

Re: Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications, CFPB-2023-0053/RIN 3170-AB17

January 7, 2024

NetChoice is a trade association of leading internet businesses that promotes the value, convenience, and choice internet business models provide to American consumers.

NetChoice has worked for over two decades to make the internet safe for free enterprise and free expression. We also work to promote the integrity and availability of the internet on a global stage and are engaged on issues in the states, in Washington, D.C., and in international internet governance organizations.

Overreach of CFPB and Violation of Major Questions Doctrine & The Focus of the CFPB

As stated in the Notice of Proposed Rulemaking “The Consumer Financial Protection Bureau (CFPB) proposes a rule to define a market for general-use digital consumer payment applications. The proposed market would cover 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.

Larger participants of this market would be subject to the CFPB’s supervisory authority under the Consumer Financial Protection Act (CFPA).” This aggressive expansion of CFPB’s reach and authority is troubling in a number of ways, not least is that Congress has not acted, and the expansion of power would cause increasing friction in the flow of capital

and commerce by introducing massive regulations where none before were ever contemplated or necessary.

The CFPB's own documents show it's limited authority - which the proposed rules then violate

According to the Bureau's own website, the "Consumer Financial Protection Bureau, a U.S. government agency dedicated to making sure you are treated fairly by banks, lenders and other financial institutions" makes quite clear the scope of its believed authority."

USA.gov describes the Bureau this way, "The Consumer Financial Protection Bureau helps consumers by providing educational materials and accepting complaints. It supervises banks, lenders, and large non-bank entities, such as credit reporting agencies and debt collection companies. The Bureau also works to make credit card, mortgage, and other loan disclosures clearer, so consumers can understand their rights and responsibilities."

Further, the Bureau details its reach on its website, "We have supervisory authority over banks, thrifts, and credit unions with assets over \$10 billion, as well as their affiliates. In addition, we have supervisory authority over nonbank mortgage originators and servicers, payday lenders, and private student lenders of all sizes."

The license of the organization is completely clear, and importantly for this discussion, in no way includes payment apps or digital wallets or other means of merely transferring financial assets from one place to another or as a place to hold those assets momentarily. The clear mission of the CFPB is oversight of, in layman's terms, financial organizations.

Expansion of Power and Discriminatory Treatment as Proposed Rules Vastly Expand CFPB's Authority

The proposed rule then would vastly expand that authority and mission, effectively grabbing new authority, into what one might refer to as financial-adjacent industries. But even that characterization is generous. In addition, it seems that the CFPB would ascribe some special status to electronic items that were created as a digital expression of common items in our lives.

The rules would bring “digital wallets” under the purview of the CFPB. How silly would it seem if the rules were not discriminatory and included leather wallets or cloth handbags? Would we even be discussing rules to have the CFPB ride herd over how we choose to transfer money? Does anyone believe we should invite the CFPB to have governance over the act of handing someone a \$20 or sending a gift card for a child’s birthday?

To be clear, these are apt comparisons given that the underlying financial element is already under the watch and regulatory control of the CFPB. For example, a digital wallet may “hold” a credit card and a debit card. What need does the government have to control the digital wallet when it already has control over the issuing banks of those cards?

These analogies highlight the vast difference between online transactions and banks, between storing money electronically in a “wallet” and acquiring a mortgage. These simple questions also highlight the basic discriminatory aspect of this proposal - while the government would hopefully never consider such an intrusion into the physical world, it has no such hesitation to run riot in the digital world.

Simply put, the CFPB's proposed rule to regulate non-bank digital wallet and payment app providers is a substantial expansion of its regulatory authority that raises new and novel concerns.

Undertaking a Major Question Without Congressional Direction - Violating the Major Questions Doctrine

Lacking clear Congressional intent is not license for CFPB, or any other agency, to simply fill in the gaps. When the issue being addressed is a “major question,” that is a question of major political or economic significance, the agency is discouraged by the major questions doctrine from expansive interpretations of regulatory authority. And certainly, the agency is not granted powers to simply dream up a preferred regulatory regime, implement and enforce it. Instead, clear congressional authorization for significant policy decisions by federal agencies is required, and regardless, clearly desirable in a representative democracy.

In the Director’s own words, “Payment systems are critical infrastructure for our economy.”¹ In our governmental system such questions are squarely in the purview of Congress, particularly if the subject is so critical as to be considered critical infrastructure, most often by legislating specifically or occasionally empowering agencies via legislation to propose rules in new areas.

So, if this radical expansion is warranted, then certainly Congress should be involved in laying out the justification for the new reach and provide direction for such a major question of public policy. The very justification, as a required predicate, provided by the Bureau for a massive expansion of its own authority demonstrates just how major a question the Bureau is tackling without Congressional direction.

This move into a largely unregulated domain, traditionally overseen by market dynamics and tech innovation and enforced by consumer choice rather than financial regulators, exceeds the scope of authority granted by Congress. Reaching nearly one trillion dollars this year, the vibrant ecommerce marketplace has continued to grow and play an important role in a consumer’s life. This reality has developed not least because ecommerce has not been burdened with overbroad and overaggressive regulation designed to empower bureaucracy rather than people. This proposed rule goes right at that convenience and will slow the pace of innovation in this space, innovation that well serves the consumer.

Whether comfortable to accept as reality or not, and yet proven again and again to be true, regulations come at a cost. That cost is not borne by the government or some faceless being. Instead the costs of complying with regulations, and particularly new regulatory schemes in new areas of industry, become part of the cost of producing an item or service. So, the cost to produce each new unit increases. Obviously then the price to each consumer increases. The end result is the government acting to directly raise the costs to consumers.

In the end, the proposed rule would have a substantial impact on the digital economy, financial technology sector and specifically will alter the competitive landscape and innovation dynamics in the digital payments sector. This is precisely why regulation of this magnitude would require an explicit, clear and specific Congressional mandate. Without that, when the proposal is challenged in court, the Supreme Court is likely to act as it has

¹ *CFPB Proposes New Federal Oversight of Big Tech Companies and Other Providers of Digital Wallets and Payment Apps* (Nov. 7, 2023)

in the past, striking down agency actions that lack clear congressional authorization, especially when those actions have broad economic and political implications.

As addressed by Chief Justice John Roberts in *West Virginia v. Environmental Protection Agency*² (2022): “As for the major questions doctrine, it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted. Scholars and jurists have recognized the common threads between those decisions. So have we.” Also, he wrote clarifying as to what authority might look like, “To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to ‘clear congressional authorization’ for the power it claims.”³

In this instance, that digital wallets or electronic transfers of funds are somehow suddenly relevant stretches belief. Such technology has been in popular use for decades and well before even the congressional debate regarding what would become the CFPB. And yet Congress was not express in including these swaths of industry when crafting the legislation, clearly by intent. We can only interpret the silence of Congress as intentional given these facts. To pretend otherwise is to simply ignore our system of representative democracy.

Congress Must also Intervene

Such sweeping regulatory change impacting such a broad portion of our economy is worthy of specific Congressional action and direction. In this case Congress has not acted further. By doing so they continue to send a very clear message – that the declarations they made are still the intended direction of policy governing the CFPB. To change that path is a major question of national public policy which only Congress is qualified to address.

² *West Virginia v. Environmental Protection Agency*, 597 U.S. ____ (2022).

³ *Ibid.*

Harm to American Consumers and Businesses: Why the CFPB Should Not Create This Rule Even If They Could

The above section has addressed the fundamental issue: whether the CFPB has the right to enact its proposed rule or do much of anything else for that matter. This section concerns itself with whether the CFPB should enact its rule and what the consequences could be if it does.

It is no great shock that a federal agency, particularly an “independent” one has set its eyes upon a burgeoning industry. It is perhaps even less surprising that such an agency would find it necessary to regulate said industry. This is the situation we find ourselves in with the CFPB and nonbank payment processors.

CFPB fails to create a record of harms it aims to address

It is reasonable to expect that the CFPB would marshal a significant amount of evidence of harm or wrongdoing in order to justify its regulatory mania. Looking at the information the agency provided in its notice of proposed rulemaking, it seems as though CFPB is in an unreasonable mood. Little to no data is provided that suggests there is any problem whatsoever. It points to the fact that nonbank payment processors are more popular than ever.⁴

It is a revealing peak into the regulatory mindset that success or popularity is evidence enough to justify intervention. In any event, no evidence points to harm, nor is any potential harm clearly defined. Instead, popularity mixed with the theoretical possibility of a type of harm is sufficient for the CFPB to begin monitoring.

Proposed rule fails to evaluate consumer risks

The proposed rule lacks precise identification of regulatory benefits because it does not adequately define or evaluate the consumer risks (and possible violations of Federal consumer financial law) that supervision could mitigate. Additionally, the Rule overlooks various direct and indirect costs associated with supervision in this area of innovative products and underestimates the costs it acknowledges.

⁴ CFPB Press Release

The impact of these costs is further exacerbated by the CFPB's erroneous belief that its supervisory authority goes beyond the specific products or services that initially classified a company as a larger participant, leading to an increased regulatory burden for providers in other business areas the Bureau may choose to supervise.

CFPB fails to identify the source of risk and a connection to digital wallets

Beyond a general philosophical conversation about the merits of government intervention, as has been stated previously, Dodd-Frank gives the CFPB authority to monitor certain types of nonbank entities specifically tied to the presence of risk.⁵ No effort has been made by the agency to define risk and therefore no meaningful legal justification for this proposed action exists.

Indeed, giving the NPRM a generous read, we are left to conclude that the novelty of these nonbank offerings is what the CFPB identifies as the source of risk. In other words, newness is inherently risky and therefore innovation necessarily justifies regulation. This is a disturbing standard for the CFPB to articulate, is anathema to the concept of Congressional oversight, and is a position that should be immediately abandoned by the agency before it has an opportunity to harm businesses and consumers.

The CFPB declaring open season on any new offering that attempts to provide value or convenience to its customers would be catastrophic to American innovation and harm the public who benefit from technological advancement.

CFPB's "guesstimation" is not analysis

CFPB examinations of nonbank companies for potential infractions, broadly defined, are guesstimated by the agency to take between eight and ten weeks.⁶

When was the last time a government audit went smoothly? When did a heavy-handed federal procedure proceed apace?

Overnight, an entire industry would be transformed from one dedicated to developing products that best serve customers and turn it into one that gathers documents for federal

⁵ 12 U.S.C. § 5512(c)(4)

⁶ NPRM, 80213

investigators with dubious authority. As ever, compliance costs will begin to compete with innovation for the primary attention of each regulated nonbank.

CFPB's NRPM is politics not policy

As the CFPB's NPRM is a largely political document, it takes great pains to make clear the intended target of its ire even if it lacks helpful details elsewhere: "Big Tech."⁷ Central planners using this disingenuous and entirely unspecific misnomer in order to justify expanded regulatory authority is so cliché at this point as to inspire groaning and eye-rolling from the reader.

The CFPB would Americans believe that its sights are only set upon those nonbank companies of sufficient size to offend their sensibilities: five million annual transactions.⁸ This is problematic for two reasons.

One, it is incredibly easy for even the smallest competitor to enter the market and within a few years begin to come within striking distance of that figure. The CFPB's actions disincentivize new market entrants because small businesses will be less able to effectively absorb the regulatory burden that their larger competitors have already absorbed. As ever, regulation is a tax on start-ups and a gift to incumbents.

Two, given the CFPB's own stated rationale for its proposed rulemaking, they believe they already have the authority to regulate smaller nonbank entities. Again, new offerings won't flood into a market that is a regulatory mood swing away from new heavy-handed rules.

Harm to consumer privacy

Expansion of government power often comes with commensurate declines in the privacy of its citizens. There is understandable concern that the expansion of the CFPB's authority over a broad swath of businesses it has little experience with could open up customers of those businesses to privacy breaches and data leaks.

Regardless of intent, the more individuals who have access to sensitive and private information and the wider that information is shared, increases dramatically the likelihood

⁷ CFPB Press Release

⁸ NPRM, 80199

the information will be used in unintended and harmful ways. Government agencies already have a poor track record with protecting data they themselves are stewards of.

Whatever action the CFPB takes following the comment period, NetChoice strongly urges them to prioritize customer privacy.

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Given the Bureau's own arguments of the importance of digital wallets and payment apps, the proposed expansion of government regulations and control would have a profound impact on how people now interact financially. That importance, again as stipulated by the Bureau, is precisely why one could hardly imagine a better example of a major question only appropriate for direct Congressional comment and action.

NetChoice appreciates the opportunity to comment on the CFPB's NPRM. There is little doubt in our mind that the agency's proposed action violates the major questions doctrine and would swiftly invite legal action that could call into question not only the CFPB's ability to regulate certain nonbank actors but also the CFPB's ability to operate at all. Similarly, there is no question that, even if the proposed rulemaking goes forward unabated, it is entirely the wrong action to take.

The consequences of a vague, burdensome regulatory expansion on the businesses creating new offerings and the Americans who use and benefit from them would be significant. It is incumbent on the CFPB, as a matter of good policy and statutory fidelity, to clarify the risks it seeks to mitigate before charging ahead. Failing that, this poorly conceived NPRM should be dropped.

We appreciate your consideration of our views and are happy to provide further information.

Sincerely,

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