Trate

---

<sup>2</sup> Ibid.



Policy Analyst  
ITIF's Center for Data Innovation

### CFPB Authority and Evidence of Consumer Harm

The CFPB has the authority to supervise non-bank financial services and define new markets for oversight. The CFPB historically has used this authority to define and supervise markets with evidence of consumer harm, such as in the student loan lending industry, auto lending industry, and debt collection industry.<sup>3</sup> The CFPB is now using this authority to define a new market of digital wallet providers (or what it refers to as “providers of funds transfer and wallet functionalities through digital applications for consumers’ general use in making payments to other persons for personal, family, or household purposes.”)<sup>4</sup>

The CFPB’s market definition for digital wallet providers is incredibly vast. Within it, covered applications include: peer-to-peer payment applications, such as Venmo or Zelle; stored-value wallets, such as PayPal, that allow consumers to load funds onto a stored-value card for use at multiple merchants; pass-through wallets, like Apple Pay or Google Pay, that store a user’s payment card details and security information and allow for digital payment; cryptocurrency and digital asset providers; neo-banks, or fully online financial technology firms; and money transfer providers, like Western Union.<sup>5</sup> Consumers interact with these products differently and rely on them for different purposes, and each presents different potential consumer harms.

Not only is the market definition broad, but the Bureau has not enumerated consumer harm for the proposed market. Before continuing with rulemaking, the CFPB should investigate and enumerate instances of consumer harm presented by each type of product in the market, as well as their prevalence. It should collaborate with the Federal Trade Commission (FTC) to explore reported instances of consumer fraud, and include that data in the public-facing rule. For example, as of September 2023, consumers reported 48,000 instances of peer-to-peer payment fraud to the FTC.<sup>6</sup> Data such as this quantifies the potential consumer risk caused by each type of product and will guide the CFPB as it crafts the rule. Enumerating the harm will also allow businesses to provide context and underscore how they address consumer risks in comments to the CFPB and inform consumers about the rule’s intention. If the Bureau finds that

---

<sup>3</sup> 78 Fed. Reg. 73383

<sup>4</sup> 88 Fed. Reg. 80197

<sup>5</sup> Ibid.

<sup>6</sup> FTC Consumer Sentinel Network, “Fraud Reports – Payment & Contact Methods,” Federal Trade Commission, October 30, 2023,

[www.public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/FraudLosses](http://www.public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/FraudLosses).



particular types of applications account for the vast majority of consumer harm or threats to consumers, it should undertake a specific rulemaking that targets the areas with evidence of consumer harm instead of an overarching rulemaking for all the different types of digital wallet providers.

### Redefining "Large Participant" in the Proposed Rule

The proposed rule defines "large participants" as any provider that meets a \$5 million transaction threshold.<sup>7</sup> This broad criterion potentially includes almost every firm in the market, which seems excessive since the CFPB intends only to capture "large" participants in the marketplace. Under this definition, even the smallest participants in a market would be subjected to additional rules. This increases the cost of compliance for new firms to enter the market.

The CFPB has previously used a relatively low threshold when defining "large participants" in a market. For example, the CFPB justified using a low threshold in the auto lending LPR by noting that "some entities that meet this threshold will have considerably less than one percent market share, but that is due in large part to the fragmentation of the market and does not change the fact they are 'larger' than the vast majority of market participants."<sup>8</sup> However, in the proposed rulemaking, the CFPB provides no evidence or justification for why the threshold sits at \$5 million in transactions. The CFPB should offer more comprehensive information and justification for this threshold to ensure it accurately targets only true "large participants" in the market, and should transparently communicate the reasoning and data used to determine the threshold to businesses and the public. This clarity will enhance understanding of the rule's implications, assist businesses in determining their compliance obligations, and facilitate more informed commentary on the proposed rule.

The CFPB should also consider creating different thresholds for different products. For example, in 2022, the total global market size of neo-banks was \$66.8 billion and Chime, the largest neo-bank in the United States, had 14.5 million users.<sup>9</sup> For neo-banks, it would make sense to have a lower threshold because the number of users, and the total number of transactions, will be

---

<sup>7</sup> 88 Fed. Reg. 80197

<sup>8</sup> 80 Fed. Reg 37496

<sup>9</sup> Statista, "Market size of neo-banks from 2021 to 2023, with a forecast for 2030," [www.statista.com/statistics/1228241/neobanks-global-market-size/](https://www.statista.com/statistics/1228241/neobanks-global-market-size/) and Ron Shevlin, "2022 Online Bank Ranking: Chime At The Top, Current Coming on Strong," *Forbes*, May 16, 2022, [www.forbes.com/sites/ronshevlin/2022/05/16/2022-online-bank-ranking-chime-at-the-top-current-coming-on-strong/?sh=161402091573](https://www.forbes.com/sites/ronshevlin/2022/05/16/2022-online-bank-ranking-chime-at-the-top-current-coming-on-strong/?sh=161402091573).



lower. However, compare that to peer-to-peer payment service providers. In 2022, Zelle transacted \$649 billion with an estimated 61.1 million users, Venmo transacted \$244 billion with an estimated 77.7 million users, and Cash App (owned by Square) transacted \$186.4 billion with 47.8 million users.<sup>10</sup> The transaction total to determine a large participant in peer-to-peer services should be proportionally greater, to reflect the users and total value of transactions. It does not make sense to use a unified threshold to determine “large participants” for these two products because the total number of transactions and the number of users for these products are so different. The threshold to determine a “large participant” should reflect what is a large service provider for that product.

### Tailored Approaches for Each Type of Application

The draft rule encompasses a variety of consumer financial products. While all these products fall under the umbrella of consumer financial products, they exhibit significant differences. For instance, peer-to-peer payment apps facilitate direct monetary transfers between individuals and often function like a stored-value wallet. In contrast, passthrough wallets, though digital financial products, do not support direct transfers between individuals. Instead, they enable third-party payment processing without holding any stored value.

The CFPB is entering a new realm by adopting a uniform rulemaking approach for diverse products. Historically, the CFPB has emphasized the importance of tailored strategies in rulemaking. The Bureau’s final rule on larger participants in the student loan servicing market is a case in point, where it acknowledges the necessity of distinct treatment for varied markets:

The tailored approach is essential given the considerable differences across the markets we have examined so far (consumer reporting, consumer debt collection, and student loan servicing). These differences range from the nature of the firms’ operations, their interaction with consumers, market structures, to the relevant Federal consumer financial laws, and how annual receipts relate to consumer interactions in each market.<sup>11</sup>

---

<sup>10</sup> Statista, “Value of payments process (TPV – Total Payment Value) of Venmo from 1<sup>st</sup> quarter 2017 to third quarter 2023”, [www.statista.com/statistics/763617/venmo-total-payment-volume/](https://www.statista.com/statistics/763617/venmo-total-payment-volume/); David Curry, “Cash App Revenue and Usage Statistics,” *Business of Apps*, January 17, 2024, [www.businessofapps.com/data/cash-app-statistics/](https://www.businessofapps.com/data/cash-app-statistics/); and Andriana Nunez, “Zelle carries momentum thanks to network and capability expansions,” *Insider Intelligence*, September 9, 2022, [www.insiderintelligence.com/content/zelle-carries-momentum-thanks-network-capability-expansions](https://www.insiderintelligence.com/content/zelle-carries-momentum-thanks-network-capability-expansions).

<sup>11</sup> 78 Fed. Reg. 73383



More recently, the last large participant rule focused narrowly on international money transfers between individuals.<sup>12</sup> The market encapsulated in this rule was unified by a single purpose, and while unique, each participant served the same function. However, the providers under the proposed rule lack a cohesive consumer purpose. Each has its unique function and consumer interaction model, like in student loan servicing. Implementing a single, all-encompassing rule to govern these diverse providers could result in regulatory overreach and potentially hinder innovation in the digital consumer financial products industry.

In order to correct this, the CFPB should continue its history of tailored approaches to address the various types of providers in the market by doing an individual rulemaking for each type of provider. Creating unique rules for each type of provider allows the rule to specifically and effectively address the consumer harm at the center of the regulation. It also will assist businesses in ensuring compliance and understanding their legal obligation in regard to consumer financial products. Finally, tailored rulemaking will help to promote innovation by highlighting consumer risks, identifying gaps in the market, and providing regulatory clarity.

### Potential for Overreach of the Consumer Financial Protection Act

The Consumer Financial Protection Act (CFPA) includes two carveouts to clarify that the Bureau does not have authority over retailers insofar as retailers offer financial services as part of the checkout process. In the definitions section, the statute carves out these services from the definition of consumer financial product or service because retailers facilitate the sale of non-financial goods and services.<sup>13</sup> However, the proposed rule essentially nullifies this carve-out, creating a scenario in which all retailers would be subject to the supervisory authority of the rule.

The proposed rule states that "...a narrow exclusion for financial data processing in the context of the direct sale of nonfinancial goods or services applies. That exclusion would *not apply* if a merchant or online marketplace's digital consumer application stores, transmits, or otherwise processes payments or financial data for any purpose other than initiating a payments transaction by the consumer to pay the merchant or online marketplace operator for the purchase of a nonfinancial good or service... Other purposes beyond payments for direct sales could include using or sharing such data for targeted marketing, data monetization, or research purposes."<sup>14</sup> This would nullify the carve-out for essentially all retailers and merchants, as the

---

<sup>12</sup> Consumer Financial Protection Bureau, "Defining Larger Participants of the International Money Transfer Market," September 2014, [www.consumerfinance.gov/rules-policy/final-rules/defining-larger-participants-international-money-transfer-market/](http://www.consumerfinance.gov/rules-policy/final-rules/defining-larger-participants-international-money-transfer-market/).

<sup>13</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5581

<sup>14</sup> 88 Fed. Reg. 80197



majority of consumer goods brands and retailers engage in some data usage.<sup>15</sup> For example, most grocery store chains use purchase history to provide personalized coupons, and e-commerce retailers use purchase and return history to solicit product reviews. These uses nullify the carve-out written in the (CFPA) since they require data storage and usage for reasons unrelated to payment processing.

In order to make the rule effective, the Bureau should remove language that nullifies the carve-out. In addition to demonstrating a significant overreach of the specific exclusion for retailers, this language discourages the use of retailer data and incentivizes retailers to abandon their data in order to avoid falling under the supervisory authority of the CFPB. Retail data provides significant consumer benefits. It is used to train anti-fraud technologies, target advertising, and offer coupons and other benefits to consumers.<sup>16</sup> Losing access to these data would ultimately harm consumers by reducing their access and engagement with the market.

---

<sup>15</sup> Kohavi, R., Mason, L., Parekh, R. et al. Lessons and Challenges from Mining Retail E-Commerce Data. *Machine Learning* 57, 83–113 (2004). <https://doi.org/10.1023/>  
<sup>16</sup> Ibid.