IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TECHNET,
1420 New York Avenue NW
Suite 825
Washington, DC 20005,

and

NETCHOICE, LLC,
1401 K Street NW
Suite 502
Washington, DC 20005,

Plaintiffs,

- against -

CONSUMER FINANCIAL PROTECTION BUREAU,
1700 G Street NW
Washington, DC 20552,

and

ROHIT CHOPRA, in his official capacity as Director of the Consumer Financial Protection Bureau,
1700 G Street NW
Washington, DC 20552,

Defendants.

Case No. 25-118

COMPLAINT

Plaintiffs TechNet and NetChoice, LLC ("NetChoice") (together with TechNet, "Plaintiffs") for their complaint against Defendants the Consumer Financial Protection Bureau (the "CFPB" or "Bureau") and Rohit Chopra, in his official capacity as CFPB Director (together with the CFPB, "Defendants"), allege as follows:

INTRODUCTION

1. The Dodd-Frank Act authorized the CFPB to establish a "risk-based supervision program" for certain *nonbank* providers of consumer financial products and services—the first congressional authorization of supervision of nonbanks by a federal agency. While federal agencies had long supervised banks, supervision of certain categories of nonbanks has historically been the province of state regulators with a few narrow exceptions.

2. Congress authorized the Bureau to supervise only certain classes of nonbanks. *See* 12 U.S.C. § 5514(a)(1)(A, C, D, E). As relevant here, Congress empowered the CFPB to promulgate rules applying supervisory authority to "larger participant[s] of a market for other consumer financial products or services." *Id*. at § 5514(a)(1)(B).

3. Importantly, Congress did not give the CFPB free rein in choosing which nonbank entities to supervise under this "larger participant" authority. Rather, the statute makes clear that the CFPB's supervision must be "risk-based" and that the Bureau "shall exercise its [supervision] authority" by assessing "the risks posed to consumers in the relevant product markets and geographic markets." 12 U.S.C. § 5514(b)(1)-(2). Congress then specified the factors that the CFPB must consider in making that assessment—including "the risks to consumers created by the provision of such consumer financial products or services" and "the extent to which such institutions are subject to oversight by State authorities for consumer protection." *Id.* at § 5514(b)(2)(C)-(D).

4. The Act also requires that the Bureau consider "the potential benefits and costs to consumers and covered persons" when engaging in rulemaking. 12 U.S.C. § 5512(b)(2)(A)(i). Whether supervision in a particular market will reduce consumer risk, and whether state regulation

is already addressing any such risk, is highly relevant in determining whether the benefits of supervision outweigh the costs.

5. These congressionally-imposed limits on the CFPB's supervisory authority are not surprising in light of the extraordinary power associated with federal supervision. The CFPB employs its supervisory authority aggressively to:

- demand voluminous documents, records, materials, and other information from a supervised company at any time of its choosing;
- conduct on-site or remote examinations that can last months at a time and include interviews of company employees; and
- demand the company's attorney-client privileged information (at the CFPB's unilateral discretion).

CFPB supervision thus places enormous burdens on a supervised company, diverts financial and personnel resources, and inhibits innovation and the roll-out of new products and features. Congress accordingly left regulation of nonbanks to state agencies except where necessary and as clearly and expressly authorized.

6. This action challenges the CFPB's final rule published on December 10, 2024, which purports to define a "market" for "general-use digital consumer payment applications" and targets the "larger participants" in that market for onerous supervision. *See* "Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications," 89 Fed. Reg. 99,582 (Dec. 10, 2024) (the "Final Rule").[1] Despite substantial criticism during the notice-and-comment process from dozens of stakeholders, including nonprofits, companies, industry

[1] A true and correct copy of the Final Rule is attached as Exhibit A to this Complaint.

associations, members of Congress, and other individuals, the CFPB proceeded to issue a Final Rule with several fatal flaws.

7. Notably, while the CFPB proceeded with its Final Rule over considerable opposition, other federal agencies and regulators—including the Federal Reserve, FDIC, and Office of the Comptroller of the Currency—announced in November 2024 that they were suspending all pending major rulemakings at least until President-elect Trump takes office.[2]

8. The CFPB wrote the Final Rule with the express aim that it would target specific market participants, corresponding almost exactly to the pejoratively-labelled "Tech Giants" that Director Chopra has been pursuing ever since he became the head of the CFPB.[3] Indeed, Director Chopra has made clear that the purpose of the Final Rule is to "crack down" on "large technology firms," and is the culmination of his efforts throughout his tenure at the Bureau to do just that.[4]

9. The Final Rule is invalid and unlawful under the Dodd-Frank Act and the Administrative Procedure Act (APA) for several fundamental reasons. *First,* the CFPB exceeded its statutory authority, and acted arbitrarily and capriciously, by asserting that consumer risk—a fundamental animating principle of the Dodd-Frank Act and a touchstone of the nonbank

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[2] *See* ABA Banking Journal, *Bank Regulators: No Plans to Move Forward With Major Rulemakings Until Next Year* (Nov. 20, 2024), https://bankingjournal.aba.com/2024/11/bank-regulators-no-plans-to-move-forward-with-major-rulemakings-until-next-year/.

[3] *See* Hugh Son, *CFPB Expands Oversight of Digital Payments Services Including Apple Pay, Cash App, and PayPal,* CNBC (Nov. 21, 2024), https://www.cnbc.com/2024/11/21/cfpb-expands-oversight-of-apple-pay-other-digital-payments-services.html ("CNBC Article").

[4] *See* Lynne Marek and James Pothen, *CFPB Wants to Bring Big Tech Firms Under Its Jurisdiction*, LEGALDIVE (Nov. 7, 2023), https://www.legaldive.com/news/cfpb-rohit-chopra-rule-proposal-apple-google-digital-wallet-app/699197/; Douglas Gillison and Hannah Lang, *U.S. Consumer Watchdog Proposes Rules for Big Tech Payments, Digital Wallets*, REUTERS (Nov. 7, 2023), https://www.reuters.com/technology/us-consumer-watchdog-proposes-rules-big-tech-payments-digital-wallets-2023-11-07/ (describing the Proposed Rule as Director Chopra's attempt "to assert the agency's full authority over Big Tech, a sector he has frequently criticized for privacy and competition issues" and noting that Director Chopra has "steadily increased CFPB scrutiny of the sector" since becoming Director in 2021).

supervision program—need not be considered in defining a "market" subject to its supervision authority. The Bureau has sought to define a purported market for supervision without finding—in accordance with the statutory structure that focuses on consumer risk—that consumers in that market were being harmed or that there were any consumer protection risks that CFPB supervision could or would remedy, much less any that were not already being addressed by state-level supervision. To the contrary, the CFPB has taken the astonishing position that it need not even try to "make findings regarding risk to issue this larger participant rule." 89 Fed. Reg. at 99,597. For that reason alone, the Final Rule must be vacated.

10. Eschewing objective criteria and other intelligible principles in favor of its own unconstrained discretion, the Bureau simply disclaims the need to determine whether it has selected an appropriate "market" in any legal or commonsense meaning of that term, even though the Dodd-Frank Act required it to examine the "risks posed to consumers" both in the "relevant product market[]" and in the "geographic market[]." *See* 12 U.S.C. § 5514(b)(2). According to the Bureau, it "need not conclude before issuing a [larger participant rule] that the market identified in the rule has a higher rate of noncompliance, poses a greater risk to consumers, or is in some other sense more important to supervise than other markets." *See* "Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications," 88 Fed. Reg. 80,197, 80,200 n.24 (Nov. 17, 2023) (the "Proposed Rule"). That position runs headlong into the major questions and non-delegation doctrines, as the Bureau is claiming authority over a matter of vast economic and political significance without any—or, at most, "wafer-thin"—statutory grounding. *See West Virginia v. EPA*, 597 U.S. 697, 721-723 (2022) (citing several cases "from all corners of the administrative state" where Congress did not "confer the power the agency has asserted").

11. The Bureau's standardless approach to determining its own nonbank supervisory jurisdiction was not at all what Congress intended and undermines notice-and-comment rulemaking and judicial review. If the CFPB is entitled to simply ignore harms or risks to consumers, there is no principle or rule of decision by which to assess the CFPB's identification of the market for supervision, the exclusions the CFPB made to the market definition, and the thresholds the CFPB selected to define larger participants. This Court should reject the Bureau's sweeping interpretation of its own regulatory powers.

12. *Second*, because the CFPB identifies no consumer risk or gap in regulatory oversight that it seeks to fill, or any other concrete problem it seeks to resolve via the Final Rule, it also acted arbitrarily and capriciously under the APA. *See*, *e.g.*, *ALLTEL Corp. v. FCC*, 838 F.2d 551, 556-561 (D.C. 1988) (arbitrary and capricious to rely on "hypotheses" and "questionable assumptions" in place of "reasoned explanation for agency action").

13. *Third*, the Bureau brushed aside commenters' legitimate objections that the Bureau was lumping together various disparate products—all with different risk profiles and applicable regulations—into a "one-size-fits-all" contrived market. Specifically, the Final Rule shoehorns into the Bureau's "market" two distinct products: first, "funds transfer functionalities," such as peer-to-peer (P2P) payment applications and many others, such as applications that charge or otherwise offer a payment method for consumer purchases; and second, "wallet functionalities," including those that merely store consumers' credit or debit cards and charge those cards to facilitate a payment to a merchant. There are fundamental differences between the regulatory standards implicated by funds transfer functionalities and wallet functionalities, given that the latter commonly do not store funds and merely transmit payment credentials (such as a consumer's credit card information) to facilitate a purchase from a merchant. The Dodd-Frank Act directs the

Bureau to deploy its authority to ensure compliance with the Federal consumer financial laws, and these groups of products implicate entirely distinct laws. Yet the Bureau arbitrarily and capriciously dealt with these disparate products and regulatory concerns in a single, blunt manner.

14. Indeed, the Final Rule's two categories disguise its sweeping breadth. The Final Rule has conflated several distinct markets into one by lumping together (i) peer-to-peer services (*i.e.*, a platform allowing two individuals to connect directly to complete a transaction), (ii) stored value accounts (*i.e.*, a service that stores funds that can be accessed and transferred at a later time), (iii) digital-only banking services (*i.e.*, banking services that are only available through digital platforms), (iv) merchant payment processing (*i.e.*, a service allowing businesses to accept payments from customers), and (v) payment credential management (*i.e.*, the process of controlling and managing payment credentials). The Bureau acknowledged differences in these products and services in responding to the numerous comments it received, but wrongly claimed that it simply could ignore them. *See* 89 Fed. Reg. at 99,603, 99,615. Given the goals of supervision specified in the Dodd-Frank Act, attempting to address the specific regulatory concerns (if any) raised by separate products in the context of a single contrived market definition is arbitrary and capricious.

15. *Fourth*, the CFPB has not only set its sights on the covered companies' funds transfer and wallet application products, but it also asserts that its broad supervisory oversight authority applies to *any and all consumer financial products and services offered company-wide*. The Bureau takes this expansive view of its own supervisory powers regardless of how remote the company's activity may be from the products and services that purportedly qualify for larger participant-based supervision in the first place. The CFPB's approach is particularly problematic given the broad and diverse business models of the companies that it is singling out; by contrast,

prior "larger participant" rulemakings concerned companies whose operations were more limited.[5] Most importantly, the CFPB points to no statutory authority for that unbridled power. The roving, unchecked, and unmoored supervisory authority to which Defendants lay claim is flatly contrary to the statutory text and congressional purpose, will stifle new product development, and will impose outsized regulatory costs on any firms it chooses to target.

16. *Fifth*, the CFPB has failed to consider what is good for consumers—which is, after all, the Bureau's entire congressional mandate—by failing to satisfy the cost-benefit requirements demanded not only by the APA's general requirement that an agency "'consider[ ] . . . the relevant factors," *MetLife, Inc. v. Fin. Stability Oversight Council,* 177 F. Supp. 3d 219, 240 (D.D.C. 2016), "but also by specific provisions of the Dodd-Frank Act, which demand attention to 'the potential benefits and costs to consumers and covered persons' that come from regulation." *PayPal, Inc. v. CFPB*, 728 F. Supp. 3d 31, 43 (D.D.C. 2024) (citing 12 U.S.C. § 5512(b)(2)). The CFPB admits, for example, that it had no quantitative data on which to base its analysis, and relied on speculation about the effects of supervision on companies' levels of compliance. *See* 89 Fed. Reg. at 99,643. The Bureau's failure to adequately conduct a cost-benefit analysis is all the more surprising given its years-long inquiry into these same companies' payment products pursuant to its market monitoring authority.[6] After two orders demanding information and years of purported study, the Bureau has failed to point to any findings from that inquiry to support its selection of the purported market for larger participant supervision. Had the Bureau's market monitoring efforts indicated

[5] The CFPB has previously issued rules exercising supervisory authority over larger participants in five other markets: consumer reporting, consumer debt collection, student loan servicing, international money transfers, and automobile financing. *See* 89 Fed. Reg. at 99,582 n.6.

[6] *See*, *e.g.*, *CFPB Orders Tech Giants to Turn Over Information on their Payment System Plans*, CFPB (Oct. 21, 2021), https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-tech-giants-to-turn-over-information-on-their-payment-system-plans/ ("2021 Market Monitoring Order").

the need for supervision, based on the data that it presumably gathered, one would have expected the Bureau to have relied on and cited that data in support of its rulemaking here. That it failed to do so speaks volumes.

17. The Bureau's cost-benefit "analysis" is nonsensical even on its own terms: using implausibly low cost figures, it estimated that the costs of the Final Rule would be low because it would not require substantial ongoing compliance efforts by companies aside from periodic exams, yet at the same time estimated that the benefits of the Final Rule would be high because companies would make significant compliance changes in anticipation of potential exams. And the Bureau failed to adequately consider the Final Rule's costs to consumers, admitting that the costs of supervision could be passed through to consumers but that the Bureau lacked data to assess the potential increase in consumers' costs. The Bureau also failed to fulfill its statutory mandate to consider how its rulemaking could reduce access to consumer financial products and services, including by chilling innovation in the market. The Bureau further failed to find—nor could it—that the benefits of the Final Rule outweighed its costs. In short, the CFPB's cost-benefit analysis was superficial and fell far short of satisfying its statutory obligations.

18. Nor is this the first time that the CFPB has issued an arbitrary and capricious Final Rule on a deficient record. Just last year, this Court vacated a similarly "prescriptive and burdensome" CFPB rule regulating digital wallets and prepaid accounts because the Bureau engaged in the same "missteps" replayed here. *PayPal*, 728 F. Supp. 3d at 45. As here, the CFPB in *PayPal* failed to "identify a well-founded, non-speculative reason for subjecting digital wallets" to the rule it promulgated; failed to adequately "perform a reasoned cost-benefit analysis" before issuing the rule; "ignored key differences" among the products it was trying to "shoehorn[]" into its "regulatory regime"; "cavalierly" dismissed those distinctions; and relied on "pure speculation"

as a "substitute for a reasoned examination of the facts." *Id.* at 34-41 and n.3. And as here, the Bureau failed to show what "consumer risks" the rule was even "meant to alleviate" in its haste to "dream[] up a problem in search of a solution." *Id.* at 40-41.

19. For these reasons and those set forth below, this Court should declare that the Final Rule exceeds the Bureau's statutory authority, is arbitrary and capricious, and is contrary to law. It should therefore vacate and set aside the Final Rule and enjoin any enforcement efforts.

PARTIES

20. Plaintiff TechNet is a 501(c)(6) nonprofit corporation headquartered in Washington, D.C. TechNet's diverse membership includes dynamic American businesses ranging from startups to iconic companies, representing over 4.5 million employees and countless customers in the fields of financial technology, information technology, artificial intelligence, and e-commerce, among others. Its mission is to support innovation and competition to allow America's technology industry to flourish. Based on press regarding the Final Rule and prior statements from the CFPB, Plaintiffs anticipate that the CFPB will seek to subject certain of TechNet's members, or their relevant subsidiaries, to Bureau supervision as "larger participants" under the Final Rule based on allegations that these member companies meet the Final Rule's transaction threshold and thus fall within the scope of the Final Rule.[7]

21. Plaintiff NetChoice is a Delaware limited liability company headquartered in Washington, D.C. It is a nonprofit trade association for Internet companies dedicated to advancing free enterprise and free expression in the internet and technology sectors, including by facilitating consumer choice, reasonable regulation, and abundant competition. Based on press regarding the

[7] *See* TechNet Members, https://www.technet.org/our-story/members/ (Jan. 14, 2025).

Final Rule and prior statements from the CFPB, Plaintiffs anticipate that the CFPB will seek to subject certain of NetChoice's members, or their relevant subsidiaries, to Bureau supervision as "larger participants" under the Final Rule based on allegations that these member companies meet the Final Rule's transaction threshold and thus fall within the scope of the Final Rule.[8]

22. Plaintiffs bring this action on behalf of their respective members to advance their members' interest—particularly those members that offer digital consumer payment applications and who allegedly meet the Final Rule's transaction threshold. As part of their advocacy efforts for their respective members, each of the Plaintiffs is committed to protecting against administrative overreach that could create a chilling effect on their member companies' innovation and ingenuity, which drive economic growth and benefit millions of consumers.

23. Because the Proposed Rule threatened to impose onerous and burdensome obligations on certain of Plaintiffs' members, Plaintiffs each submitted comments opposing many features of the Proposed Rule, including features that were later included in the Final Rule over Plaintiffs' objections.[9]

24. Defendant Consumer Financial Protection Bureau is a federal administrative agency headquartered in Washington, D.C. The Bureau is subject to the APA pursuant to 5 U.S.C. §§ 702-706.

25. Defendant Rohit Chopra is the Director of the Bureau. He is sued in his official capacity and is also subject to the APA pursuant to 5 U.S.C. § 551(1). Chopra acted under color of law at all relevant times.

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[8] *See* NetChoice Members, https://netchoice.org/about/ (Jan. 14, 2025).

[9] *See* NetChoice Comment Letter, Docket No. CFPB-2023-0053 (Jan. 7, 2024), https://www.regulations.gov/comment/CFPB-2023-0053-0020 ("NetChoice Comment Letter"); TechNet Comment Letter, Docket No. CFPB-2023-0053 (Jan. 8, 2024), https://www.regulations.gov/comment/CFPB-2023-0053-0035 ("TechNet Comment Letter").

JURISDICTION AND VENUE

26. Plaintiffs bring this action under the APA, 5 U.S.C. §§ 551 *et seq*. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 because Plaintiffs' claims arise under the United States Constitution and the APA. The Court has the authority to grant the requested declaratory and injunctive relief under the APA, 5 U.S.C. §§ 702-706, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

27. Plaintiffs each have associational standing to bring this suit on behalf of, and to seek judicial relief for, their respective members. As set forth above, certain of Plaintiffs' members are directly and adversely affected by the Final Rule and accordingly have standing to sue in their own right. Those members who allegedly meet the Final Rule's transaction threshold will be harmed by the Final Rule because if they are designated for Bureau supervision, they may have to, among other things, produce voluminous records, documents, and other information to the Bureau; submit to employee interviews; issue reports and audits relating to their compliance; disclose privileged information; and set aside their primary business and operation duties to prepare for and respond to the Bureau's examination process. Those members will thus face substantial compliance burdens and costs, including significant legal costs, once they are designated for supervision. Neither the claims asserted nor the relief requested requires an individual member to participate in the suit. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

28. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e) because it is an action against an agency and an officer of the United States resident in this District. Venue is also proper in this District because each Plaintiff resides here.

FACTS

A. Statutory Background and Structure

29. In the wake of the 2008 financial crisis, Congress enacted, as part of the Dodd-Frank Act, the Consumer Financial Protection Act of 2010 (CFPA), Pub. L. 111-203, 124 Stat. 1955 (2010). In the CFPA, Congress created the Bureau based on its concern that existing federal financial services regulatory agencies were not adequately focused on protecting consumers in light of their other responsibilities. *See* 12 U.S.C. § 5511(b). Congress made clear that the Bureau's sole and limited responsibility was consumer financial protection, and to that end established the CFPB as an agency tasked with "enforc[ing] Federal consumer financial law." 12 U.S.C. § 5511(a); *see also id*. at §§ 5481-5603. "Federal consumer financial law" comprises 18 enumerated consumer laws, plus the CFPA itself, which is Title X of the Dodd-Frank Act (including 12 U.S.C. § 5514). *See* 12 U.S.C. § 5481(14).

30. In the Dodd-Frank Act, Congress granted the Bureau limited supervisory authority over financial services companies. With respect to banks, the Bureau was authorized to supervise only "very large" banks and credit unions—those with more than $10 billion in assets—and their affiliates, for consumer financial protection purposes. 12 U.S.C. § 5515. The Bureau has some additional limited authority to require reports from "other" smaller banks and credit unions, but only "as necessary to support the role of the Bureau in implementing Federal consumer financial law," and similarly "to assess and detect risks to consumers and consumer financial markets." 12 U.S.C. § 5516.

31. The Bureau was also granted authority under 12 U.S.C. § 5514(a) to supervise certain *nonbank entities* in far more limited circumstances. Congress granted supervisory authority over nonbank companies that operate in several specific areas that it considered high risk,

including mortgage lending, mortgage servicing, private student loan lending, and payday lending. *See id.* § 5514(a)(1)(A, D, E). Congress authorized the Bureau to identify "market[s]" for "other consumer financial products or services" and supervise the "larger participant[s]" in such markets with respect to their products or services within those markets—*i.e.*, the CFPB's "larger participant" authority. *Id.* at § 5514(a)(1)(B). And Congress authorized the Bureau to supervise a nonbank company that does not fall within an express statutory category or is not a larger participant in a market defined by rule, but only if the Bureau determines that the company "poses risks to consumers." *Id.* at § 5514(a)(1)(C).

32. Congress prescribed specific requirements that the CFPB must meet in order to invoke its "larger participant" supervision authority. *First*, as with all of its rulemakings, the CFPB must consider "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services," as well as the "impact of proposed rules" on the companies that will be subject to supervision. *Id.* at § 5512(b)(2)(A)(i)-(ii). *Second*, recognizing that the Bureau would need adequate information to make a determination consistent with its cost-benefit analysis obligations, Congress further provided that, in promulgating a larger participant rule, the CFPB must consult the Federal Trade Commission and, more generally, "the appropriate prudential regulators or other Federal agencies . . . regarding consistency with prudential, market, or systemic objectives administered by such agencies." *Id.* at § 5512(b)(2)(B), § 5514(a)(2). *Third,* to ensure informed rulemaking, the CFPB must "gather and compile information" from various sources, including examination reports, consumer complaints, voluntary surveys and voluntary interviews, and available databases. *Id.* at § 5512(c)(4)(B)(i). *Fourth*, the CFPB's larger participant rulemaking is subject to the APA's procedures and requirements. *See Owner-Operator Indep. Drivers Ass'n, Inc. v.*

Fed. Motor Carrier Safety Admin., 494 F.3d 188, 199 (D.C. Cir. 2007); *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991).

33. Moreover, Congress also required the CFPB to "monitor for risks to consumers in the offering or provision of consumer financial products or services," including by considering the "likely risks and costs to consumers associated with buying or using a type of consumer financial product or service." *Id.* at § 5512(c)(1-2).

34. Further reflecting its intention to establish a nonbank supervision program centered on risk to consumers, Congress directed the CFPB to operate a "risk-based supervision program." 12 U.S.C. § 5514(b)(2). Congress expressly stated that in connection with a "risk-based supervision program," the Bureau "shall" exercise its authority "in a manner designed to ensure that such exercise . . . is based on the assessment by the Bureau *of the risks posed to consumers* in the relevant product markets and geographic markets" by "taking into consideration" certain enumerated factors. *Id.* (emphasis added). Those factors include "(A) the asset size of the covered person; (B) the volume of transactions involving consumer financial products or services in which the covered person engages; (C) the risks to consumers created by the provision of such consumer financial products or services; (D) the extent to which such institutions are subject to oversight by State authorities for consumer protection; and (E) any other factors that the Bureau determines to be relevant to a class of covered persons." 12 U.S.C. § 5514(b)(2).

35. Congress also specified the purposes of the Bureau's supervisory activities over qualifying nonbank entities: (1) assess compliance with Federal consumer financial law; (2) obtain information about a supervised entity's activities and compliance systems or procedures; and (3) detect and assess "risks to consumers and to markets for consumer financial products or services." 12 U.S.C. § 5514(b)(1).

B. The Burdens and Costs of the CFPB's Broad Supervisory Powers

36. CFPB supervision is a "comprehensive, ongoing process of pre-examination scoping and review of information, data analysis, on-site examinations, and regular communication with supervised entities and prudential regulators, as well as follow-up monitoring."[10]

37. The Bureau's supervision practices are detailed in a 1,814-page "Supervision and Examination Manual" (the "Exam Manual").[11] The Exam Manual describes the Bureau's extremely detailed processes for supervising a company—a "far-reaching" exercise in which Bureau examiners "request internal company data, interview a company's managers and employees, and observe operations at company facilities." *Chamber of Commerce of United States of America v. CFPB*, 691 F. Supp. 3d 730, 733, 746 (E.D. Tex. 2023) (granting declaratory and injunctive relief barring CFPB examiners from scrutinizing companies for discrimination against unspecified protected classes because the CFPB's updates to the Exam Manual were beyond the Bureau's constitutional and statutory authority).

38. In a typical examination conducted pursuant to the CFPB's supervisory authority, the CFPB first sends a "Request for Information" seeking documentation and data, including policies and procedures, training materials, and consumer complaints. The scope of the documentation and information requested is "often broad and can include highly sensitive and confidential data." *See* Brief of *Amici Curiae* Bank Policy Institute at 21, *Chamber of Commerce*

[10] *See* CFPB, *Supervision* (last visited Jan. 14, 2025), https://www.consumerfinance.gov/about-us/careers/supervision/; *see also* 12 U.S.C. § 5514(b) (authorizing the CFPB both to conduct examinations and to require reports from entities subject to supervision).

[11] *See generally* CFPB, *Supervision and Examination Manual* (Sept. 2023), https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual.pdf.

of United States of America v. CFPB, No. 23-40650 (5th Cir. Oct. 14, 2024), ECF No. 87. CFPB examiners then go onsite—often for weeks or months at a time—to scrutinize the supervised entity's practices, conduct interviews with personnel, and review additional documents and information. *Id.* Adding to the burdens and expenses involved, the CFPB can at its discretion require the supervised entity to issue reports and audits relating to its compliance, and it can also demand quarterly, standing productions of materials and other information. *See* Exam Manual, Part I ("Compliance Supervision and Examination") and Part II(A) ("Examination Procedures").

39. One commenter explained that "[t]he full examination process, including responding to the Bureau's follow-up requests, typically spans multiple months and oftentimes longer than a year. The CFPB expects prompt and thorough responses throughout the supervisory process . . . . It often takes dozens of employees, who must set aside their primary business or operational duties, to assist in preparing examination responses because responses often require collaboration across departments, the creation of new reports and data fields, and engineers building new code." Financial Technology Association Comment Letter at 7 (Jan. 8, 2024), Docket No. CFPB-2023-0053, https://www.regulations.gov/comment/CFPB-2023-0053-0042 ("FTA Comment Letter"); *see also* NetChoice Comment Letter at 7-8 ("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 investigators with dubious authority. As ever, compliance costs will begin to compete with innovation for the primary attention of each regulated nonbank."). As explained in greater detail below in connection with the Bureau's inadequate calculation of the Final Rule's costs, the CFPB has grossly underestimated the heavy compliance burdens and substantial costs that companies incur in preparing for and responding to a CFPB examination, even though the Bureau has been supervising large banks and

other nonbank entities for years and should know well the significant costs and burdens associated with supervision.

40. Once the CFPB initiates supervision, it views itself as facing no practical limitations to its authority to demand information and compel compliance with whatever requirements it imposes, regardless of whether they fall within the Bureau's regulatory mandate. In doing so, the CFPB aggressively demands attorney-client privileged information and may challenge a company's proposed redactions, with potentially damaging consequences for the supervised company.

41. The CFPB thus wields enormous power over any company that it designates for supervision. The Bureau can seek largely unfettered access to troves of documents and materials; it can coerce compliance with supra-regulatory standards; and its broad supervisory powers are backed with the threat of enforcement and "coupled with extensive adjudicatory authority," including the ability to conduct administrative proceedings and, when it acts as an adjudicator, grant legal or equitable relief. *See Seila Law LLC v. CFPB*, 591 U.S. 197, 219 (2020) (describing the "coercive power of the state" wielded by the CFPB).

C. The Proposed Rule and Final Rule

42. On November 17, 2023, the Bureau published the Proposed Rule, 88 Fed. Reg. at 80,197. The Proposed Rule defined a new market for "general-use digital consumer payment applications" and set forth a test for "larger participants" in that market that would be subject to Bureau supervision.

43. Defining the "market" is a fundamental prerequisite for determining who is a "larger participant" in that market. The market under the Proposed Rule broadly encompassed entities providing a "general-use digital consumer payment application," defined to mean a

"covered payment functionality through a digital application for consumers' general use in making consumer payment transaction(s)." 88 Fed. Reg. at 80,201.

44. "Covered payment functionalities" under the Proposed Rule encompassed two categories of distinct products: a "funds transfer functionality" and a "wallet functionality." 88 Fed. Reg. at 80,205. "Funds transfer functionality" meant consumer payment transactions that involve "(1) receiving funds for the purpose of transmitting them; or (2) accepting and transmitting payment instructions." *Id.* "Wallet functionality" meant "a product or service that: (1) Stores account or payment credentials, including in encrypted or tokenized form; and (2) Transmits, routes, or otherwise processes such stored account or payment credentials to facilitate a consumer payment transaction." *Id.*

45. The Proposed Rule set forth two criteria for a nonbank to be considered a "larger participant" in the proposed market: (1) its annual volume of covered consumer payment transactions would have to exceed the proposed threshold of 5 million in the prior calendar year, and (2) it could not be a small business concern, as defined by the Small Business Administration. 88 Fed. Reg. at 80,208.[12] The Bureau estimated that the transaction volume threshold in the Proposed Rule would bring 17 entities within the Bureau's supervisory authority. *Id.* at 80,210.

46. The Bureau requested comments on the Proposed Rule, and the comment period lasted from November 17, 2023, to January 8, 2024. 89 Fed. Reg. at 99,592. Despite various requests to extend the comment period due to multiple intervening holidays and the many other CFPB pending rulemakings requiring comment, the Bureau declined to do so and improperly cited its receipt of comments as proof that the comment period was adequate. *Id.*

[12] The Proposed Rule included exceptions for certain international money transfers, foreign exchange transactions, sales from online marketplaces, extensions of consumer credit, and payment applications that are not of "general use." 88 Fed. Reg. at 80,215.

47. In all, the Bureau received 59 comments from stakeholders, nonprofits, companies, industry associations, members of Congress, and others. 89 Fed. Reg. at 99,583. Reaction to the Proposed Rule from commenters was predominantly negative: numerous commenters raised a host of serious concerns about the Proposed Rule, including, among many others, that the Bureau: (1) failed to identify any risks to consumers it was seeking to address through the Proposed Rule; (2) proposed an invalid and incoherent market definition; (3) claimed supervisory authority not only over the specific financial products and services that purportedly qualified the company for supervision, but over all of the company's consumer financial products and services; and (4) failed to adequately perform a cost-benefit analysis.

48. Despite the numerous objections and comments it received, the Bureau issued the Final Rule on November 21, 2024 and published it on December 10, 2024. *See* 89 Fed. Reg. at 99,582. The Final Rule largely adopts the Proposed Rule, with only a few notable changes, none of which remedy the fundamental concerns expressed by commentors. Among other things, the Final Rule increased the transaction threshold from the proposed 5 million to 50 million transactions in the preceding calendar year. *Id.* at 99,639. As a result, the CFPB "estimates" that the Final Rule will cover seven companies.[13] *Id.* The Bureau's stated rationale for this change was a fear that supervision at a lower threshold could harm "new entrants and others with smaller volumes"—a concession to the severe burdens associated with supervision. *Id.* at 99,640. The Final Rule also limited the definition of "annual covered consumer payment transaction volume" to transactions denominated in U.S. dollars, which excludes transfers of digital assets, including crypto-assets. *Id.* In making this change, the Bureau cited general concerns about

[13] Based on press reports, six of these seven companies are Plaintiffs' members. *Compare* CNBC Article, *supra* n.3 (identifying expected covered companies) *with* lists of Plaintiffs' members, *supra* n.7-8.

"administrability." *Id.* And while the Proposed Rule focused on the location of transactions—counting only those transactions initiated in a State—the Final Rule counts any transaction initiated by or on behalf of a United States resident. *Id.* at 99,612.

THE FINAL RULE IS UNLAWFUL AND INVALID

A. The CFPB Rejected Every Objective Standard for Limiting Its Authority

1. The CFPB Purported to Create a "Risk-Based Supervision Program" Without Assessing Consumer Risk

49. In the Final Rule, the CFPB took the extraordinary position that notwithstanding Congress's focus on risk-based supervision, it could designate a nonbank market for larger participant supervision without any regard to consumer harm or consumer risk. It therefore pointedly declined to cite evidence or make findings about whether consumers in the "market" it identified were in fact experiencing harm or facing any risks. Nor, for that matter, did it make any findings about whether and how CFPB supervision would address or ameliorate any such risks. This position contravenes the statutory emphasis on risk-based supervision, including that the Bureau "shall" conduct a "*risk-based* supervision program" and tailor its supervision of nonbanks to "risks posed to consumers in the relevant product markets and geographic markets." 12 U.S.C. § 5514(b)(2) (emphasis added); *see Dubin v. United States*, 599 U.S. 110, 121-122, 127 (2023) (explaining "a title is especially valuable [where] it reinforces what the text's nouns and verbs independently suggest" and relying on a title that, as here, had "a focused meaning" and was "mutually reinforcing" with the statute's text).

50. When the Bureau introduced the Proposed Rule, it boldly disclaimed any need to assess the risks to consumers from the products and services in the market it sought to define. The CFPB further claimed that it need not "determine the relative risk proposed by this market as

compared to other markets." 88 Fed. Reg. at 80,200 n.24; *see also* 89 Fed. Reg. at 99,585 n.27 (reiterating this statement in its Final Rule). According to the CFPB, citing its own flawed precedent, it "need not conclude before issuing a [larger participant rule] that the market identified in the rule has a higher rate of non-compliance, poses a greater risk to consumers, or is in some other sense more important to supervise than other markets." 88 Fed. Reg. at 80,200 n.24 (alteration in original). Based on this expansive view of its own rulemaking authority under the Dodd-Frank Act, the Bureau, in direct contravention of the Act, entirely "fail[ed] to identify specific harms to consumers that it seeks to address"—as multiple commenters, including each of the Plaintiffs, explained.[14]

51. Despite commenters' well-founded objections on this front, the Bureau did nothing to address them in the Final Rule. Instead, it doubled down on its position by refusing to analyze or assess harm or risks to consumers and declining to base its market identification on these factors in any way. Making no attempt to reconcile its approach with the text of 12 U.S.C. §§ 5512 and 5514, the CFPB stated simply that it "disagrees . . . that in a larger participant rule the CFPB is required to assess the degree or prevalence of risks to consumers, potential violations of law, or other specific harms occurring in the described market" and admitted "it [did] not do so here." 89 Fed. Reg. at 99,596-97. This fundamental error pervades the Final Rule: the Bureau repeatedly emphasized that it was "not required to make findings about relative risks in a market to justify issuing (or proposing) a larger participant rule," or otherwise "required to consider in this rulemaking the kinds of detailed information about mitigation of concrete risks contemplated by

[14] TechNet Comment Letter at 6-7; NetChoice Comment Letter at 6; FTA Comment Letter at 5-6; Amazon.com Comment Letter at 12 (Jan. 8, 2024), Docket No. CFPB-2023-0053, https://www.regulations.gov/comment/CFPB-2023-0053-0058 ("Amazon.com Comment Letter"); Members of Congress Comment Letter at 2 (Jan. 30, 2024), Docket No. CFPB-2023-0053, https://www.regulations.gov/comment/CFPB-2023-0053-0063 ("Members of Congress Comment Letter").

[commenters]." *Id.* at 99,592, 99,596. As discussed below, the Bureau's admitted failure to make any such assessments or findings renders its resulting rulemaking illegitimate.

52. In flatly refusing to cite any evidence or make any findings about whether there are *any* risks to consumers—much less meaningful or substantial risks—posed by the products and services covered by the Final Rule, the CFPB exceeded two separate limits on its authority under the Dodd-Frank Act. The statute requires that supervisory authority be tethered to consumer risk and mandates attention to a rule's impact on compliance with the Federal consumer financial laws and its costs and benefits.

53. The touchstone of the CFPB's nonbank supervision regime is that it must be "risk-based." Congress specifically provided that the CFPB must exercise its nonbank supervisory authority "in a manner designed to ensure that such exercise . . . is based on the assessment by the Bureau of the risks posed to consumers in the relevant product markets and geographic markets," taking into account several factors. 12 U.S.C. § 5514(b)(2). Remarkably, in a Final Rule that spans 73 pages, the CFPB references this critical statutory text only once, and buries even that passing reference in a footnote. 89 Fed. Reg. at 99,601 n.154.

54. The CFPB's suggestion that the risk-based supervision program requirement applies only *after* supervised nonbank entities have already been designated for supervision is illogical and violates the canon that different parts of a statute, and especially neighboring provisions and terms, should be interpreted harmoniously. *See*, *e.g.*, *Tex. Dep't of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 539 (2015); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012) (under the "harmonious-reading canon," the "provisions of a text should be interpreted in a way that renders them compatible, not contradictory"). It would be a particularly unharmonious interpretation of the

statute—and contrary to the requirement that the CFPB conduct an *ex ante* cost-benefit analysis—to suppose that the Bureau could select a nonbank market for supervision without first identifying *some* consumer risk, given that "risks to consumers" is the *sine qua non* of the statute's "risk based supervision program."

55. Indeed, each of the surrounding categories of nonbanks explicitly designated for CFPB supervision in Section 5514(a) are markets known for posing particular risks to consumers. *See* 12 U.S.C. § 5514(a)(1)(A, D, E) (authorizing supervision in connection with mortgage brokers, private educational loans, and payday loans). This statutory focus on consumer risk finds further expression in Section 5514(a)(1)(C), which authorizes the Bureau to supervise persons who fall outside a market identified as high risk only when the Bureau has "reasonable cause to determine . . . that such covered person . . . poses risks to consumers." *Id.* § 5514(a)(1)(C). It would make no sense as a matter of statutory interpretation, and violate the harmonious-reading canon, to posit that while all the other immediately surrounding provisions of the Bureau's nonbank supervision authority in Section 5514(a) are based on consumer-risk considerations, its larger participant supervision authority, codified in the *very same sub-section of the statute—id.* at § 5514(a)(1)(B)—somehow stands alone when it comes to risk. *See Peter v. Nantkwest, Inc.*, 589 U.S. 23, 31 (2019) (interpreting the term "expenses" by reference to and alongside "neighboring words in the statute"); *United States v. Williams*, 553 U.S. 285, 294 (2008) ("[T]he commonsense canon of *noscitur a sociis* . . . counsels that a word is given more precise content by the neighboring words with which it is associated.").

56. Congress's instructions about how the Bureau should engage in nonbank supervision necessarily inform the selection and definition of any new markets for supervision. It would be nonsensical for Congress to require the CFPB to organize its supervision programs on

the basis of consumer risk, but at the same time empower the Bureau to ignore risk in selecting the particular markets in which to supervise "larger participant[s]." Because the Bureau must take into consideration the "risks posed to consumers" in exercising its risk-based supervision program, *see* 12 U.S.C. § 5514(b)(2), both the statutory structure and reasoned decision-making require that, in selecting a market for supervision, the Bureau consider whether supervision will allow it to identify and mitigate any actual consumer risk. And as a practical matter, it would make no sense for the Bureau to wait until after designating companies for supervision to only then evaluate and prioritize based on risk considerations. If, as it turns out, those companies pose no such risk, how then is the Bureau to prioritize, institute, or operate a "risk-based supervision program"? That cannot be what Congress intended.

57. Indeed, this claim of standardless authority, if upheld, would render the larger participant provision of the Dodd-Frank Act violative of the non-delegation doctrine by failing to provide an intelligible principle under which the Bureau may exercise its nonbank larger participants rulemaking power and failing to provide regulated parties with any notice of what conduct might expose them to supervision. *See Gundy v. United States*, 588 U.S. 128, 135 (2019); *see also id*. at 161 (Gorusch, J., dissenting).

58. The Bureau notes in passing that "[a]lthough the CFPB disagrees with the comments suggesting that it must make findings regarding risk to issue this larger participant rule and it does not do so here, as discussed above other commenters described various existing and emerging risks to customers that *may be* associated with products and services by larger participants" and "[t]hose comments raise legitimate concerns regarding potential concerns to consumers." 89 Fed. Reg. at 99,597 (emphasis added). This reference to various concerns raised by "other commenters"—and not the CFPB itself—is insufficient to justify the Final Rule and

would also improperly offload the CFPB's rulemaking responsibilities to "other commenters." Moreover, by its own admission, the CFPB did not evaluate the nature and veracity of these concerns; indeed, they are described only as mere possibilities that "may be" associated with the products in this purported market. *Id.* Nor did the CFPB rely on any of these "concerns" to justify its Proposed Rule, and thus commenters were deprived of any opportunity to comment on them, which is a "serious procedural error." *Owner-Operator Indep. Drivers Ass'n*, 494 F.3d at 199 (citing *Solite Corp.*, 952 F.2d at 484).

59. In any event, none of the reasons offered by commenters and repeated by the Bureau in the Final Rule identified a specific "risk" in light of which a market could be properly defined. For example, the Bureau noted that it "shares the view of the group of State attorneys general and other commenters that this highly-concentrated market will continue to grow and evolve rapidly" and "it is important for the CFPB to be able to closely assess whether pressure to sustain high growth in this market will drive nonbank firms to develop new and increasingly risky products." 89 Fed. Reg. at 99,595. But rapid growth and evolution does not itself justify supervision. While consumer protection regulations must evolve with new technology, this neither negates nor satisfies the statutory requirement that the Bureau must take into account risks to consumers in identifying a market for larger participant supervision.[15]

60. The Bureau also "agree[d] with the comments expecting that the market will continue to grow, including by expanding how general-use digital consumer payment applications help consumers to make payments in other ways." 89 Fed. Reg. at 99,595. It then noted that

[15] *See* TechNet Comment Letter at 7; FTA Comment Letter at 6 (observing that while "consumer protection regulations must evolve with new technology, the Bureau must nonetheless identify and assess the consumer harms that it perceives in the precise market at issue before it proposes a larger participant rule").

"[s]upervision can detect and assess risks that may arise from a single application establishing connections that can cause payments to be made from many different consumer accounts." *Id.* But again, generic and speculative predictions about what risks "may arise" in the future are not substitutes for identifying the types of concrete and existing risks to consumers that Congress explicitly required. And to the contrary, the Bureau ignored the obvious *benefits* to consumers from the platforms at issue, which offer convenient, efficient, low-cost offerings to consumers and present a remarkable technological breakthrough as compared to traditional financial services.

61. The Bureau's refusal to consider risk is all the more striking given that Defendants have been engaged in a years-long inquiry into these same companies' varied payment products under the Bureau's market monitoring authority.[16] That authority allows the Bureau to "monitor for risks to consumers in the offering or provision of consumer financial products or services," 12 U.S.C. § 5512(c)(1), and it is meant to inform the Bureau's rulemaking and other activities, which would include larger participant rulemakings. The CFPB undertook its first round of market monitoring inquiries in October 2021, which covered a range of topics spanning payment product features, operating manuals, fees, data use practices, advertising practices, access restrictions, and fraud protection activities. *See* 2021 Market Monitoring Order, *supra* n.6. Shortly thereafter, the CFPB invited interested parties to submit comments to inform the Bureau's searching inquiry.[17] The CFPB then launched a second, expanded round of inquiries in January 2023. Despite all of those inquiries, the Bureau declined to make any findings about actual harms or risks to consumers in support of its selection of this purported market for larger participant supervision.

[16] *See supra* n.6.

[17] *See* CFPB, *Notice and Request for Comment Regarding the CFPB's Inquiry Into Big Tech Payment Platforms*, 86 Fed. Reg. 61,182 (Nov. 5, 2021).

62. The CFPB's failure to consider risk to consumers not only violates the statute's requirements, but is also arbitrary and capricious, rendering the Final Rule invalid for that separate reason as well. *See* 5 U.S.C. § 706(2)(A); *Michigan v. EPA*, 576 U.S. 743, 753 (2015) ("reasonable regulation ordinarily requires paying attention to the advantages *and* disadvantages of agency decisions"). An "agency regulation must be designed to address identified problems" and "problems with existing regulatory requirements that an agency has delegated authority to address." *N.Y. Stock Exch. LLC v. SEC*, 962 F.3d 541, 556-557 (D.C. Cir. 2020) ("*NYSE*"). An agency must consider every "important aspect of the problem," reach a conclusion based on the "evidence before the agency," and "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

63. As noted above, this Court recently observed in *PayPal* that the APA does not authorize the Bureau to "[t]ry to solve an imaginary problem" or to "dream[] up a problem in search of a solution." 728 F. Supp. 3d at 41, 45 (citation omitted). The Bureau must, instead, identify and address an *existing* problem requiring its intervention. *NYSE*, 962 F.3d at 556. It must also provide "some quantitative or qualitative assessment of the 'costs' of regulation . . . as well as its 'benefits.'" *PayPal*, 728 F. Supp. 3d at 45 (quoting 15 U.S.C. § 5512(b)(2)). Yet as in *PayPal*, "[t]he CFPB did neither." *Id.*

64. Under this framework, the Bureau's position that it may altogether ignore risks to consumers in identifying a market for larger participant supervision is arbitrary and capricious. The Bureau's position ignores "an important aspect of the problem," which is that, under the CFPB's risk-based nonbank supervision program, the Bureau must exercise its supervisory authority by taking into consideration whether and if there are "risks to consumers" afoot. *See* 12

U.S.C. § 5514(b)(2); *see also PayPal*, 728 F. Supp. 3d at 39 n.3 ("questions we ask under the APA" include whether the agency "'fail[ed] to consider an important aspect of the problem,'" failed to "'explain why it has exercised its discretion in a given manner,'" or "'offer[ed] an explanation for its decision that runs counter to the evidence'" (quoting *State Farm*, 463 U.S. at 43, 48-49)). It would ignore this important statutory feature were the Bureau to proceed with identifying larger participants for supervision in a manner that is willfully blind to risk considerations.

65. By refusing to make any finding of risks to consumers in a product market or geographic market, the Bureau disclaims any standard by which to exercise its larger participant supervisory authority. If the Bureau is not complying with the guardrails set forth by Congress in its statutory criteria for the risk-based supervision program, then it is entirely unclear what standard, if any, the Bureau believes governs its selection of markets to supervise and the threshold for larger participants in those markets. The Bureau notably did not offer any alternative standard to govern its decision-making. This standardless approach undermines the notice-and-comment process and judicial review, rendering each a formality without any substance. Agency action is arbitrary and capricious if "it fails to articulate a comprehensible standard for assessing the applicability of a statutory category," largely because it thereby fails to provide a reasonable opportunity for comment. *ACA Int'l v. FCC*, 885 F.3d 687, 700 (D.C. Cir. 2018) (internal quotation marks and citation omitted). When applying general terms like "market," an agency must "pour some definitional content" into the term by "defining the criteria it is applying," but the Bureau failed to do so here. *PDK Lab'ys Inc. v. U.S. Drug Enf't Admin.*, 438 F.3d 1184, 1194 (D.C. Cir. 2006) (internal quotation marks and citation omitted).

66. Subjecting companies to onerous supervision without any finding of risk is precisely the sort of reliance on an "imaginary problem" to impose a preferred solution that the Bureau was warned against, and ultimately prevented from implementing, in *PayPal*. *See* 728 F. Supp. 3d at 45. The Final Rule should meet the same fate.

2. The CFPB Identifies No Gap in Regulatory Oversight

67. The Final Rule also fails to satisfy another objective standard that limits the Bureau's rulemaking authority: identifying a gap in the state supervision that already applies to many of the relevant payment applications that will be subject to the Final Rule. *See* 12 U.S.C. § 5514(b)(2)(D); *id.* at § 5514(b)(3). The CFPB is well-aware that state regulators are already active supervisors in this space: it expressly acknowledged "that States have been active in regulation of money transmission by money services businesses and that many States actively examine money transmitters." 89 Fed. Reg. at 99,586; *see also id.* at 99,643 (conceding that "some nonbank market participants already are subject to State supervision and also may be supervised by Federal prudential regulators in certain capacities"). Tellingly, the Bureau says only that there is "currently no *Federal* program for supervision of nonbank covered persons in the market for general-use digital consumer payment applications." *Id.* at 99,645-46 (emphasis added). Yet beyond its vague lip-service reference to "coordinat[ing] with appropriate State regulatory authorities in examining larger participants," *id.* at 99,586, the Final Rule never adequately explains: "(1) which rules and regulations the Bureau believes require additional compliance, (2) how much compliance there currently is, (3) how much incremental compliance would be achieved by supervision, or (4) why other alternative regulatory steps would not achieve that incremental amount of compliance." *See* Amazon.com Comment Letter at 12. By the Bureau's own admission, then, there is no oversight gap for it to fill.

68. For example, as one commenter noted, companies with money transmitter licenses are already supervised by approximately fifty jurisdictions in successive multi-state or single-state exams. These exams cover a wide range of topics and risk areas, including Federal consumer financial law. *See* Amazon.com Comment Letter at 12. The Bureau has not only ignored this long-standing state regulatory and supervisory system, but also fails to show why additional federal supervision would provide any worthwhile benefit. *Id.* at 13.

69. Indeed, those who have studied the issue have described an existing system of robust state supervision: "[M]ost state banking regulators regulate and supervise a variety of nonbank financial services providers, including money transmitters, for safety, soundness, and compliance with consumer protection and [anti-money laundering] laws. Although state agencies have various frequency cycles for conducting examinations, most licensed money transmitters are examined annually by either multistate teams or individual states. State supervisors review a money transmitter's operations, financial condition, management, compliance function, and compliance with AML laws. Between exams, state regulators monitor their licensees on an ongoing basis by reviewing the information submitted pursuant to reporting requirements. Additionally, money transmitters must meet financial statement reporting requirements, permissible investments adequacy, branch and agent listings, and transmission volume activity."[18]

70. As TechNet pointed out, the Proposed Rule "glosses over and minimizes robust state and federal supervision over money transmitters," and "also fails to address how the CFPB's examinations will add value beyond the examinations already being conducted by the federal

[18] Andrew P. Scott, Cong. Rsch. Serv., R46486, *Telegraphs, Steamships, and Virtual Currency: An Analysis of Money Transmitter Regulation* 3 (2020) (quoted in Amazon.com Comment Letter at 12 n.52); *see also* Marc Labonte, Cong. Rsch. Serv., R44918, *Who Regulates Whom? An Overview of the U.S. Financial Regulatory Framework* 16 (2020) (similar).

prudential regulators and the states, while downplaying the significant additional costs resulting from the duplication." TechNet Comment Letter at 10. The Final Rule addresses none of these defects, as the Bureau inexplicably declined to discuss the existing regime of state supervision at any significant length. Instead, it merely offered the vague assurance that it "takes seriously its inter-governmental coordination obligations," and the illogical assertion that *additional* oversight will somehow "minimize regulatory burden." 89 Fed. Reg. at 99,599. Nor did it did provide any evidence that state supervision was inadequate, or otherwise quantify what benefits CFPB supervision would offer above and beyond robust existing state supervision, contrary to what Congress required. *See* 12 U.S.C. § 5514(b)(2)(D); *id.* at § 5514(b)(3) (each requiring consideration of existing state oversight).

3. The CFPB's "Market" Definition is Arbitrary and Capricious

71. The Final Rule also violates the APA because the Bureau's definition of a market for consumer products and services is arbitrary and capricious.

72. The Bureau must articulate the risks to consumers and noncompliance with Federal consumer financial laws that justify the designation of a market for supervision. The Bureau did not do so when it placed funds transfer functionality and wallet functionality in the same market for supervision. Nor could it, as the functionalities may present different risks (if any) and implicate different regulations.

73. Specifically, the Final Rule defines the market "[p]roviding a general-use digital consumer payment applications" as "providing a covered payment functionality through a digital payment application for consumers' general use in making consumer payment transaction(s)." 89 Fed. Reg. at 99,653. A "covered payment functionality" is defined, in turn, as "funds transfer functionality," a "wallet functionality," or "both." *Id.* "Funds transfer functionality" includes

products in which "nonbanks help to transfer a consumer's funds to other persons, sometimes referred to as [peer-to-peer] transfers," *see id.* at 99,616, while "wallet functionality" includes products that "store[] . . . account or payment credentials, including in encrypted or tokenized form." *Id.* at 99,653.

74. A critical difference between the two categories is that many wallet functionalities do not hold value or provide customers access to their funds. *See*, *e.g.*, FTA Comment Letter at 14 ("A pass-through wallet should not be considered a covered payment functionality . . . because the company providing this type of wallet is not involved in the holding, transmission, or receipt of funds and is merely a record holder."); Chamber of Progress Comment Letter at 3 (Jan. 8, 2024), Docket No. CFPB-2023-0053, https://www.regulations.gov/comment/CFPB-2023-0053-0053 ("Chamber of Progress Comment Letter") ("[T]he terms 'wallet functionality' and 'funds transfer functionality' suggested by the Bureau as interchangeable to consumers are actually not the same products and services, and should not be grouped together in the Proposed Rule."). The Bureau, however, disregarded these comments and amalgamated these products with no meaningful explanation.

75. The Bureau acted arbitrarily and capriciously in defining a market because P2P products and wallets would present different theoretical risks, to the extent they pose any risks at all, and implicate different regulations. Yet the CFPB failed to address these differences, which the Dodd-Frank Act identifies as critical criteria. *See PayPal*, 728 F. Supp. 3d at 40 (requiring consideration of different "consumer risks" among products); 12 U.S.C. § 5514(b)(1)(A), (C), (b)(2)(C) (criteria for supervision).

76. Indeed, this is not the first time that the CFPB has ignored critical product differences in its rulemaking, or even the first time that it has done so in connection with "digital

wallets." *See PayPal*, 728 F. Supp. 3d at 45 (striking down CFPB rule for failure to consider in detail distinctions between "digital wallets" and "general-purpose reloadable cards"). As this Court held in *PayPal,* when products are "different in kind," the CFPB may not "dismiss[]" or "shrug off" the "cited differences" as "irrelevant" unless it can "explain *why* the differences between products are irrelevant, or *why* their one similarity is somehow more consequential than those material differences." *Id.* at 39-40. To do so, it must identify "evidence, statistics, reports, or competing analyses" to support its conclusion, rather than make "conclusory" claims that it is "not convinced" or "not persuaded" that products are "fundamentally dissimilar." *Id.* at 39.

77. The CFPB has again made the same "missteps" as in *PayPal* by failing to meaningfully address the product differences included within its defined market. *See PayPal*, 728 F. Supp. 3d at 40 (requiring consideration of different "consumer risks" among products). The Bureau's failure to make product distinctions is all the more suspect given its acknowledgment that it was indeed "grouping activities that are in some ways different into a single market." 89 Fed Reg. at 99,603 at n.76; *see also id.* at 99,615 (conceding that the two covered "functionalities . . . may differ in some ways," including in regards to their "technological and commercial processes").

78. What's more, even products with "funds transfer functionality" are not one-size-fits-all for market definition purposes. *See*, *e.g.*, FTA Comment Letter at 1 (noting that "companies offering digital applications for person-to-person ('P2P') transfers are fundamentally different from companies that process payments for merchants."). As TechNet already explained to the Bureau, the proposed market definition is woefully overbroad because it amalgamates together companies that offer altogether disparate services: some allow consumers to make payments using a stored balance held by that company; others route funds from a consumer's bank account for

transmission to a third party; while still others offer payment methods to facilitate the purchase of goods and services from merchants, which is generally exempt from regulated money transmission by the states because of the minimal potential risk posed to consumers. *See* TechNet Comment Letter at 5; *see also* Computer & Communications Industry Association Comment Letter at 13 (Jan. 8, 2024), Docket No. CFPB-2023-0053, https://www.regulations.gov/comment/CFPB-2023-0053-0048 ("CCIA Comment Letter") (similar). And that's to say nothing of the wallet companies, which "merely hold[] and pass[] payment information, such as card numbers, but never participate[] in the flow of funds from the consumer to the third-party recipient." TechNet Comment Letter at 5.

79. To the extent that the Final Rule identifies any problem that it is designed to solve through its artificial market definition, the Bureau claims that the Final Rule will improve the larger participants' compliance with the "prohibition against unfair, deceptive, and abusive acts and practices [UDAAP], the privacy provisions of the Gramm-Leach-Bliley Act (GLBA) and its implementing Regulation P, and the Electronic Fund Transfer Act (EFTA) and its implementing Regulation E." 89 Fed. Reg. at 99,586. But the Bureau does not explain how or why supervising wallet applications, for example, would prevent any risks to consumers arising under these consumer financial laws. As noted above, many wallet applications do not hold customer funds, but merely offer customers the convenience of holding their payment credentials (such as a credit card or a debit card) and causing these cards to be charged to facilitate a payment to a merchant. The Bureau has not explained how Regulation E or Regulation P applies to such wallet services. Even assuming that the UDAAP prohibition could apply to wallet applications, the Bureau has not identified any UDAAP violations or risks of UDAAP violations by wallet applications.

80. To be sure, the CFPB attempted to justify its decision not to "differentiate" among the disparate products within its Frankenstein market by stating that *some* industry participants provide both funds transfer functionalities and wallet functionalities, designing "seamless, undifferentiated common user experience[s]" for their consumers. 89 Fed. Reg. at 99,605. The CFPB did not claim, however, that this is the case across the board—on the contrary, it expressly recognized that some firms have chosen to "discontinue offering payments" while others "have not yet enabled that capability in the United States." *Id.* That some companies may offer both functionalities does not give the CFPB carte blanche to exercise supervisory authority over all products offering these distinct functionalities, when wallet functionalities do not implicate the regulations identified by the CFPB.

B. The CFPB's Expansive Assertion of Supervisory Authority Over Products Outside Its "Market" Is Unlawful

81. Even if the CFPB could justify its proposed market for "general-use digital consumer payment applications"—and it cannot—the Bureau has no statutory authority to extend that mandate to a company's activities outside that market and that are not otherwise subject to supervision under the risk-based standards that Congress carefully set out. But that breathtaking assertion of its own jurisdiction is exactly what the Bureau claims.

82. In the Dodd-Frank Act, Congress specifically provided that the CFPB can issue a larger participant rule only if the Bureau defines the particular "market." 12 U.S.C. § 5514(a)(1)(B), (a)(2). The Act also provides that "[t]he Bureau shall exercise its authority . . . based on the assessment by the Bureau of the risks posed to consumers in the *relevant product markets* and geographic markets." *See* 12 U.S.C. § 5514(b)(2) (emphasis added).

83. The Bureau's supervisory authority therefore extends only to the "relevant" product market—and not to any and all consumer financial product and service markets in which a designated entity might participate. *See Chamber of Commerce*, 691 F. Supp. 3d at 742 (vacating update to Exam Manual where the CFPB claimed authority beyond the scope of Congress's mandate, and recognizing that "Congress knew how to clearly add . . . to the CFPB's portfolio when it meant to do so"). As discussed above, Congress expressly limited the Bureau's supervisory authority to the specifically delineated categories set out in Section 5514(a)(1)(A-E). That decision necessarily implies that Congress was limiting the scope of such supervision to those categories of activity that qualified the entity for supervision. Were it otherwise, the Bureau would have an unfettered ability to circumvent the CFPA's reticulated supervisory structure.

84. The Proposed Rule nonetheless allowed the CFPB to supervise an entity's products and activities offered even *outside* of the general-use digital consumer payment application "market." Specifically, the Bureau asserted the authority to supervise *any* consumer financial products or services offered by a company so long as that company offers *one* product that qualifies for supervision. *See* 88 Fed. Reg. at 80,198 n.7.

85. Numerous commenters assailed this obvious overreach—to no avail.[19] As TechNet put it, the "position that the CFPB can exercise its supervisory authority over an entire entity is not grounded in any statutory authority. There is no clear mandate permitting the Bureau to supervise

[19] *See*, *e.g.*, Amazon.com Comment Letter at 13; NetChoice Comment Letter at 7; CCIA Comment Letter at 9; American Consumer Institute Comment Letter at 2 (Jan. 8, 2024), Docket No. CFPB-2023-0053, https://www.regulations.gov/comment/CFPB-2023-0053-0039 ("American Consumer Institute Comment Letter"); Members of Congress Comment Letter at 2; McGuireWoods Comment Letter at 9-10 (Jan. 8, 2024), Docket No. CFPB-2023-0047, https://www.regulations.gov/comment/CFPB-2023-0053-0047; *see also* 89 Fed. Reg. at 99,592 (summarizing criticisms of the CFPB's "description of its supervisory authority").

all aspects of a company merely because the Bureau has authority to supervise *one* activity." TechNet Comment Letter at 4.

86. Indeed, the Final Rule persisted in fundamentally mischaracterizing the Bureau's statutory authority. It does not engage with the commenters' criticisms under the statute other than a conclusory footnote in which the CFPB merely notes that it "disagrees" that the "reference to 'relevant product markets and geographic markets'" in 12 U.S.C. § 5514(b)(2) was intended to "limit the scope of [its] authority under 12 U.S.C. 5514(a)(1) and (b)(1) to only the consumer financial products and services described in the larger participant rule." *See* 89 Fed. Reg. at 99,600 n.152. But that is pure *ipse dixit*, belied by the statutory text, which the Bureau does not even try to justify as a matter of statutory construction.

87. The CFPB also purports to "clarif[y]" that its position that its supervisory authority is not limited to the consumer financial products or services that qualified a company for supervision is not a "rationale for the Final Rule" and that it would have promulgated the Final Rule "irrespective of the existence of that position." 89 Fed. Reg. at 99,600. But that "clarification" is thin gruel to Plaintiffs and their member companies who will now find themselves potentially subject to federal supervision over *any* financial product or service they offer if the Final Rule is left standing. And, at a minimum, if this is in fact the CFPB's position about the scope of authority conferred by the Final Rule, the CFPB was required to take this into account in its cost-benefit analysis (and failed to do so). Contrary to the CFPB's dismissive statement, it is required to take a view on the scope of its supervisory authority under the Final Rule—and the expansive view it has chosen is unlawful and should be set aside by this Court.

88. The Bureau's expansive position runs headlong into the major questions doctrine, under which an agency like the CFPB must have "clear congressional authorization" to wield

substantial authority over a matter of "vast economic and political significance." *See West Virginia*, 597 U.S. at 716. A "merely plausible textual basis" will not do. *Id.* at 723. That is because Congress is expected "to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 764 (2021) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

89. "That is exactly the kind of power the [CFPB] claims here." *Ala. Ass'n of Realtors*, 594 U.S. at 764. It baldly claims authority to supervise *entire entities*, rather than a specific product that falls within a specific market. But authority over certain qualifying products in a specific market is the *only* "clear congressional authorization" to be found in the statute. Because the CFPB can point to no "clear statement" from Congress that delegates the vast authority it claims, *see West Virginia*, 597 U.S. at 717, the Final Rule fails under the major questions doctrine.

C. The Bureau's Cost-Benefit Analysis Was Fatally Deficient

90. Agency action is "arbitrary and capricious" under the APA when the agency fails to "consider[] the costs and benefits associated" with the action. *Mex. Gulf Fishing Co. v. Dep't of Com.*, 60 F.4th 956, 973 (5th Cir. 2023).

91. And the Dodd-Frank Act requires the Bureau to consider "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from" regulation. 12 U.S.C. § 5512(b)(2). Section 5512 empowers the Bureau to "exercise its authorities under Federal consumer financial law to administer, enforce, and otherwise implement the provisions of Federal consumer financial law," 12 U.S.C. § 5512(a), and to "prescribe rules" that are "necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial

laws, and to prevent evasions thereof," 12 U.S.C. § 5512(b)(1). Thus, all rulemaking by the Bureau must be tethered to administering, enforcing, or otherwise implementing Federal consumer financial laws. *See Seila Law*, 591 U.S. at 206. As the Supreme Court has instructed in interpreting the "necessary and appropriate" standard, such rulemaking must consider "the advantages *and* the disadvantages of agency decisions," including "cost" and every other "important aspect of the problem"—which, in the context of this rulemaking, would naturally include consumer risk. *Michigan*, 576 U.S. at 752-53.

92. The CFPB's cost-benefit analysis was fundamentally flawed from the outset. How could the Bureau determine whether the benefits of supervision would outweigh the costs without assessing consumer risk and considering whether there are gaps in state regulation? If there is no or minimal consumer risk, or if any risks are addressed by state regulation, then the costs necessarily would outweigh the non-existent benefits. The CFPB's failure to examine those factors and determine that they justified the Final Rule therefore violated both the APA and the specific cost-benefit requirement in the Dodd-Frank Act.

93. Moreover, in issuing the Final Rule, the Bureau violated both the APA and the Dodd-Frank Act because it undertook a superficial cost-benefit analysis that, among other things, failed to adequately consider important costs.

94. As a threshold matter, the Bureau failed to meaningfully attempt to quantify and assess the actual costs and benefits, and instead relied on qualitative speculation. As the Bureau admits, "limited data are available with which to quantify the potential benefits, costs, and impacts of the Final Rule." 89 Fed. Reg. at 99,642. And the Bureau "lacks detailed information" about the rate of compliance of the entities to be supervised under the rule with Federal consumer financial law, and "about the range of, and costs of, compliance mechanisms used by market

participants." *Id.* It was the Bureau's obligation, however, to obtain that quantitative data for its cost-benefit analysis, and its failure to obtain and rely upon accurate data in its cost-benefit analysis violates its statutory obligation to "support its rulemaking" by, among other things, "gather[ing] and compil[ing] information from a variety of sources." 12 U.S.C. § 5512(c)(4)(B)(i); *see also State Farm*, 463 U.S. at 43 (agencies "must examine the relevant data and articulate a satisfactory explanation for its action"). The CFPB's failure to obtain necessary data does not justify the superficial, "qualitative" assessment it undertook. 89 Fed. Reg. at 99,642.

95. Engaging in this inadequate qualitative analysis, the Bureau inflated the benefits that would be obtained from increased compliance and reductions in unspecified risk to consumers, while severely underestimating or ignoring the significant costs to larger participants from installing compliance infrastructure for a new regulatory regime of unknown scope. The Bureau's excuse that it lacks "detailed information," *see* 89 Fed. Reg. at 99,642, is particularly troubling because the Bureau has authority to seek information from providers of consumer financial products and services (its so-called "market monitoring" authority). 12 U.S.C. § 5512(c)(4)(B)(ii). This authority was specifically created "to support [the Bureau's] rulemaking" processes and allows the Bureau's methods and findings to be shared with those seeking to comment on proposed rules. *Id*. § 5512(c)(1). The Bureau has used this authority to engage in factfinding efforts for past rulemakings, where it presented sufficiently detailed data to enable meaningful evaluation of, and comment on, its conclusions. But the Bureau did not do so here, and its "failure to adduce empirical data that can readily be obtained" violates basic principles of administrative law. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009).

96. The Bureau's analysis is flawed in several other respects. For example, the Bureau's consideration of the costs associated with increased compliance in anticipation of Bureau

supervision is contradictory and noncommittal. After asserting that "it is likely that many larger participants would increase compliance in response to the CFPB's supervisory activity authorized by the Final Rule[,]" the Bureau stated in the very same paragraph that it lacks the data necessary to "support a specific quantitative estimate or prediction." 89 Fed. Reg. at 99,643. The Bureau stated that "because the Final Rule itself would not require any provider of general-use digital consumer payment applications" to increase compliance, it cannot predict increased compliance without "an estimate of current compliance levels and a prediction of market participants' behavior in response to a Final Rule." *Id.*

97. In the same breath, though, the Bureau touted the purported benefits to consumers of the new, expansive compliance framework it was introducing. Just after saying that it cannot estimate to what extent larger participants would have to increase their compliance efforts, the Bureau assumed that one of the Final Rule's benefits would be "[i]ncreased compliance with Federal consumer financial laws." *Id.* at 99,643.

98. The Bureau cannot have it both ways. Either the increase in compliance in response to possible supervision will be negligible, and both the costs and benefits will be minimal; or the Final Rule will amplify compliance efforts, with attendant significant costs and benefits. What the Bureau has done, however, is effectively tamp down its cost estimate by touting the purported uncertainty of any increase in compliance—notwithstanding the vast knowledge on that front that it already has accumulated from its years of supervision over large banks—while inflating its benefits estimate by assuming the Final Rule will ensure widespread adoption of consumer protection compliance practices.

99. Moreover, because the Bureau admittedly lacks data about the current level of compliance by larger participants with Federal consumer protection laws, it failed to consider the

possible cost of additional, unnecessary, and costly compliance measures undertaken out of an abundance of caution.

100. The Bureau also dramatically understated the costs of supervisory activities in several respects. The Bureau's cost analysis is flawed from the start: the Bureau "does not consider the costs of establishing a compliance management system to be part of the cost of supporting the supervisory activity itself." 89 Fed. Reg. at 99,646 n.401. This is because "[f]irms are expected to have the systems and policies necessary to ensure they comply with existing" Federal consumer legal requirements. *Id.* But this ignores the reality, to which several commenters to the Proposed Rule drew the Bureau's attention, that firm responses to supervisory examinations are vastly different in size and scope from routine compliance activities and can necessitate significant expenditures of time and money.

101. An additional flaw in the Bureau's analysis is that it assumed that "the cost to a larger participant of supporting a typical eight-week on-site examination should not vary significantly depending on which consumer financial products or services are scoped into the examination." *Id.* This is an illogical assumption on its face. If, as the Bureau asserts, it can supervise *all* consumer financial products or services offered by a larger participant—and not just the specific product(s) that made the entity a larger participant in the first place—the number of exams that a company might potentially face would meaningfully increase given that exams are usually product-specific in nature. Yet the CFPB improperly shrugged this issue aside in estimating the costs and burdens of supervision.

102. To the extent the Bureau does attempt to quantify the costs of supervisory activities, its estimates are unsupported by available evidence. The Bureau estimates that the total employer cost of labor to comply with an examination ranges from $39,000 at the low end, to $392,000 at

the high end. 89 Fed. Reg. at 99,648-49. Assuming that half of the seven potential larger participants undergo supervision in a given year, the Bureau estimated the total industry-wide cost of supervisory activity to be approximately $1.4 million ($392,000 x 3.5). *Id.* at 99,649. Although the Bureau revised its cost estimate upward (from its previous, egregiously erroneous estimate of $25,001) in response to a flood of comments on the Proposed Rule, the estimate in the Final Rule still rests on several erroneous assumptions, including that:

a. An examination will last only 12 weeks. *Id.* at 99,648.

b. The mean hourly wage in the top-paying metropolitan area for compliance officers is $56, and for lawyers is $129.[20] *Id.*

c. That firms would only retain, on the upper end of estimates, one outside counsel at an hourly rate of $917. *Id.* at 99,648 n.412.

d. That outside counsel would only spend 20 hours on preparation and 10 hours of support for a Bureau examination. *Id.*

103. In short, the Bureau vastly underestimated the time and labor involved in preparing for a supervisory examination of a large firm, as well as the wages of professionals required to properly respond to a supervisory examination. What's worse, the Bureau's systematic underselling of the costs involved is simply not credible given its years of supervisory experience in the large banking sector; to claim that it has no evidence of the hefty compliance costs associated with supervision is to make a mockery of the cost-benefit analysis it was required by law to undertake.

[20] In the Proposed Rule, the Bureau derived these hourly wages from the U.S. Bureau of Labor Statistics (BLS), which merely estimated "mean hourly wages" for a generic "lawyer"; the Bureau did not consider whether that estimate is representative of those lawyers who would have the specialized skillset to work on complex administrative supervisory matters. *See* 88 Fed. Reg. at 80,213 and n.105 (citing BLS estimates for "lawyers"); *see also* Final Rule, 89 Fed. Reg. at 99,646 and n.404 (same).

104. Compounding the uncertainty of the Bureau's cost estimate, the Bureau "decline[d] to predict . . . precisely how many examinations it will undertake at each larger participant of general-use digital consumer payment applications." 89 Fed. Reg. at 99,649 n.416. But not only did the Bureau fail to make a *precise* estimate of examination frequency, it made *no* estimate of any kind.

105. As noted above, the Bureau also failed to consider that supervised entities are already subject to supervision at the state level, and thus any benefits of further federal supervision would be *de minimis* in comparison to the costs.

106. The Bureau also failed to meaningfully consider whether and to what extent consumers of general-use digital consumer payment applications could potentially bear increased costs. Again admitting that it "lacks detailed information" about "the extent to which increased costs [of compliance] would be borne by providers or passed on to consumers," the Bureau stated that the decision about whether to "increase resources dedicated to compliance and/or pass those costs on to consumers would depend not only on the entities' current practices and the changes they decide to make," as well as on "market conditions." 89 Fed. Reg. at 99,644. This contradicts the requirement of the Dodd-Frank Act that the Bureau consider "the potential reduction of access by consumers to consumer financial products or services resulting from" the Final Rule. 12 U.S.C. § 5512(b)(2). Whether and to what extent there is increased cost to consumers of using general-use digital consumer payment applications—which are currently largely available to consumers at *no* cost—is a quintessential question of reduction of access the Bureau was required to give due consideration, yet did not.

107. Basing its consideration on its "high" estimate of $1.4 million total industry-wide cost of compliance, the Bureau speculated that this figure represents such a small portion of firms'

overall revenue that it is "less likely that these costs would cause firms to substantially change their business models." 89 Fed. Reg. at 99,650. The Bureau also speculated, without foundation, that merchants and consumers can choose no-fee options if one larger participant begins charging a fee for use.

108. The Bureau further estimated that even if larger participants did pass through the entire cost of compliance to merchants or consumers, the cost per person or entity would be low. 89 Fed. Reg. at 99,650. But earlier in its analysis, the Bureau admitted that it "cannot foresee how larger participants may respond to the cost of supervision." *Id.*

109. Nor, for that matter, did the Bureau adequately analyze the blow to innovation that will be inflicted by the Rule. Supervised entities may pass the cost of supervision on to consumers not merely through increased fees, for example, but by decreased access to consumer financial products and services when those entities are inhibited from developing new products.

110. Because it fails to properly consider costs and benefits, and includes no finding that the benefits of the Final Rule outweigh the costs, the Final Rule violates the Dodd-Frank Act and the APA and fails the basic test of reasoned decision-making. *See Michigan*, 576 U.S. at 751.

CLAIMS FOR RELIEF

COUNT I

In Excess of Statutory Authority (Failure to Consider Harms or Risks to Consumers)
5 U.S.C. § 706(2)(C)

111. Plaintiffs incorporate paragraphs 1-110 as though fully set forth herein.

112. In identifying a purported market for larger participant supervision, the Bureau violated the Dodd-Frank Act by failing to consider or make findings of risks to consumers. Instead,

the Bureau has assumed that it has standardless discretion for designating a market for nonbank supervision.

113. The Bureau also failed another objective standard by not meaningfully considering existing state supervision that already applies to many of the financial products or services that will be subject to the Final Rule, and thus not identifying any gap in oversight that it seeks to fill.

114. The major-questions doctrine forecloses agencies from claiming "sweeping and consequential authority" absent "clear congressional authorization." *West Virginia*, 597 U.S. at 721-23. The Bureau's claimed standardless authority to designate any nonbank market, regardless of risks, for supervision violates this doctrine.

115. The Bureau's posited standardless authority would render the larger participant provision of the Dodd-Frank Act a violation of the nondelegation doctrine, and the Court should interpret the statute to avoid that constitutional concern. *See Gundy*, 588 U.S. at 135; *id.* at 149 (Gorsuch, J., dissenting).

116. The Final Rule therefore exceeds the CFPB's statutory authority and must be set aside. *See* 5 U.S.C. § 706(2)(C).

COUNT II

In Excess of Statutory Authority (Assertion of Supervisory Authority Over Activities Outside the Relevant "Market")
5 U.S.C. § 706(2)(C)

117. Plaintiffs incorporate paragraphs 1-116 as though fully set forth herein.

118. In the Dodd-Frank Act, Congress specifically provided that the CFPB can issue a larger participant rule only if the Bureau defines the particular "market," 12 U.S.C. § 5514(a)(1)(B), (a)(2), and "exercise[s] its authority" based on "the risks posed to consumers in the

relevant product markets and geographic markets." *See* 12 U.S.C. § 5514(b)(2). Congress thus specifically provided that the CFPB's supervisory authority would extend only to the "relevant" product market—and not to all other consumer financial product and service markets in which a designated entity might participate. The CFPB's position that the CFPB can exercise its supervisory authority over the entirety of an entity's consumer financial products or services, regardless of how remote they may be from the products and services that purportedly qualify for market-based supervision in the first place, is not grounded in any statutory authority.

119. By nonetheless claiming the authority to supervise *any* consumer financial products or services offered by a covered company, so long as that company offers *one* product that qualifies for supervision, the Bureau has exceeded its authority under the Dodd-Frank Act, *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369, 398-99 (2024), violated the major questions doctrine, *West Virginia*, 597 U.S. at 722-723, and the authority it posits would render the larger participant provision of the Dodd-Frank Act an unlawful delegation of power, *see Gundy*, 588 U.S. at 135; *id.* at 149 (Gorsuch, J., dissenting).

120. The Final Rule therefore exceeds the CFPB's statutory authority and must be set aside. *See* 5 U.S.C. § 706(2)(C).

COUNT III

In Excess of Statutory Authority (Inadequate Cost-Benefit Analysis) 5 U.S.C. § 706(2)(C)

121. Plaintiffs incorporate paragraphs 1-120 as though fully set forth herein.

122. The Bureau failed to perform the cost-benefit analysis required by the Dodd-Frank Act, including, among other things, by failing to obtain and consider data about the costs of the

rule and failing to adequately consider the reduction of access to consumer financial products and services occasioned by the Rule.

123. The Final Rule therefore exceeds the CFPB's statutory authority and must be set aside. *See* 5 U.S.C. § 706(2)(C).

COUNT IV

Arbitrary and Capricious (Failure to Consider Harms or Risks to Consumers)
5 U.S.C. § 706(2)(A)

124. Plaintiffs incorporate paragraphs 1-123 as though fully set forth herein.

125. By identifying a purported market for larger participant supervision without considering or make findings on consumer harm or risks to consumers, the Bureau acted arbitrary and capriciously by, among other things, failing to consider an important part of the problem.

126. The Bureau also acted arbitrarily and capriciously by failing to specify a purported standard for identifying markets for larger participant supervision, thus undermining notice-and-comment and judicial review.

127. The Final Rule is therefore arbitrary and capricious and must be set aside. *See* 5 U.S.C. § 706(2)(A).

COUNT V

Arbitrary and Capricious (Failure to Identify an Appropriate "Market")
5 U.S.C. § 706(2)(A)

128. Plaintiffs incorporate paragraphs 1-127 as though fully set forth herein.

129. By combining funds transfer functionalities and payment wallet functionalities into a single market, the Bureau defined an arbitrary and incoherent market. The Bureau ignored pertinent regulatory differences between these two functionalities, and imposed a one-size-fits-all

regulatory scheme, without adequate justification, where different products implicate different risks (if any) and different laws.

130. The Final Rule is therefore arbitrary and capricious and must be set aside. *See* 5 U.S.C. § 706(2)(A).

COUNT VI

Arbitrary and Capricious (Assertion of Oversight Beyond the Relevant "Market")
5 U.S.C. § 706(2)(A)

131. Plaintiffs incorporate paragraphs 1-130 as though fully set forth herein.

132. The Bureau acted arbitrarily and capriciously in claiming the ability to supervise the entirety of a covered entity's consumer financial products and services, including as relates to products that plainly fall well outside of the entity's "general-use digital consumer payment application" market. By claiming this additional authority, the Bureau has exponentially increased the scope and size of its supervisory authority, while ignoring comments challenging this overreach. The resulting "market" is no market at all.

133. The Final Rule is therefore arbitrary and capricious and must be set aside. *See* 5 U.S.C. § 706(2)(A).

COUNT VII

Arbitrary and Capricious (Inadequate Cost-Benefit Analysis)
5 U.S.C. § 706(2)(A)

134. Plaintiffs incorporate paragraphs 1-133 as though fully set forth herein.

135. The Bureau acted arbitrarily and capriciously in purporting to assess the costs and benefits of the rule under the Dodd-Frank Act, including, among other things, by failing to obtain and/or meaningfully consider data about the costs of the rule; failing to meaningfully consider existing state supervision that already applies to many of the financial products or services that

will be subject to the Final Rule; and failing to adequately consider the reduction of access to consumer financial products and services occasioned by the Final Rule. The Bureau also failed to make a finding—nor could it—that the benefits of the Final Rule outweighed its costs.

136. The Final Rule is therefore arbitrary and capricious and must be set aside. *See* 5 U.S.C. § 706(2)(A).

PRAYER FOR RELIEF

Plaintiffs respectfully pray that this Court enter an order and judgment:

1. Vacating and setting aside the Final Rule;
2. Declaring that the Final Rule exceeds the Bureau's statutory authority, is arbitrary and capricious, and contrary to law;
3. Permanently enjoining Defendants and any relevant officers, employees, and agents from commencing supervision, enforcing, implementing, applying, or taking any action whatsoever under, or in reliance on, the Final Rule;
4. Awarding Plaintiffs the costs of this litigation, including reasonable attorney's fees; and
5. Entering such other and further relief as this Court may deem just and proper.

Dated: January 16, 2025

Respectfully submitted,

/s/ Andrew J. Pincus

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EXHIBIT A

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part 1090

[Docket No. CFPB–2023–0053]

RIN 3170–AB17

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

AGENCY: Consumer Financial Protection Bureau.

ACTION: Final rule.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) issues this rule to define larger participants of a market for general-use digital consumer payment applications. Larger participants of this market will be subject to the CFPB's supervisory authority under the Consumer Financial Protection Act (CFPA). A nonbank covered person qualifies as a larger participant if it facilitates an annual covered consumer payment transaction volume of at least 50 million transactions as defined in the rule, and it is not a small business concern.

DATES: This rule is effective January 9, 2025.

FOR FURTHER INFORMATION CONTACT: George Karithanom, Regulatory Implementation and Guidance Program Analyst, Office of Regulations, at 202–435–770. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Overview

Section 1024 of the CFPA,[1] codified at 12 U.S.C. 5514, gives the CFPB supervisory authority over all nonbank covered persons [2] offering or providing three enumerated types of consumer financial products or services: (1) Origination, brokerage, or servicing of consumer loans secured by real estate and related mortgage loan modification or foreclosure relief services; (2) private education loans; and (3) payday loans.[3] The CFPB also has supervisory authority over ''larger participant[s] of a market for other consumer financial products or services, as defined by rule[s]'' the CFPB issues.[4] In addition, the CFPB has the authority to supervise any nonbank covered person that it ''has reasonable cause to determine by order, after notice to the covered person and a reasonable opportunity . . . to respond . . . is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.'' [5]

This rule (the Final Rule) is the sixth in a series of CFPB rulemakings to define larger participants of markets for consumer financial products and services for purposes of CFPA section 1024(a)(1)(B).[6] The Final Rule establishes the CFPB's supervisory authority over nonbank covered persons that are larger participants in a market for ''general-use digital consumer payment applications.'' In establishing the CFPB's supervisory authority over such persons, the Final Rule does not impose new substantive consumer protection requirements. In addition, some nonbank covered persons that would be subject to the CFPB's supervisory authority under the Final Rule also may be subject to other CFPB supervisory authorities, including for example under CFPA section 1024 as a larger participant in another market defined by a previous CFPB larger participant rule. Finally, regardless of whether they are subject to the CFPB's supervisory authority, nonbank covered persons generally are subject to the CFPB's regulatory and enforcement authority and to applicable Federal consumer financial law.

The market described in the Final Rule includes providers of funds transfer and payment wallet functionalities through digital payment applications for consumers' general use in making payments to other persons for personal, family, or household purposes. Examples include consumer financial products and services that are commonly described as ''digital wallets,'' ''payment apps,'' ''funds transfer apps,'' ''peer-to-peer payment apps,'' ''person-to-person payment apps,'' ''P2P apps,'' and the like. Providers of consumer financial products and services delivered through these digital applications help consumers to make a wide variety of consumer payment transactions, including payments to friends and family and payments for purchases of nonfinancial goods and services.

The CFPB is authorized to supervise nonbank covered persons that are subject to CFPA section 1024(a) for purposes of (1) assessing compliance with Federal consumer financial law; (2) obtaining information about such persons' activities and compliance systems or procedures; and (3) detecting and assessing risks to consumers and consumer financial markets.[7] The CFPB conducts examinations of various scopes of supervised entities. In addition, the CFPB may, as appropriate, request information from supervised entities prior to or without conducting examinations.[8] Section 1090.103(d) of the CFPB's existing larger participant regulations also provides that the CFPB may require submission of certain records, documents, and other information for purposes of assessing whether a person qualifies as a larger participant of a market as defined by a CFPB larger participant rule.[9]

Consistent with CFPA section 1024(b)(2), the CFPB has established and implemented a risk-based supervisory program that is designed to prioritize supervisory activity among nonbank covered persons subject to CFPA section 1024(a) on the basis of risk.[10] The CFPB's prioritization process

[1] Consumer Financial Protection Act of 2010, title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376, 1955 (2010) (hereinafter, ''CFPA'').

[2] The provisions of 12 U.S.C. 5514 apply to certain categories of covered persons, described in section (a)(1), and expressly excludes from coverage persons described in 12 U.S.C. 5515(a) (very large insured depository institutions and credit unions and their affiliates) or 5516(a) (other insured depository institutions and credit unions). The term ''covered person'' means ''(A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate of a person described [in (A)] if such affiliate acts as a service provider to such person.'' 12 U.S.C. 5481(6).

[3] 12 U.S.C. 5514(a)(1)(A), (D), (E).

[4] 12 U.S.C. 5514(a)(1)(B), (a)(2); *see also* 12 U.S.C. 5481(5) (defining ''consumer financial product or service'').

[5] 12 U.S.C. 5514(a)(1)(C); *see also* 12 CFR part 1091 (prescribing procedures for making determinations under 12 U.S.C. 5514(a)(1)(C)). In addition, the CFPB has supervisory authority over very large depository institutions and credit unions and their affiliates. 12 U.S.C. 5515(a). Furthermore, the CFPB has certain authorities relating to the supervision of other depository institutions and credit unions. 12 U.S.C. 5516(c)(1). One of the CFPB's objectives under the CFPA is to ensure that ''Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition[.]'' 12 U.S.C. 5511(b)(4).

[6] The first five rules defined larger participants of markets for consumer reporting, 77 FR 42874 (July 20, 2012) (Consumer Reporting Rule), consumer debt collection, 77 FR 65775 (Oct. 31, 2012) (Consumer Debt Collection Rule), student loan servicing, 78 FR 73383 (Dec. 6, 2013) (Student Loan Servicing Rule), international money transfers, 79 FR 56631 (Sept. 23, 2014) (International Money Transfer Rule), and automobile financing, 80 FR 37496 (June 30, 2015) (Automobile Financing Rule).

[7] 12 U.S.C. 5514(b)(1). The CFPB's supervisory authority also extends to service providers of those covered persons that are subject to supervision under 12 U.S.C. 5514(a)(1). 12 U.S.C. 5514(e); *see also* 12 U.S.C. 5481(26) (defining ''service provider'').

[8] *See, e.g.,* 12 U.S.C. 5514(b)(1) (authorizing the CFPB both to ''require reports and conduct examinations on a periodic basis'' of nonbank covered persons subject to supervision).

[9] 12 CFR 1090.103(d).

[10] 12 U.S.C. 5514(b)(2). The CFPB notes that its prioritization process is not the subject of this rulemaking.

takes into account, among other factors, the size of each entity, the volume of its transactions involving consumer financial products or services, the size and risk presented by the market in which it is a participant, the extent of relevant State oversight, and any field and market information that the CFPB has on the entity. Specifically, as the CFPB Supervision and Examination Manual explains in greater detail, the CFPB evaluates risks to consumers at market-wide and the institution product line levels. At the market-wide level, the CFPB considers and compares risks to consumers across different types of products (*e.g.,* mortgage loans or debt collectors) along with the relative product market size in the overall consumer finance marketplace. At the institution product line level, the CFPB evaluates and compares risks across entities that, regardless of status as a nonbank or an insured depository institution or credit union, offer the same or similar products (*e.g.,* providers of mortgage loans). When evaluating risks across entities in an institution product line, the CFPB considers which entities have business models and market shares that pose greater risk of harm to consumers. The CFPB also places significant weight on ''field and market intelligence,'' which includes findings from prior examinations and other information about the strength of compliance management systems, metrics gathered from public reports, and the number and severity of consumer complaints the CFPB receives.[11] Taken together, this approach of assessing risks at the market-wide level and at the institutional level allows the CFPB to focus on areas where consumers have the greatest potential to be harmed, specifically, on relatively higher-risk institution product lines within relatively higher-risk markets. Finally, as described in CFPA section 1024(b)(3), the CFPB also coordinates its supervisory activities at nonbank covered persons with the supervisory activities conducted by Federal prudential regulators and State regulatory authorities.[12]

The specifics of how an examination takes place vary by market and entity. However, the examination process generally proceeds as follows.[13] CFPB examiners contact the entity for an initial conference with management and often request records and other information. CFPB examiners may review the components of the supervised entity's compliance management system. Based on these discussions and a preliminary review of the information received, examiners determine the scope of an on-site or remote examination and coordinate with the entity to initiate this portion of the examination. While on-site or working remotely, examiners discuss with management the entity's compliance policies, processes, and procedures; review documents and records; test transactions and accounts for compliance; and evaluate the entity's compliance management system. At the conclusion of that stage of an examination, examiners may review preliminary examination findings at a closing meeting. After the closing meeting, if examiners have identified potential violations of Federal consumer financial law, they also may provide the entity an opportunity to respond in writing to those potential findings.[14] Finally, examinations may involve issuing confidential examination reports, supervisory letters, and compliance ratings. In addition to the process described above, the CFPB also may conduct other supervisory activities, such as periodic monitoring.[15]

II. Background

On November 17, 2023, the CFPB published a notice of proposed rulemaking to define larger participants of a market for general-use digital consumer payment applications (Proposed Rule).[16] As described in part V below, the Proposed Rule would have defined a larger participant as any nonbank covered person that, in the previous calendar year, both facilitated at least five million consumer payment transactions by providing general-use digital consumer payment applications and was not a small business concern as defined in the Proposed Rule. The CFPB requested comment on the Proposed Rule. The CFPB received 59 comments from consumer advocate organizations (consumer groups), nonprofits, companies, industry associations, State attorneys general, Members of Congress, and other individuals. The comments are discussed in more detail below.

III. Summary of the Final Rule

The CFPB is authorized to issue rules to define larger participants in markets for consumer financial products or services. Subpart A of the CFPB's existing larger-participant regulation, 12 CFR part 1090, prescribed procedures, definitions, standards, and protocols that apply to the CFPB's supervision of larger participants.[17] Those generally-applicable provisions will apply to the CFPB's supervision of larger participants in the general-use digital consumer payment application market described by the Final Rule. The definitions in § 1090.101 should be used to interpret terms in the Final Rule unless otherwise specified.

The CFPB includes relevant market descriptions and associated larger-participant tests, as it develops them, in subpart B.[18] Accordingly, the Final Rule defining larger participants of a market for general-use digital consumer payment applications is codified in § 1090.109 in subpart B.

The CFPB is finalizing the Proposed Rule largely as proposed, with certain changes described below, including changes to increase the transaction threshold that the CFPB will use as part of the test to assess when a nonbank covered person is a larger participant of a market for general-use digital consumer payment applications.

The Final Rule defines larger participants of a market for general-use digital consumer payment applications. That market encompasses specific activities. The market definition generally includes nonbank covered persons that provide funds transfer or payment wallet functionalities through a digital payment application for consumers' general use in making consumer payments transactions as defined in the Final Rule. The Final Rule defines ''consumer payment transactions'' to include payments to

[11] *See id.* For further description of the CFPB's supervisory prioritization process, see *CFPB Supervision and Examination Manual* (updated Sept. 2023), part I.A (pages 11–12 of Overview section), *https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual_2023-09.pdf* (last visited Nov. 10, 2024).

[12] 12 U.S.C. 5514(b)(3). The Final Rule further describes this coordination in response to general comments about existing oversight of the market below. As discussed there, the CFPB also coordinates its supervisory activity with the Federal Trade Commission. The CFPB notes that its coordination process is not the subject of this rulemaking.

[13] For further description of the CFPB's examination process, see *CFPB Supervision and Examination Manual,* part I.A.

[14] *See, e.g.,* CFPB, *Supervisory Highlights Issue 8, Summer 2015,* sec. 3.1.3 (describing supervision process of sending a Potential Action and Request for Response (PARR) letter to a supervised entity), *https://files.consumerfinance.gov/f/201506_cfpb_supervisory-highlights.pdf* (last visited Nov. 5, 2024).

[15] *CFPB Supervision and Examination Manual,* part I.A (page 12 of Overview section describing supervisory monitoring).

[16] 88 FR 80197 (Nov. 17, 2023).

[17] 12 CFR 1090.100 through 103.

[18] 12 CFR 1090.104 (consumer reporting market); 12 CFR 1090.105 (consumer debt collection market); 12 CFR 1090.106 (student loan servicing market); 12 CFR 1090.107 (international money transfer market); 12 CFR 1090.108 (automobile financing market).

other persons for personal, household, or family purposes, excluding certain transactions as described in more detail in the section-by-section analysis in part V below. The Final Rule also identifies a limited set of digital payment applications that do not fall within the proposed market definition because they do not have general use for purposes of the Final Rule.

The Final Rule sets forth a test to determine whether a nonbank covered person is a larger participant of the general-use digital consumer payment applications market. As further explained below, a nonbank covered person is a larger participant if it satisfies two criteria. First, the nonbank covered person (together with its affiliated companies) must provide general-use digital consumer payment applications with an annual volume of at least 50 million consumer payment transactions denominated in U.S. dollars. Second, the nonbank covered person must not be a small business concern based on the applicable Small Business Administration (SBA) size standard. As prescribed by subpart A of the CFPB's general larger participant regulation, any nonbank covered person that qualifies 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.[19]

As noted above, § 1090.103(d) of the CFPB's existing larger participant regulation provides that the CFPB may require submission of certain records, documents, and other information for purposes of assessing whether a person is a larger participant of a market as defined by a CFPB larger participant rule.[20] As with the CFPB's other larger participant rules codified in subpart B, this authority will be available to facilitate the CFPB's identification of larger participants of the general-use digital consumer payment applications market. In addition, pursuant to existing § 1090.103(a), a person will be able to dispute whether it qualifies as a larger participant in the general-use digital payment applications market. The CFPB will notify an entity when the CFPB intends to undertake supervisory activity; if the entity claims not to be a larger participant, it will then have an opportunity to submit documentary evidence and written arguments in support of its claim.[21]

[19] 12 CFR 1090.102.

[20] 12 CFR 1090.103(d).

[21] 12 CFR 1090.103(a).

IV. Legal Authority and Procedural Matters

A. Rulemaking Authority

The CFPB is issuing the Final Rule pursuant to its authority under the CFPA, as follows: (1) sections 1024(a)(1)(B) and (a)(2), which authorize the CFPB to supervise nonbanks that are larger participants of markets for consumers financial products or services, as the CFPB defines by rule; [22] (2) section 1024(b)(7), which, among other things, authorizes the CFPB to prescribe rules to facilitate the supervision of covered persons under section 1024; [23] and (3) section 1022(b)(1), which grants the CFPB the authority to prescribe rules as may be necessary or appropriate to enable the CFPB to administer and carry out the purposes and objectives of Federal consumer financial law, and to prevent evasions of such law.[24]

B. Consultation With Other Agencies

In developing the Final Rule and the Proposed Rule, the CFPB consulted with the Federal Trade Commission (FTC), as well as with the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission (CFTC), the Federal Deposit Insurance Corporation (FDIC), the Financial Crimes Enforcement Network, the National Credit Union Administration (NCUA), the Office of the Comptroller of the Currency (OCC), and the Securities and Exchange Commission (SEC), on, among other things, consistency with any prudential, market, or systemic objectives administered by such agencies.[25]

[22] 12 U.S.C. 5514(a)(1)(B), (a)(2).

[23] 12 U.S.C. 5514(b)(7).

[24] 12 U.S.C. 5512(b)(1).

[25] Specifically, 12 U.S.C. 5514(a)(2) directs that the CFPB consult with the FTC prior to issuing a final rule to define larger participants of a market pursuant to CFPA section 1024(a)(1)(B). In addition, 12 U.S.C. 5512(b)(2)(B) directs the CFPB to consult, before and during the rulemaking, with appropriate prudential regulators or other Federal agencies, regarding consistency with objectives those agencies administer. The manner and extent to which provisions of 12 U.S.C. 5512(b)(2) apply to a rulemaking of this kind that does not establish standards of conduct are unclear. Nevertheless, to inform this rulemaking more fully, the CFPB performed the consultations described in that provision of the CFPA.

Some commenters questioned whether the CFPB met its consultation obligations based on the statement in the proposal that it ''consulted with or provided an opportunity for consultation and input to'' the FTC and certain other agencies. 88 FR 80197 at 80199. The CFPB clarifies that it did meet during the rulemaking process with the FTC and other agencies listed above to consult about the rule. Some commenters also suggested that the CFPB is specifically required to consult with the FTC's Bureau of Competition, in line with those commenters' view that the CFPB must apply antitrust principles when defining a market for a larger participant rule. However, the relevant statutory provision, 12 U.S.C. 5514(a)(2), by its terms requires the CFPB to consult with the FTC, and not with specific divisions of the FTC. The CFPB addresses comments regarding the applicability of antitrust principles in discussion of general comments in part V further below.

V. Section-by-Section Analysis

Part 1090

Subpart B—Markets

Section 1090.109 General-Use Digital Consumer Payment Applications Market

Proposed Rule

As described further below, the CFPB proposed to establish CFPB authority to supervise nonbank covered persons that are larger participants in this market because: (1) the market has grown dramatically and become increasingly important to the everyday financial lives of consumers; (2) CFPB supervisory authority over its larger participants would help the CFPB to promote compliance with Federal consumer financial law; (3) that authority would help the CPFB to detect and assess risks to consumers and the market, including emerging risks; and (4) that authority would help the CFPB to ensure consistent enforcement of Federal consumer financial law between nonbanks and insured banks and credit unions.

To accomplish these goals, the Proposed Rule would have added to existing subpart B of part 1090 of the CFPB's rules a new § 1090.109 establishing CFPB supervisory authority over nonbank covered persons who are larger participants in a market for general-use digital consumer payment applications.[26]

As the Proposed Rule explained, many nonbanks provide consumer financial products and services that allow consumers to use digital applications accessible through personal computing devices, such as mobile phones, tablets, smart watches, or computers, to transfer funds to other persons. Some nonbanks also provide consumer financial products and services that allow consumers to use digital applications on their personal computing devices to store payment credentials they can then use to purchase goods or services at a variety of stores, whether by communicating with a checkout register or a self-

[26] As explained in the Proposed Rule and discussed further below, the general-use digital payment applications described in this Final Rule are ''financial products or services'' under the CFPA. 12 U.S.C. 5481(15)(A)(iv), (vii). Nonbanks that offer or provide such financial products or services to consumers primarily for personal, family, or household purposes are ''covered persons'' under the CFPA. 12 U.S.C. 5481(5)(A), (6).

checkout machine, or by selecting the payment credential through a checkout process at ecommerce websites. Subject to the definitions, exclusions, limitations, and clarifications discussed in the Proposed Rule, the proposed market definition generally would have covered these consumer financial products and services.

The Proposed Rule explained that the CFPB proposed to establish supervisory authority over nonbank covered persons who are larger participants in this market because this market has large and increasing significance to the everyday financial lives of consumers.[27] Consumers are growing increasingly reliant on general-use digital consumer payment applications to initiate payments.[28] Recent market research indicates that 76 percent of Americans have used at least one of four well-known P2P payment apps, representing substantial growth since the first of the four was established in 1998.[29] Even among consumers with annual incomes lower than $30,000 who have more limited access to digital technology,[30] 61 percent reported using P2P payment apps.[31] And higher rates of use by U.S. adults in lower age brackets may drive further growth well into the future.[32] Across the United States, merchant acceptance of general-use digital consumer payment applications also has rapidly expanded as businesses seek to make it as easy as possible for consumers to make purchases through whatever is their preferred payment method.[33]

The Proposed Rule described how consumers rely on general-use digital consumer payment applications for many aspects of their everyday lives. In general, consumers make payments to other individuals for a variety of reasons, including sending gifts or making informal loans to friends and family and purchasing goods and services, among many others.[34] Consumers can use digital applications to make payments to individuals for these purposes, as well as to make payments to businesses, charities, and other organizations. According to one recent market report, nonbank digital payment apps have rapidly grown in the past few years to become the most popular way to send money to other individuals other than cash,[35] and are

[27] The Proposed Rule explained that, in proposing a larger participant rule for this market, the CFPB was not proposing to determine the relative risk posed by this market as compared to other markets. It noted that, as explained in its previous larger participant rulemakings, ''[t]he Bureau need not conclude before issuing a [larger participant rule] that the market identified in the rule has a higher rate of non-compliance, poses a greater risk to consumers, or is in some other sense more important to supervise than other markets.'' 88 FR 80197 at 80200 (citing Consumer Debt Collection Larger Participant Rule, 77 FR 65775 at 65779).

[28] *See* CFPB, *Issue Spotlight: Analysis of Deposit Insurance Coverage Through Payment Apps* (June 1, 2023) (CFPB Deposit Insurance Spotlight), *https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-analysis-of-deposit-insurance-coverage-on-funds-stored-through-payment-apps/full-report/* (last visited Oct. 23, 2023); *see also* McKinsey & Company, *Consumer digital payments: Already mainstream, increasingly embedded, still evolving* (Oct. 20, 2023) (describing results of consulting firm's annual survey reporting that for the first time, more than 90 percent of U.S. consumers surveyed in August 2023 reported using some form of digital payment over the course of a year), *https://www.mckinsey.com/industries/financial-services/our-insights/banking-matters/consumer-digital-payments-already-mainstream-increasingly-embedded-still-evolving* (last visited Oct. 30, 2023); J.D. Power, *Banking and Payments Intelligence Report* (Jan. 2023) (reporting results of a survey of Americans that found that from the first quarter of 2021 to the third quarter of 2022, the number of respondents who had used a mobile wallet in the past three months rose from 38 percent to 49 percent), *https://www.jdpower.com/business/resources/mobile-wallets-gain-popularity-growing-number-americans-still-prefer-convenience* (last visited Oct. 23, 2023); PULSE, *PULSE Study Finds Debit Issuers Focused on Digital Payments, Mobile Self-Service, Fraud Mitigation* (Aug. 17, 2023) (reporting that nearly 80 percent of debit card issuers reported increases in consumers' use of mobile wallets in 2022), *https://www.pulsenetwork.com/public/insights-and-news/news-release-2023-debit-issuer-study/* (last visited Oct. 30, 2023); FIS, *The Global Payments Report* (2023) (FIS 2023 Global Payments Report) at 175 (industry study reporting that in 2022 digital wallets became the leading payment preference of U.S. consumers shopping online), *https://www.fisglobal.com/-/media/fisglobal/files/campaigns/global-payments%20report/FIS_TheGlobalPaymentsReport_2023.pdf* (last visited Nov. 5, 2024); *Digital Payment Industry in 2023: Payment methods, trends, and tech processing payments electronically, eMarketer (formerly known as Insider Intelligence)* (Jan. 9, 2023) (projecting 2023 transaction volume by U.S. P2P mobile payment app providers to reach over $1.1 trillion), *https://www.emarketer.com/insights/digital-payment-services/* (last visited Nov. 5, 2024); Consumer Reports Survey Group, *Peer-to-Peer Payment Services* (Jan. 10, 2023) (Consumer Reports P2P Survey) at 1 (reporting results from a survey finding that four in ten Americans use P2P services at least once a month), *https://advocacy.consumerreports.org/wp-content/uploads/2023/01/P2P-Report-4-Surveys-2022.pdf* (last visited Oct. 23, 2023); Kevin Foster, Claire Greene, and Joanna Stavins, *2022 Survey and Diary of Consumer Payment Choice: Summary Results* (Sept. 17, 2022) at 8 (reporting results of survey conducted by Federal Reserve System staff finding that, as of 2022, two thirds of consumers reported adopting one or more online payment accounts in the previous 12 months—a share that was nearly 20 percent higher than five years earlier), *https://www.atlantafed.org/-/media/documents/banking/consumer-payments/survey-diary-consumer-payment-choice/2022/sdcpc_2022_report.pdf* (last visited Oct. 30, 2023); FDIC, *FDIC National Survey of Unbanked and Underbanked Households* (2021) at 33 (Table 6.4 reporting finding that nearly half of all households (46.4 percent) used a nonbank app in 2021), *https://www.fdic.gov/analysis/household-survey/2021report.pdf* (last visited Oct. 23, 2023).

[29] *See, e.g.,* Monica Anderson, Pew Research Center, *Payment apps like Venmo and Cash App bring convenience—and security concerns—to some users* (Sept. 8, 2022) (Pew 2022 Payment App Article), *https://www.pewresearch.org/short-reads/2022/09/08/payment-apps-like-venmo-and-cash-app-bring-convenience-and-security-concerns-to-some-users/* (last visited Oct. 23, 2023).

[30] Emily A. Vogels, Pew Research Center, *Digital divide persists even as Americans with lower incomes make gains in tech adoption* (June 22, 2021) (reporting results of early 2021 survey by Pew Research Center, finding 76 percent of adults with annual household incomes less than $30,000 have a smartphone and 59 percent have a desktop or laptop computer, compared with 87 percent and 84 percent respectively of adults with household incomes between $30,000 and $99,999, and 97 percent and 92 percent respectively of adults with household incomes of $100,000 or more), *https://www.pewresearch.org/short-reads/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/* (last visited Oct. 23, 2023).

[31] *Consumer Reports P2P Survey* at 2 (55 percent reported ongoing use and six percent stated they used to use this kind of service).

[32] *See id.* (85 percent of surveyed consumers aged 18 to 29 and 85 percent of surveyed consumers aged 30 to 44 reported using a digital payment application, compared with 67 percent of consumers aged 45 to 59 and 46 percent of consumers aged 60 and over); *see also* Ariana-Michele Moore, *The U.S. P2P Payments Market: Surprising Data Reveals Banks are Missing the Mark* (AiteNovarica 2023 Impact Report) at 6, 24 (Figure 13 reporting 94 percent and 86 percent adoption of P2P accounts and digital wallets among the youngest adult cohort born between 1996 and 2002, compared with 57 percent and 40 percent among the oldest cohort born before 1995), *https://aite-novarica.com/report/us-p2p-payments-market-surprising-data-reveals-banks-are-missing-mark* (last visited Oct. 23, 2023) and *https://datos-insights.com/reports/us-p2p-payments-market-surprising-data-reveals-banks-are-missing-mark/* (last visited Nov. 5, 2024).

[33] *See* Geoff Williams, *Retailers are embracing alternative payment methods, though cards are still king* (Dec. 1, 2022) (National Retail Federation article citing its 2022 report describing a Forrester survey indicating that 80 percent of merchants accept Apple Pay or plan to do so in the next 18 months, 65 percent of merchants accept Google Pay or plan to do so in the next 18 months, and, online, 74 percent accept PayPal or plan to do so), *https://nrf.com/blog/retailers-are-embracing-alternative-payment-methods-though-cards-are-still-king* (last visited Oct. 23, 2023); *see also* The Strawhecker Group (TSG), *Merchants respond to Consumer Demand by Offering P2P Payments* (June 8, 2022) (TSG: Merchants Offering P2P Payments) (reporting results of TSG and Electronic Transactions Association survey of over 500 small businesses merchants finding that 82 percent accept payment through at least one digital P2P option), *https://thestrawgroup.com/merchants-respond-to-consumer-demand-by-offering-p2p-payments/* (last visited Oct. 23, 2023).

[34] *AiteNovarica 2023 Impact Report* at 8–9 (Figure 1 reporting 66 percent of 5,895 consumers surveyed reported making at least one domestic P2P payment in 2022 whether via digital means or not, and Figure 2 reporting that, of consumers who made P2P payments in 2022, among other purposes, 70 percent did so for birthday gifts, 64 percent for holiday gifts, 49 percent for other gift occasions, 46 percent to lend money, 41 percent to make a charitable contribution, 39 percent paid for services, 39 percent purchased items, 31 percent provided funds in an emergency situation, and 18 percent provided financial support).

[35] *Id.* at 25 (Figure 14 reporting that, among other payment methods or sources, 74 percent of consumers made P2P payments in cash, 69 percent used alternative digital P2P payment services, defined as services offered by nonbank providers

Continued

used for a higher number of such transactions than cash.[36] For many consumers, general-use digital consumer payment applications offer an alternative, technological replacement for non-digital payment methods.[37] Consumers increasingly have adopted general-use digital consumer payment applications [38] as part of a broader movement toward noncash payments.[39] Amid growing merchant acceptance of general-use digital consumer payment applications, consumers with middle and lower incomes use digital consumer payment applications for a share of their overall retail spending that rivals or exceeds their use of cash.[40] Such applications now have a share of ecommerce payments volume that is similar to or greater than other traditional payment methods such as credit cards and debit cards used outside of such applications.[41] Such applications also have been gaining an increasing share of in-person retail spending.[42]

The Proposed Rule would have brought nonbanks that qualified as larger participants in a market for general-use digital consumer payment applications under the CFPB's supervisory jurisdiction.[43] The Proposed Rule explained that supervision of larger participants, who engage in a substantial portion of the overall activity in this market, would help to ensure that they are complying with applicable requirements of Federal consumer financial law, such as the CFPA's prohibition against unfair, deceptive, and abusive acts and practices, the privacy provisions of the Gramm-Leach-Bliley Act (GLBA) and its implementing Regulation P,[44] and the Electronic Fund Transfer Act (EFTA) and its implementing Regulation E.[45] The Proposed Rule also explained that, as firms increasingly offer funds transfer and wallet functionalities through general-use digital consumer payment applications, the rule would enable the CFPB to detect and assess new risks to both consumers and the market.[46] As stated in the Proposed Rule, the CFPB's ability to detect and assess emerging risks is critical as new product offerings blur the traditional lines of banking and commerce.[47]

The Proposed Rule explained that the CFPB regularly supervises depository institutions that provide general-use digital consumer payment applications.[48] As the Proposed Rule noted, greater supervision of nonbanks in this market therefore would further the CFPB's statutory objective of ensuring that Federal consumer financial law is enforced consistently between nonbanks and depository institutions in order to promote fair competition.[49]

The Proposed Rule also recognized that States have been active in regulation of money transmission by money services businesses and that many States actively examine money transmitters.[50] The Proposed Rule stated that the CFPB would coordinate with appropriate State regulatory authorities in examining larger participants.

General Comments Received [51]

In this part of the section-by-section analysis, the Final Rule summarizes and responds to comments about general aspects of the proposal, including the rulemaking process, the CFPB's general reasons for issuing the proposal, and certain other general topics.

Comments on Rulemaking Process

Some comments addressed the rulemaking process. First, some commenters suggested that the CFPB should not have issued, and should not finalize, the Proposed Rule during the

via mobile app, web service, or digital wallet, and 27 percent used Zelle through a bank's mobile application).

[36] *Id.* at 27–28 (Figure 15 reporting that, compared with 20 percent of P2P transactions made in cash, 37 percent of P2P transactions made through alternative P2P payment services).

[37] *See* Marqueta, *2022 State of Consumer Money Movement Report* (May 26, 2022) at 1 (summary of report describing results of industry survey finding that 56 percent of US consumers felt comfortable leaving their non-digital wallet at home and taking their phone with them to make payments), *https://www.marqeta.com/resources/2022-state-of-consumer-money-movement* (last visited Oct. 23, 2023).

[38] *AiteNovarica 2023 Impact Report* at 24 (Figure 13 reporting 81 percent of U.S. adults surveyed held one or more P2P accounts and 69 percent had one or more digital wallets).

[39] *The Federal Reserve Payments Study: 2022 Triennial Initial Data Release* (indicating a rapid increase in core non-cash payments between 2018 and 2021 and a rapid decline in ATM cash withdrawals during the same period), *https://www.federalreserve.gov/paymentsystems/fr-payments-study.htm* (last visited Nov. 19, 2024).

[40] PYMNTS, *Digital Economy Payments: The Ascent of Digital Wallets* (Feb. 2023) at 16–17 (December 2022 survey finding 6.1 percent of overall consumer spending by consumers with lower incomes made using digital consumer payment applications, compared with 9.9 percent of consumer spending by consumers with middle-level incomes), *https://www.pymnts.com/study/digital-economy-payments-ecommerce-shopping-retail-consumer-spending/* (last visited Oct. 23, 2023).

[41] *See FIS 2023 Global Payments Report* at 176 (reporting 32 percent share of ecommerce transactions, by value, made using a digital wallet, compared with 30 percent by credit card and 20 percent by debit card).

[42] *See, e.g., 2023 Pulse Debit Issuer Study* (Aug. 17, 2023) at 11 (reporting that mobile wallet use at point of sale nearly doubled in 2022, representing nearly 10 percent of total debit card purchase transactions in 2022), *https://content.pulsenetwork.com/2023-debit-issuer-study/2023-pulse-debit-issuer-study-white-paper* (last visited Nov. 5, 2024); *Digital Economy Payments: The Ascent of Digital Wallets* at 12 (December 2022 survey finding 7.5 percent of in-person consumer purchase volume made with a digital consumer payment application). *See also* CFPB Issue Spotlight, *Big Tech's Role in Contactless Payments: Analysis of Mobile Devices Operating Systems and Tap-to-Pay Practices* (Sept. 7, 2023) (CFPB Contactless Payments Spotlight) (describing market report by Juniper Research forecasting that the value of digital wallet tap-to-pay transactions will grow by over 150 percent by 2028), *https://www.consumerfinance.gov/data-research/research-reports/big-techs-role-in-contactless-payments-analysis-of-mobile-device-operating-systems-and-tap-to-pay-practices/full-report/* (last visited Oct. 23, 2023).

[43] 12 U.S.C. 5514(a)(1)(B).

[44] *See generally* 12 CFR part 1016—Privacy of Consumer Financial Information (CFPB's Regulation P implementing 15 U.S.C. 6804).

[45] 15 U.S.C. 1693 *et seq.,* implemented by Regulation E, 12 CFR part 1005. *See, e.g.,* 12 CFR 1005.11 (Procedures for financial institutions to resolve errors).

[46] 88 FR 80197 at 80201 & n.43 (citing CFPB, *The Convergence of Payments and Commerce: Implications for Consumers* (Aug. 2022) (CFPB Report on Convergence of Payments and Commerce) at sec. 4.1 (highlighting the potential that consumer financial data and behavioral data are used together in increasingly novel ways), *https://files.consumerfinance.gov/f/documents/cfpb_convergence-payments-commerce-implications-consumers_report_2022-08.pdf* (last visited Oct. 27, 2023)).

[47] *See generally id.*

[48] For example, as the Proposed Rule noted, some depository institutions and credit unions provide general bill-payment services and other types of electronic fund transfers through digital applications for consumer deposit accounts. *Id.* at n.45.

[49] 12 U.S.C. 5511(b)(4).

[50] 88 FR 80197 at 80198 n.12, 80214 n.108 (citing CSBS, *Reengineering Nonbank Supervision, Ch. 4: Overview of Money Services Businesses* (Oct. 2019) (CSBS Reengineering Nonbank Supervision MSB Chapter), *https://www.csbs.org/sites/default/files/other-files/Chapter%204%20-%20MSB%20Final%20FINAL_updated_0.pdf* (last visited Nov. 5, 2024)).

[51] Some commenters provided additional recommendations that are outside the scope of this rulemaking, such as increasing education of consumers who use general-use digital consumer payment applications, promulgating new consumer protections for these consumers, or imposing information collection requirements such as collecting the legal entity identifier (LEI) of larger participants. The Final Rule does not address these comments, which are outside the scope of a rulemaking under CFPA section 1024(a)(1)(B) to define and establish supervisory authority over larger participants in a market for consumer financial products and services. In addition, a consumer group suggested that the CFPB the CFPB expressly clarify that meeting the definition of a larger participant does not automatically cause application of exclusions in State privacy laws for GLBA compliance and that the CFPB coordinate with States to avoid risk of preempting State privacy laws when the CFPB supervises for compliance with the GLBA and its implementing Regulation P. This rulemaking does not establish or interpret substantive consumer protection requirements and thus does not interpret Regulation P (including its provision describing its relationship with State laws in 12 CFR 1016.17); it also does not itself govern State coordination, which occurs separately when the CFPB carries out nonbank supervision.

pendency of a Supreme Court case concerning the constitutionality of the CFPB's funding structure under the Appropriations Clause.[52] Second, some industry commenters, a nonprofit commenter, an individual commenter, and some Members of Congress asked the CFPB to extend the comment period, such as by an additional 30 or 45 days. These commenters cited various reasons for their request, including the number of holidays during the comment period, the complexity of the proposed market including coverage of digital assets, the complexity of the proposed larger-participant test that included multiple steps, a need for more specifics regarding which products and services were encompassed in the market and the risks the CPFB believed they pose that justify the need for the Proposed Rule, and overlap between the comment period for the Proposed Rule, the comment period for the CFPB's proposal regarding personal financial data rights, and the CFPB's new market-monitoring orders covering some of the same entities. One industry commenter added that the decision not to extend the comment period formed part of the basis for their view that the CFPB should withdraw the Proposed Rule.

Comments on the Large and Growing Market

Commenters agreed that the market for general-use digital consumer payment applications has grown substantially in recent years. For example, consumer groups, several nonprofits, a payment network, an industry association, two banking industry associations, and a credit union association agreed (and an industry provider acknowledged [53]) that there has been rapid growth and widespread consumer adoption of general-use digital consumer payment applications. In support of their view, these commenters cited data in the Proposed Rule as well as other public information. An industry association stated that digital consumer payment applications have helped millions of U.S. consumers to send money to friends and family and make retail payments more efficient. A group of State attorneys general noted that a significant portion of consumers with lower incomes frequently rely upon general-use digital consumer payment applications. Two nonprofit commenters also agreed that adoption by younger individuals may drive further growth.[54] An industry association observed that the proposed market has experienced rapid increases in consumer adoption that likely will continue. As a consequence, this commenter described this market as still in what industry lifecycle literature describes as a stage of market growth as opposed to market maturity.

Several of these commenters stated that these general-use digital consumer payment applications increasingly are accepted by retailers and embedded into in-person and online commerce, which is itself growing. They pointed to this as one trend driving existing growth and future growth in the market. A comment from several consumer groups stated that as merchants seek to avoid interchange fees, they will increasingly rely upon digital payment applications as a payment method at the point of sale. A banking association and consumer group stated that they also expected the lines between banking, commerce, and technology to further converge and blur.[55] A comment from several consumer groups stated that nonbank providers of consumer financial products and services have greater latitude under U.S. law to integrate those products into commercial platforms, and that large technology firms' business models depend on data collection.[56]

Another nonprofit commenter suggested in general terms that CFPB supervision of larger participants in the general-use digital consumer payment applications market could help the CFPB to detect and assess risks to the U.S. financial system. It stated that the market may present such risk, given how general-use digital consumer payment applications facilitate a high volume of transactions, including flows of funds through stored value accounts that are not FDIC-insured.

However, some industry and nonprofit commenters stated that the rapid growth in the market and widespread consumer adoption merely indicates that the market is successful and popular among consumers. In their view, as discussed further below, the fact that the market is large and growing market is not an adequate basis for subjecting its larger participants to supervision, absent findings of risks to consumers or markets or market failures.[57]

Comments on Promoting Compliance With Federal Consumer Financial Law

The Proposed Rule stated that CFPB supervision of larger participants would promote compliance with applicable requirements of Federal consumer financial law. A group of State attorneys general, consumer groups, some nonprofit and individual commenters, a banking association, and a comment from a payment network and an industry association generally agreed that the proposal would serve this purpose, as described below. However, as described further below, some industry and nonprofit and other commenters disagreed or stated that the proposal did not provide sufficient support for the claim that it would serve this purpose.[58]

Several commenters expressed concern that larger participants may be violating or inadequately incentivized to comply with one or more of the Federal consumer financial laws cited in the Proposed Rule. A joint comment from consumer groups stated that consumers are exposed to unfair, deceptive and abusive practices in the payments area, and stated that oversight of this market is needed to ensure market participants comply with the prohibition against

[52] *See CFPB* v. *Cmty. Fin. Servs. Ass'n of Am., Ltd.,* 601 U.S. 416 (2024) (U.S. argued Oct. 3, 2023).

[53] As discussed further below, this commenter stated that growth alone was insufficient to justify the Proposed Rule, and that the CFPB must make certain specific findings regarding market risk. The Final Rule responds to those comments further below in the discussion of general comments about the relevance of risks to consumers to the rulemaking.

[54] While not disputing the rapid growth in the market, some other industry commenters suggested that the broader consumer payments sector should be considered, including when defining the market and setting the threshold for the larger-participant test, as discussed in the section-by-section analysis of those provisions further below.

[55] One of these commenters pointed to an industry white paper describing a trend in the market toward ''embedding financial services into nonfinancial apps and other digital experiences.'' Google LLC White Paper, *Embedded finance: The new gold rush in financial services* (2021) (Google LLC Embedded Finance White Paper) at 4 (''These embedded experiences will soon permeate all aspects of our lives that involve money—and they'll feel so frictionless that users won't be aware of the underlying work financial institutions are doing to support these transactions.''), at 6 (''Embedded finance means, simply, embedding your financial services in the non-financial products, services or technologies consumers already use and love. Since they spend much of their time in non-financial applications in their everyday lives—but only a fractional amount of time in financial applications—the growth opportunity for financial services companies is considerable.''), *https://cloud.google.com/resources/financial-services-embedded-finance-whitepaper* (last visited Nov. 5, 2024).

[56] One consumer group commenter added that in its view, Big Tech firms have a business model that seeks to maximize data collection based on different goals from publicly-chartered and regulated financial institutions.

[57] The Final Rule further summarizes and responds to those comments in the discussion below of general comments on detecting and assessing risks (including emerging risks) to consumers and markets.

[58] Some commenters also suggested that existing State and Federal oversight of some market activities, including for compliance with Federal consumer financial law, was adequate. The Final Rule separately addresses comments on those general topics further below.

unfair, deceptive, and abusive acts and practices.[59] This comment assessed the risk of abusive practices as high due to what the comment described as lack of competition and consumer choice with respect to the larger participants defined in the Proposed Rule. A comment from a group of State attorneys general stated that the Proposed Rule, coupled with existing State consumer protection statutes, would allow the Federal and State governments to work together to prevent and abate unfair, deceptive, and abusive acts and practices in the market. A consumer group and a nonprofit commenter stated that the Proposed Rule would be especially useful in promoting compliance with the prohibition against unfair, deceptive, and abusive acts and practices by companies that provide financial services to incarcerated and recently incarcerated persons. And a consumer group and nonprofit commenter stated that it was common sense that unfair, deceptive, and abusive acts and practices protections be applied to new entrants and technologies like those described in the Proposed Rule.

As an example of how supervision of larger participants would promote compliance, a banking association noted that the CFPB's publication *Supervisory Highlights*[60] communicates CFPB expectations of compliance to the overall market and encouraged its use in this market, and stated that the proposal should enable the CFPB to publish *Supervisory Highlights* identifying problematic conduct in this market. A comment from several consumer groups pointed to findings in *Supervisory Highlights* related to violations of Regulation E and other provisions of Federal consumer financial law violations at banks. The comment stated that the CFPB also should supervise larger nonbank companies handling consumer payments, including payment apps, because such violations at nonbanks are just as likely if not more so.

Regarding EFTA and Regulation E, a comment from consumer groups stated that oversight is needed to ensure payment app and digital wallet providers comply with the EFTA's consumer protections for electronic fund transfers, highlighted payment fraud as a significant risk, and stated that violations of the EFTA related to digital payments are extremely common, even among banks that are closely supervised by regulators. The commenter cited to several findings of EFTA violations from CFPB examinations in this area that the CFPB has published in *Supervisory Highlights*. A credit union association commenter stated that nonbanks that offer consumer payment services have error resolution responsibilities under Regulation E which the CFPB cannot effectively assess without exercising supervisory authority.

Commenters also addressed risks posed to consumers associated with potential violations of the GLBA and Regulation P.[61] A comment from a group of State attorneys general supported the Proposed Rule in part because it would allow the CFPB to examine digital payment applications for compliance with the privacy provisions of the GLBA. The comment stated the Proposed Rule would permit the CFPB to address the critical data privacy issues posed by digital payment applications by allowing the CFPB to assess how applications are storing, using, and sharing their collections of sensitive consumer data as well as changes to larger participants' privacy policies. A consumer group commenter stated that its review had identified multiple risks associated with peer-to-peer payment application companies. The commenter stated that more than 25,000 consumers had signed a petition urging the CFPB to take action with respect to various risks posed by payments applications, including risks associated with fraud and collection and storage of consumer information.[62]

Other commenters such as a company, nonprofits, and an industry association stated that the Proposed Rule did not adequately assess the degree of existing compliance or otherwise explain how it would promote compliance. For example, one commenter criticized the statement in the proposal that CFPB supervision would incentivize compliance as circular, given what it viewed as inadequate discussion in the Proposed Rule of the level of existing non-compliance or risks of non-compliance.[63] In addition, several industry comments suggested that EFTA/Regulation E, GLBA/Regulation P, or both do not apply to certain market participants, which they viewed as undermining the notion that the Proposed Rule would promote compliance with Federal consumer financial law. A company commenter added that the proposal did not explain how the prohibition against unfair, deceptive, or abusive acts or practices applied to market participants, or why supervision is the appropriate mechanism to identify and prevent any anticipated violations of Federal consumer financial law more broadly. Further, an industry commenter stated that State supervision by itself is more effective and better at enforcing the law than CFPB supervision.

Comments on Detecting and Assessing Risks to Consumers and Markets, Including Emerging Risks

Comments from a group of State attorneys general, a payment network, a banking association, consumer groups, and nonprofits agreed that CFPB supervision of larger participants in this market would help the CFPB to detect and assess risks to consumers and markets, including emerging risks, in this rapidly growing and evolving market. For example, an industry association generally described the potential for CFPB supervision to promote maturity in the market, which it described as immature and rapidly evolving.[64] In addition, these comments pointed to several reasons why the CFPB supervision and examination process is well suited to this goal. A consumer group stated that supervisory authority is one of the most basic tools regulators have to identify new risks in the market as early as possible, before market failures with wide-ranging implications occur. Several consumer groups added that CFPB should not rely only on third-party sources of

[59] *See* 12 U.S.C. 5531, 5536 (prohibiting unfair, deceptive, and abusive acts and practices in connection with the offering or provision of consumer financial products and services).

[60] The CFPB periodically publishes *Supervisory Highlights* to share key examination findings in order to help industry limit risks to consumers and comply with Federal consumer financial law. Each *Supervisory Highlights* publication shares recent examination findings, including information about recent enforcement actions that resulted, at least in part, from the CFPB's supervisory activities. These reports also communicate operational changes to the CFPB's supervision program and provide a convenient and easily-accessible resource for information on the CFPB's recent guidance documents. *Supervisory Highlights* does not refer to any specific institution in order to maintain the confidentiality of supervised entities. *See https://www.consumerfinance.gov/compliance/supervisory-highlights/* (last visited Nov. 5, 2024).

[61] Title V, subtitle A of the GLBA and its implementing regulation, Regulation P, govern the treatment of nonpublic personal information about consumers by financial institutions.

[62] Similarly, other commenters emphasized potential risks with respect to use of consumer data and risks to consumer privacy that may be associated with payment application and digital wallet providers, including the risk of losing money through fraud or mistakes or having personal data collected and shared.

[63] Further below, the Final Rule summarizes and responds to comments more broadly addressing the general topic of risks to consumers in the market.

[64] In its view, the Proposed Rule may result in development of a robust, consumer-protected market, given how previous larger participant rules had helped to ensure consumer protection remains a prominent concern among participants in those markets.

information to assess market activity, which would lead to delayed responses to problems, compared with supervision.[65] A nonprofit commenter stated that because supervision occurs outside of the adversarial legal process, it is an especially effective tool for rapidly gathering information that can prevent dubious practices before they develop.

Several comments also identified various existing and emerging risks in the market that the commenters believed the CFPB would be able to effectively detect and assess though supervision, including risks with respect to consumers' loss of funds and loss and misuse or abuse of data. The Final Rule summarizes these comments below. In addition, a group of State attorneys general stated that the rule will allow the CFPB to detect and assess risks that emerge not only from the existing products and services, but also as a result of future technological advancements in the market.

With respect to the potential for consumers to lose funds or access to funds, a group of State attorneys general noted that research cited in the proposal indicated that almost a third of digital payment application users with lower incomes reported one or more problems related to funds being sent to the wrong person or not receiving funds that were sent to them.[66] These commenters stated that a lack of regulatory oversight has significantly contributed to those problems. A nonprofit commenter stated that larger participants pose unique risks to consumers related to what the commenter characterized as the lack of consumer protections associated with these applications, as well as the possible systemic risks they may present to the financial markets. The commenter raised specific concerns about the risk of consumer loss of funds from uninsured entities and lack of consumer awareness of such matters. The commenter also stated that CFPB supervision of these nonbank payment applications would, among other things, help to identify and mitigate systemic financial risk and enhance consumer protection. An individual commenter stated that the market had diverse participants but that there are common areas of risk with payment apps linked to a stored value product, including a risk of losing access to funds to pay for food or bills due to a technical glitch. Additional commenters raised various concerns about what they often described as fraud in the market and lack of related consumer protections, and a nonprofit commenter cited complaints submitted to the FTC regarding peer-to-peer payment fraud. At the same time, several industry commenters suggested that certain consumer protections such as EFTA/Regulation E or GLBA/Regulation P do not apply to some market participants, as described further above, and that consumers often are adequately protected by other parties to the transaction such as banks and credit unions, as described in the discussion of general comments about existing oversight of the market further below.

With regard to uses of consumer payments data, a banking association, a payment network, a nonprofit commenter, and several consumer groups stated that the way in which nonbanks can exploit the convergence of payments and commerce poses risk to consumers with respect to this market, such as through aggregation and monetization of consumer financial data. A group of State attorneys general added that supervision of larger participants would help the CFPB to detect and assess emerging risks in the use of consumer financial data as technology continues to evolve. And an individual commenter and several industry comments stated that consumer payments data is often used for purposes beyond initiation of the consumer payment transaction.[67] Several consumer groups described the level and use of consumer data collected by large technology firms as unreasonable and potentially dangerous. Several other commenters including individuals noted that the collection of such data also raises data security risks, including what a nonprofit commenter described as novel security risks raised by digital wallets. At the same time, other comments from industry suggested that data security risks to consumers were particularly low given the security and anti-fraud enhancements from market participants' reliance on features such as tokenization.[68] And a nonprofit commenter stated that government regulators generally are not effective at preventing data breaches as some of the largest have occurred at heavily-regulated institutions.

Some commenters disagreed that the goal of detecting and assessing risks including emerging risks warrants the proposed expansion of CFPB's supervisory authority in this market. For example, two nonprofit commenters stated that the rationale of detecting and assessing emerging risks was not supported by evidence, and instead only by the theoretical possibility of harm in an innovative, successfully-growing and popular market. Another nonprofit commenter stated that the proposal did not examine the nature of the emerging risks, whether by mentioning novel security risks posed by digital wallets or other harms. Another nonprofit commenter stated its belief that market participants' responses to the CFPB's previous market-monitoring orders generated adequate information for the CFPB to determine the level of risks posed by this emerging market.[69] Two industry associations stated that they agreed in principle that regulation needed to evolve along with new technology, but they stated that the CFPB first must identify harms it perceives in the market before proposing to supervise its larger participants. Another industry association agreed, stating that the Proposed Rule merely described the possibility of ''new risks'' from ''new product offerings'' and did not state what the ''new risks'' might be. It pointed to market reports that, in its view, indicated that nonbanks' multi-sided business models in the digital economy provide new benefits to consumers and promote competition.[70] A nonprofit commenter characterized the proposal as referring to hypothetical risks that may occur in the future, and described this reference as a mere pretext to support an agenda to target large technology firms. An industry commenter added that the goal of detecting and assessing new and emerging risks is inadequate as a

[65] These commenters also stated supervision of larger participants would allow the CFPB to respond more quickly to emerging problems affecting servicemembers who are especially vulnerable to identity theft and fraud in the market.

[66] *Consumer Reports P2P Survey* at 7 (also indicating that of all respondents who have used a P2P service, 22 percent reported one or more such problems). *See also* 88 FR 80197 at 80200 n.25 (proposal's discussion of other data in this report, noted above).

[67] The Final Rule discusses and responds to these comments in more detail in the section-by-section analysis of the exclusion for certain marketplace activities described further below.

[68] In addition, digital assets industry comments described what they viewed as additional security that digital assets provide. As discussed in the section-by-section analysis of the larger-participant test further below, the Final Rule does not count those transactions toward the larger-participant test.

[69] However, this commenter also recommended that the CFPB continue to gather information on the market before expanding its supervisory authority as proposed.

[70] Separately, this commenter observed that the financial technology sector that encompasses the proposed market often uses advanced technologies including artificial intelligence, block chain technology, and data mapping to create new financial products and services that are beneficial in various ways. This commenter did not state that such products posed any risk or could pose any emerging or new risks.

foundation for a larger participant rule. In its view, the CFPB can only engage in larger participant rulemakings when it identifies risks that supervision would mitigate. The commenter also asserted that, because the CFPB must consider risks to consumers in exercising its supervisory authority under section 1024(b)(2), the CFPA also requires that the CFPB establish the existence of specific risks to consumers that would be mitigated by supervision when issuing a larger participant rule under section 1024(a)(1)(B) and (2). The industry commenter also claimed that principles of administrative law likewise require the rule to target identified risks.[71]

More broadly, many of the industry commenters and other commenters stated that the Proposed Rule did not adequately consider whether market activity currently poses risks to consumers and if so how and to what degree. Other commenters similarly stated that the proposal failed to establish that certain provisions of Federal consumer financial law apply to market participants; that the proposal failed to identify potential violations of law or other specific harms that the Proposed Rule would seek to address, or any relevant market failures; and that the CFPB should first issue a report articulating the risks it sees in the proposed market or otherwise identify such risks prior to issuing a final rule.[72] Certain commenters also stated that the CFPB should evaluate risk separately with respect to various subcomponents of the market described in the Proposed Rule, and argued for the exclusion of various market participants, as discussed in more detail in the section-by-section analysis of the corresponding component of the market definition further below.[73] Finally, a nonprofit commenter stated that the CFPB should provide greater clarity to market participants as to how the CFPB would assess risk in its prioritization process in this market, including what risks it would consider.

Comments on Ensuring Consistent Enforcement of Federal Consumer Financial Law Between Banks and Nonbanks

Some comments addressed the Proposed Rule's statement that the rule would further the CFPB's statutory mandate to ensure consistent enforcement of Federal consumer financial law between nonbanks and banks and credit unions, in order to promote fair competition. Several consumer groups, banking and credit union industry associations, a payment network, some nonprofits, and an industry provider generally agreed that the Proposed Rule would have that benefit. For example, a community banking association stated that community banks have long expressed concerns that financial technology and large technology firms are offering financial products and services traditionally provided by banks, without the same level of regulatory oversight. A banking association stated that consumers are best protected when banks and nonbanks offering similar financial products and services are subject to the same oversight, which mitigates the potential for consumer harm and improves consumer trust and confidence. This commenter and another banking association added that establishing parity in supervision will help to ensure that nonbanks provide the same consumer protections when they provide the same services as banks. A payment network and a nonprofit commenter agreed that the proposal would help to ensure that entities engaged in the same functional activities are subject to the same functional regulation. Some comments described nonbanks as deriving a competitive advantage due to their lesser supervisory oversight, and banks and credit unions as disadvantaged. For example, the credit union industry association commenter stated that the lesser supervisory oversight of nonbank peer-to-peer payment apps increases burdens on credit unions responding to consumer disputes of transactions conducted in those apps due to the app providers' underinvestment in compliance and customer service and consumer preferences for contacting the credit union. The community banking association also stated that this gap in oversight erodes consumer trust. One of the banking industry associations agreed, noting that its 2022 survey found that an overwhelming majority of consumers were concerned about a gap in regulatory oversight between fintech firms (including cryptocurrency firms) and banks, and believed that the CFPB and Congress should do more to protect consumers from harm and abuse in these areas.[74]

At the same time, some industry and nonprofit commenters challenged the potential for Proposed Rule to promote consistent enforcement of Federal consumer financial law as between nonbanks and depository institutions, and thereby promote fair competition, as well as the appropriateness of that consideration in the rulemaking. For example, some of these commenters described the proposed objective as an illegitimate form of ''mission creep . . . outside of [the CFPB's] core jurisdiction'' or further suggested that the Proposed Rule would place the CFPB in the role of market gatekeeper for nonbanks, which would frustrate competition and innovation (which one of these commenters described as the effect that banking regulation already has on banks). Some industry commenters also suggested the objective failed to account for the structure of nonbank market activity vis-à-vis banks and credit unions. For example, an industry association stated that many nonbank market participants either complement banks and credit unions by making it easier for consumers to use payment methods provided by those financial institutions, or partner directly with the banks and credit unions. Some banking associations also expressed concern that the rule would increase indirect burden on banks and may create confusion about differences between banks and nonbanks. As another example, an industry provider stated that banks provide deposit accounts (and associated funds transfer functionalities), not pass-through payment wallets allowing consumers to access payment methods issued by

[71] The commenter also stated in a footnote that if the rule does not need to identify meaningful risks to consumers then the CFPA would violate the non-delegation doctrine in constitutional law. The commenter did not explain the basis for that view, and the CFPB disagrees with that view. Through the CFPA, Congress has provided guidance to the CFPB on how to exercise its rulemaking authority under 12 U.S.C. 5514(a)(1)(B) and has imposed limits on that authority, including rules of construction for defining larger participants and policy considerations, which the CFPB has addressed in this Final Rule.

[72] A nonprofit commenter stated that the unique data security risks that digital wallets pose should be addressed through public education rather than regulation. As noted above, consumer education is outside the scope of this rule and, for the reasons explained in the response to general comments, education is not a substitute for supervision.

[73] Some commenters suggested that CFPB supervision itself would increase risk such as by reducing examinees' resources available for fraud prevention, or exposing the supervised entity's data to breaches. For the reasons explained in the impacts analysis in part VII, the CFPB has not determined the Final Rule will reduce fraud prevention. With regard to the risk of data breaches, the CFPB's information security system mitigates those risks as further discussed in part VII.

[74] Consumer Bankers Ass'n, Press Release, *NEW POLL: Nearly Ninety Percent Of Americans Concerned That Fintech & Crypto Firms Do Not Have Appropriate Level of Federal Regulation* (Dec. 12, 2022) (describing 56 percent of respondents that want greater oversight compared to 24 percent who are satisfied with existing oversight), *https://consumerbankers.com/press-release/new-poll-nearly-ninety-percent-of-americans-concerned-that-fintech-crypto-firms-do-not-have-appropriate-level-of-federal-regulations/* (last visited Nov. 18, 2024).

third-party financial institutions.[75] And for that reason, in its view, increased oversight of those activities would not serve the CFPB's stated purpose. However, another industry association stated that banks have been introducing their own digital wallets, both directly and through affiliates, in an effort to compete with nonbank incumbents that have embedded their digital wallets into merchant checkout processes.

Finally, an industry association also suggested that in some ways the Final Rule may not promote consistent enforcement of Federal consumer financial law. It stated that the CFPB should explain why larger participants in the proposed market should be subject to what it viewed as significantly more CFPB supervisory authority than exists over other persons that facilitate consumer payment transactions, such as banks and credit unions providing physical payment cards and providers of payment applications that do not have ''general use'' as defined in the Proposed Rule such as automobile purchase applications and food delivery applications.[76]

Comments on Other Regulators' Existing Oversight Authority

Some commenters suggested the rule would help existing regulatory oversight efforts in the market, while others stated that the Proposed Rule did not adequately consider whether the CFPB supervisory authority was needed in light of existing regulatory oversight mechanisms of other regulators.

A group of State attorneys general stated that the Proposed Rule would allow Federal and State authorities to coordinate to prevent and abate unfair, deceptive, and abusive acts and practices in the market. They indicated that violations of Federal law detected through CFPB's supervisory examinations could assist State enforcement, including in States such as California, New Jersey, and New York, where a commercial practice that violates Federal law is deemed or presumed to violate the State's consumer protection laws.

On the other hand, some other commenters stated that the Proposed Rule did not adequately consider the degree to which the market already is overseen by other regulators, including State oversight of nonbank market participants that are money transmitters, Federal prudential regulators' oversight with respect to banks and credit unions that provide accounts, hold funds, and process payments facilitated by nonbank market participants, and FTC enforcement of consumer protection laws including competition laws.[77] Several industry associations stated that the rulemaking generally must better account for the potential for CFPB supervision to duplicate the oversight by those other regulators, and the unnecessary burdens and diverging regulatory expectations that such duplicative supervision can create.[78] One of these commenters stated that the CFPB should clarify the scope and requirements of the rule to prevent these outcomes, and stated that close coordination by the CFPB with other regulators is needed before the CFPB pursues oversight of larger participants.

With respect to existing State oversight, an industry association stated that State financial regulators supervise various aspects of the market and the CFPA requires the CFPB to account for oversight by State authority when exercising its supervisory authority. Two other industry associations indicated that in their view the Proposed Rule did not consider how the CFPB would address overlap in scope with State examinations on the same subject matter particularly at money transmitters. A nonprofit commenter suggested that State oversight is sufficient because States are better at enforcing the law because they have a better understanding of local conditions.[79]

Comments on CFPB Enforcement and Market-Monitoring Authorities

An industry association stated that the Proposed Rule did not explain how supervisory authority would promote additional compliance with Federal consumer financial law beyond compliance the CFPB ensures through its enforcement function and aided by its market-monitoring function. A nonprofit suggested that CFPB enforcement is sufficient to address risks to consumers, and that supervision would only impose unnecessary burden.

Comments Raising ''Major Questions'' Doctrine

Another area of comment related to the ''major questions doctrine.'' Those commenters who addressed the doctrine generally were critical of the Proposed Rule and took an expansive view of the circumstances in which the doctrine applies. First, one nonprofit commenter stated that the major question doctrine precludes the CFPB from defining larger participants in a digital wallet market generally. This commenter stated that, despite the existence of digital wallets at the time of adoption of the CFPA, Congress did not expressly include them within the scope of CFPB supervisory authority and therefore chose to foster innovation free from the CFPB's supervisory oversight. Further, in its view, the market has vast economic and political significance given both the aggregate dollar value of transactions on digital wallets (nearly $1 trillion) and references by the CFPB to payment systems as ''critical infrastructure'' and to ''Big Tech'' companies.[80] Second, some commenters stated that the CFPB's interpretation of the merchant payment processing exclusion in CFPA section 1002(15)(A)(vii)(I) also is impermissible under the major questions doctrine.[81]

[75] As discussed below in the section-by-section analysis of the definition of ''covered payment functionality,'' the preamble uses the phrase pass-through payment wallet to describe this type of functionality discussed by commenters.

[76] The commenter also stated the Proposed Rule excluded from ''general use'' bill-payment applications and applications used to purchase financial assets including securities. However, the Proposed Rule specifically acknowledged the existence in the market of ''a general-use bill-payment function.'' 88 FR 80197 at 80206. In addition, the Proposed Rule did not list applications for purchase of securities among the examples of activities that do not have ''general use'' because it already excluded those transaction from the proposed definition of ''consumer payment transaction'' as discussed in the section-by-section analysis of that term further below.

[77] A few industry comments also mentioned Federal oversight of money transmitters by FinCEN in the U.S. Treasury. These commenters did not describe any nexus between that oversight and compliance with Federal consumer financial law, or otherwise suggest that supervisory activity by FinCEN and the CFPB would have overlapping subject matter related to compliance with Federal consumer financial law.

[78] Some commenters also discussed Federal prudential regulators' existing oversight of banks and credit unions as relevant due to the inclusion in the market of nonbanks that partner with banks and credit unions, and of pass-through payment wallets that facilitate the use of accounts provided by banks and credit unions. The Final Rule summarizes and responds to those comments in more detail in the section-by-section analysis of ''covered payment functionality'' below.

[79] This commenter also stated that States generally occupy the field of consumer protection law, that Federal supervisory oversight by the CFPB would ''preempt'' State law, and that the proposal did not provide compelling evidence for doing so. The CFPB disagrees that a larger participant rule, which establishes CFPB supervisory authority and does not impose substantive consumer protection obligations, preempts such State consumer protection laws.

[80] CFPB Press Release (Nov. 7, 2023) (announcing Proposed Rule), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-new-federal-oversight-of-big-tech-companies-and-other-providers-of-digital-wallets-and-payment-apps/* (last visited Nov. 8, 2024).

[81] In addition, some commenters stated that the inclusion of certain digital assets transfers in the proposed definition of consumer payment transactions raised a ''major question.'' As

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Third, some commenters stated that the major questions doctrine voids the CFPB's interpretation of CFPA section 1024(b) as authorizing supervision of all consumer financial products and services provided by a larger participant for compliance with Federal consumer financial law and related risks.[82]

Comments on Potential Scope of CFPB Examinations of Larger Participants

Relatedly, the CFPB received several other comments on the proposal's statement that the CFPB's supervisory authority is not limited to the products or services that qualified a person for supervision, but also includes other activities of such a person that involve other consumer financial products or services or are subject to Federal consumer financial law.[83] Four commenters (representing the banking industry) expressed agreement with the CFPB's description of its supervisory authority over larger participants. They stated that the CFPB's position is consistent with how the CFPB supervises large banks, where every consumer financial activity that the bank engages in is subject to CFPB jurisdiction. Several other commenters (several industry trade groups, an individual company, and a law firm) disagreed with the CFPB's description of its supervisory authority. These commenters generally interpreted CFPA section 1024 to limit the scope of nonbank supervisory authority over larger participants to specific consumer financial products and services included in the market covered by the corresponding larger participant rule. One of these commenters asserted that the rule could not be used by the CFPB to scrutinize the digital assets business lines of entities, including those already subject to supervision. One commenter also suggested that even if the CFPA's view of its authority is correct, it would be unreasonable for the CFPB to actually exercise that authority because the costs of such supervision would exceed the benefits. Another said the exercise of such authority would discourage innovation and competition.

Response to General Comments Received

After first responding to comments on rulemaking process issues, the Final Rule provides a response below to other general comments. For the reasons described below, the CFPB continues to believe that issuance of this larger participant rule is warranted because: (1) the market has grown dramatically and become increasingly important to the everyday financial lives of consumers; (2) CFPB supervisory authority over its larger participants would help the CFPB to promote compliance with Federal consumer financial law; (3) that authority would help the CPFB to detect and assess risks to consumers and the market, including emerging risks; and (4) that authority would help the CFPB to ensure consistent enforcement of Federal consumer financial law between banks and nonbanks.

Rulemaking Process

While the CFPB was considering comments on the Proposed Rule, the Supreme Court issued a decision ruling that the CFPB funding mechanism is constitutional under the Appropriations Clause.[84] The CFPB disagrees with commenters' suggestion that it should have forgone larger participant rulemaking activity during such a challenge.

The CFPB also disagrees with those commenters suggesting that an extension of the comment period was necessary to allow for meaningful input on the Proposed Rule. The Proposed Rule would have a narrow impact, establishing CFPB supervisory authority over a group of nonbank covered persons who already are subject to CFPB enforcement and market-monitoring authority, and at least some of whom already are subject to CFPB supervisory authority on other grounds. Despite this, the CFPB received timely comments from a wide array of commenters, as described above, and all but one of the commenters described here filed timely comments after requesting more time. The CFPB disagrees that an extension of the comment period is warranted based on the proposal of a market definition that commenters viewed as complex or a larger-participant test with more than one criterion. As discussed below, commenters provided numerous useful comments about the proposed market definition and the CFPB is making several adjustments to the market definition in the Final Rule in response including to improve clarity. With regard to the larger-participant test, the CFPB proposed a test that was based on two criteria (consumer payment transaction volume and the entity's size by reference to SBA size standards) that were explained in the proposal and are not especially complicated. Proposed rules often include small entity exclusions, and many commenters provided substantive comments on the proposed exclusion, as discussed further below.[85] Further, it was unnecessary to extend the comment period with an accompanying notice of the risks the CFPB believes market participants pose to consumers because, as explained in the Proposed Rule and discussed below, the CFPB is not required to make findings about relative risks in a market to justify issuing (or proposing) a larger participant rule. Finally, the CFPB notes that the Proposed Rule set a January 8, 2024, deadline for filing of comments, about two months after the rule was issued on November 7, 2023, and 52 calendar days after its November 17, 2023, publication in the **Federal Register**. Commenters had well over 30 days to prepare comments even accounting for the end-of-year holiday season.[86] Indeed, several of the requests for an extension cited their own substantive comments on the Proposed Rule as the reasons for requesting an extension. For these reasons, the CFPB also disagrees with the industry comment suggesting that the lack of extension of the comment period supports a conclusion that the CFPB should withdraw the Proposed Rule.

discussed further below, the CFPB has decided, for purposes of this Final Rule, not to define larger participants in the general-use digital consumer payment applications market by reference to activity involving digital assets. This Final Rule therefore does not address these major questions comments further.

[82] As discussed further above in the general comments on how the rule would enable the CFPB through its supervisory activity to detect and assess risks to consumers and markets, a nonbank commenter claimed that the larger participant rule itself must identify meaningful risk, or it would violate the major questions doctrine. For the reasons described below in the response to these general comments above, the CFPB disagrees with both claims. The CFPB also disagrees that this rule implicates the major questions doctrine for reasons discussed below.

[83] 88 FR 80197 at 80198 n.7 (quoting 77 FR 42874 at 42880).

[84] *CFPB* v. *Cmty. Fin. Servs. Ass'n of Am., Ltd.,* 601 U.S. 416 (2024).

[85] With respect to the proposed coverage of digital assets, commenters from the digital asset sector provided extensive and detailed comments, demonstrating that those commenters were able to provide meaningful input on the Proposed Rule during the comment period. In any event, as discussed below, the CFPB has decided, for purposes of this Final Rule, not to define larger participants in the general-use digital consumer payment applications market by reference to activity involving digital assets.

[86] The extensive comments in the rulemaking record demonstrate that the presence of Federal holidays (Veteran's Day after issuance of the proposal and Thanksgiving, Christmas, and New Years after publication in the **Federal Register**) and a concurrent proposal and ongoing market monitoring in this market did not preclude commenters from offering detailed substantive comments. In any event, the CFPB sent the market-monitoring inquiries to a limited number of firms and issued the parallel proposal (which, unlike this rulemaking, proposed substantive consumer protections) almost three weeks earlier with a 60-day comment period.

Establishing CFPB Supervisory Authority Over the Large and Growing Market

As described above, commenters agreed with the findings in the Proposed Rule that the market has grown rapidly to achieve a significant size with high levels of adoption and broad reliance by consumers on general-use digital consumer payment applications. As the proposal explained in detail, the market for general-use digital consumer payment applications has large and increasing significance to the everyday financial lives of consumers, who are growing increasingly reliant on such applications to initiate payments.[87] Further growth can be anticipated.[88] For example, as the proposal stated, nonbank digital payment applications have rapidly grown in the past few years to become the most popular way to send money to other individuals other than cash, and are used for a higher number of such transactions than cash.[89] The proposal also cited various market research publications indicating that most merchants in the United States accept general-use digital consumer payment applications as a means or method of payment. Given the extent of consumer adoption and reliance, the extent of the consumer payment transaction volume (approximately 13.5 billion annually) and value (approximately $1.2 trillion annually), and the breadth of associated consumer data collected, it is important for the CFPB to establish Federal supervisory oversight of larger participants.

The CFPB also has considered the industry association commenter's observation that the market for general-use digital consumer payment applications as defined in the Proposed Rule may not have reached the maturity stage in the industry lifecycle. The CFPB acknowledges that, compared to the markets covered by previous larger participant rulemakings,[90] this market has developed more recently, fueled by technological change. In the years after a large nonbank financial technology firm developed the first well-known digital payment app in the late 1990s,[91] other large fintech firms including BigTech firms [92] entered and expanded the market by leveraging new digital consumer technologies, such as smartphones that support digital applications (which proliferated starting in the late 2000s) [93] and smartphone near-field communication (NFC) technologies that support in-store payments (which proliferated in the 2010s).[94] More recently, well-known market participants have been bundling consumer financial products and services to help consumers to make payments to friends and family and payments to merchants together in the same digital application. Although the market is newer than some other consumer finance markets, consumer adoption for these types of consumer payment transactions already has reached very high levels. As described in the Proposed Rule and explained above, general-use digital consumer payment applications already play a fundamental role in facilitating the payments that many consumers in the United States make every day. Therefore, the CFPB believes it is an appropriate time for it to issue a rule to establish the authority of the CFPB to supervise larger participants in this market. The CFPB reaches that conclusion in the Final Rule not solely due to the size of the market and its growth, but in conjunction with its goals described below of promoting compliance with Federal consumer financial law, detecting and assessing risks to consumers and markets, and ensuring consistent enforcement of Federal consumer financial law.

Promoting Compliance With Federal Consumer Financial Law

As described in the proposal, supervision of larger participants in a market for general-use digital consumer payment applications will help ensure those companies are complying with applicable requirements of Federal consumer financial law.[95] One of the primary purposes of supervision under CFPA section 1024(b)(1) is ''assessing compliance with the requirements of Federal consumer financial law,'' and the Final Rule will further the CFPB's ability to assess compliance by larger participants with the requirements of those laws.[96]

As identified by several commenters and described further above, the larger participants defined in the Rule engage in activities that are subject to applicable Federal consumer financial law such as the prohibition against unfair, deceptive, and abusive acts and practices set forth in the CFPA; the EFTA and its implementing Regulation E; and the data privacy protections of the GLBA and its implementing Regulation P. The CFPB disagrees with the comments suggesting that certain larger participants would not be subject to any Federal consumer financial laws.[97] The larger participants defined by the rule are covered persons under the CFPA and would at a minimum be subject to the CFPA's prohibition against unfair, deceptive, and abusive acts and practices.[98] Assessing

[87] *See* 88 FR 80197 at 80200–80201.

[88] *Id.*

[89] *Id.*

[90] Following significant growth in the 1980s, by 1990, personal remittances from the United States had reached over US$10 billion. *See* World Bank Group, *Personal remittances, paid (current US$)—United States, https://data.worldbank.org/indicator/BM.TRF.PWKR.CD.DT?locations=US* (last visited Nov. 5, 2024). Nearly two decades earlier, consumer reporting agencies and consumer debt collection markets had already grown to the point that Congress adopted substantive consumer protection legislation to regulate them. *See* Public Law 91–508 (Oct. 26, 1970) (title VI adopting Fair Credit Reporting Act); Public Law 95–109 (Sept. 20, 1977) (Title VIII adopting Fair Debt Collection Practices Act). By that time, following adoption of the Higher Education Act of 1965, Public Law 89–329 (Nov. 8, 1965), student lending and student loan servicing had already been expanding. And largescale consumer automobile financing dates back to at least the 1920s. *See Buy Now Pay Later: A History of Personal Credit,* Harv. Bus. School Library (section titled ''Cards on time'' noting that ''[i]n the 1920s, auto financing took a giant leap forward when the car manufacturers entered the game''), *https://www.library.hbs.edu/hc/credit/credit4d.html* (last visited Nov. 5, 2024).

[91] PayPal Editorial Staff, *Alternative and digital payment methods: Shaping the payment industry and preparing for the future* (Dec. 18, 2023) (stating that ''[t]he first digital solution in the alternative payment industry was PayPal, developed in 1998 to enable people to make payments via an email address''), *https://www.paypal.com/us/brc/article/alternative-payment-method-trends* (last visited Nov. 5, 2024).

[92] Consistent with its use by the Financial Stability Board, the Final Rule uses the term ''BigTech'' to refer to large technology companies with extensive customer networks. *See, e.g.,* Financial Stability Board Report P091219–1, *BigTech in finance—Market developments and potential financial stability implications* (Dec. 9, 2019) at 3 (''BigTech firms are large technology companies with extensive established customer networks. Some BigTech firms use their platforms to facilitate provision of financial services. Those that do so can be seen as a subset of FinTech firms—a broader class of technology firms (many of which are smaller than BigTech firms) that offer financial services.''), *https://www.fsb.org/wp-content/uploads/P091219-1.pdf* (last visited Nov. 5, 2024).

[93] Apple Press Release, *Apple Reinvents the Phone with iPhone* (Jan. 9, 2007), *https://www.apple.com/newsroom/2007/01/09Apple-Reinvents-the-Phone-with-iPhone/* (last visited Nov. 5, 2024); Michael DeGusta, *Are Smart Phones Spreading Faster than Any Technology in Human History?* MIT Technology Review (May 9, 2012) (citing data that smart phones, which represented only six percent of U.S. mobile phone sales as of 2006, had grown to a two-thirds share as of 2012, with use by nearly 40 percent of the U.S. population), *https://www.technologyreview.com/2012/05/09/186160/are-smart-phones-spreading-faster-than-any-technology-in-human-history/* (last visited Nov. 5, 2024).

[94] *CFPB Contactless Payments Spotlight, supra.*

[95] 88 FR 80197 at 80201, 80212.

[96] *See* 12 U.S.C. 5514(b)(1)(A).

[97] As discussed further below, the CFPB disagrees with industry commenter suggestions that pass-through payment wallets are excluded from the scope of the CFPA as ''electronic conduit services.''

[98] *See* 12 U.S.C. 5481(5) (defining the term ''covered person''), 5531 (applying prohibition against unfair, deceptive, and abusive acts and

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compliance with the prohibition against unfair, deceptive, and abusive acts and practices is itself important, because such practices can cause significant harm to consumers.[99] Many of these commenters also acknowledged that some of the other Federal consumer financial laws would apply to at least a subset of the larger participants defined by the Proposed Rule.[100]

The CFPB agrees with the commenters that stated that this rule will help the CFPB to ensure compliance with Federal consumer financial laws, and disagrees with those that stated that it would not. The CFPB's supervisory authority will promote compliance with applicable legal requirements in multiple ways. As described in the proposal, under the CFPA, the CFPB shall use its supervisory authority to ''assess[ ] compliance with the requirements'' of Federal consumer financial laws [101] and to ''obtain[ ] information about the activities and compliance systems of procedures'' of market participants.[102] The CFPB may review the entity's activities and compliance systems or procedures and issue supervisory findings or criticisms as appropriate.[103]

Supervision is one of the CFPB's most important and powerful tools to protect consumers by promoting compliance with Federal consumer financial law. As discussed in the proposal and as a nonprofit commenter emphasized, the prospect of the CFPB exercising supervisory authority over such firms may cause them to allocate additional resources and attention to compliance and to take steps to mitigate any noncompliance.[104] In addition, based on the CFPB's supervisory experience in other markets, the CFPB's supervisory activities authorized under the Final Rule are likely to help entities to identify issues before they become systemic or cause significant harm. Through its supervisory activity, the CFPB detects and addresses legal violations. In some instances, the CFPB uses enforcement actions to address violations that it originally identified through supervision. The CFPB also uses supervision to help ensure that supervised entities develop and maintain systems and procedures to prevent and remedy violations. CFPB supervisory reviews and related compliance ratings promote the development of compliance risk management practices designed to manage consumer compliance risk, support compliance, and prevent consumer harm.[105] Through supervision, CFPB examiners may articulate supervisory expectations to supervised larger participants in connection with supervisory events.[106] The CFPB also notes that, following the issuance of its five prior larger participant rules, it has successfully used its supervisory authority to detect violations and promote compliance in each of the markets covered by those rules, as the CFPB has documented in its periodic publication *Supervisory Highlights*.[107] Thus, the CFPB disagrees with comments criticizing the proposal's statement that CFPB supervision will help to ensure that larger participants are complying with applicable requirements of Federal consumer financial law.[108] Moreover, by authorizing the CFPB to supervise larger participants, the Rule will promote strong compliance risk management practices in this market.[109] The CFPB also disagrees with commenters stating that CFPB supervision generally harms

practices to all ''covered persons'' as well as other persons), 5536 (same). The CFPB also can supervise larger participants for other Federal consumer financial laws that apply, including laws that take effect or for which compliance is mandatory in the future. For example, the CFPB recently finalized a personal financial data rights rule under its CFPA authority that is part of Federal consumer financial law and that generally applies to market participants. CFPB, Final Rule, Required Rulemaking on Personal Financial Data Rights, 89 FR 90838 (Nov. 18, 2024) (CFPB Personal Financial Data Rights Rule). As another example, the CFPB's nonbank registration regulation imposes requirements on covered nonbanks related to the registration of covered orders including, for covered nonbanks that are supervised registered entities, written-statement requirements. *See* 12 CFR 1092.201(q), 1092.204.

[99] For example, under the CFPA, an unfair act or practice must cause or be likely to cause ''substantial injury'' to consumers. 12 U.S.C. 5531(c)(1); *see also, e.g., Supervisory Highlights Issue 18, Winter 2019* at 13–14 sec. 3.1.2, *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-18_032019.pdf* (last visited Nov. 13, 2024) (noting that CFPB supervisory activities resulted in or supported the public enforcement action resolved in 2019 by consent order *In re: Enova International, Inc.,* Admin. Proc. File No. 2019–BCFP–0003 (Jan. 25, 2019) ¶¶ 9–33 (describing unfair acts and practices including repeat debiting of consumer accounts without valid authorization), *https://files.consumerfinance.gov/f/documents/cfpb_enova-international_consent-order_2019-01.pdf* (last visited Nov. 13, 2024); *Supervisory Highlights Issue 21, Winter 2020* at 16 sec. 4.1 (noting that CFPB supervisory activities resulted in or supported the public enforcement action resolved in 2019 against Maxitransfers Corporation including deceptive acts and practices in statements in terms and conditions regarding company's responsibility for errors by their agents), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-21_2020-02.pdf* (last visited Nov. 13, 2024); *Issue 32, Spring 2024, supra,* at 14 sec. 4.1 (noting that CFPB supervisory activities resulted in or supported the public enforcement action resolved in 2023 against Toyota Motor Credit Corporation finding several unfair acts and practices).

[100] For a discussion of comments suggesting that the market should be confined to entities that receive or hold the funds being transferred in consumer payment transactions, or that the market should cover consumer payment transactions that transfer funds from nonbank accounts but not from bank accounts, see the section-by-section discussion below of Final Rule § 1090.109(a)(2) regarding the term ''consumer payment functionality.''

[101] *See* 12 U.S.C. 5514(b)(1)(A).

[102] *See* 12 U.S.C. 5514(b)(1)(B).

[103] See also discussion below regarding 12 U.S.C. 5514(b)(1)(C) in connection with the use of CFPB supervisory authority for the purpose of ''detecting and assessing risks to consumers and markets for consumer financial products and services,'' including the CFPB's use of its authority under the Final Rule to better understand how the Federal consumer financial laws apply to larger participants defined by the rule and the products and services they offer and to review and mitigate risks related to noncompliance.

[104] *See* 88 FR 80197 at 80211–12.

[105] *See, e.g., Federal Financial Institutions Examination Council, Uniform Interagency Consumer Compliance Rating System,* 81 FR 79473, 79474 (Nov. 14, 2016) (discussing assessment by agency examiners of consumer compliance), *https://www.ffiec.gov/press/pr110716.htm* (last visited Nov. 5, 2024).

[106] *See* CFPB, *Bulletin 2021–01: Changes to Types of Supervisory Communications* (Mar. 31, 2021), *https://files.consumerfinance.gov/f/documents/cfpb_bulletin_2021-01_changes-to-types-of-supervisory-communications_2021-03.pdf* (last visited Nov. 5, 2024).

[107] The CFPB publishes *Supervisory Highlights* on its website several times each year at *https://www.consumerfinance.gov/compliance/supervisory-highlights/* (last visited Nov. 5, 2024). Since its first larger participant rules took effect in late 2012 and early 2013, these publications have highlighted findings of violations of Federal consumer financial law and compliance management weaknesses from examinations in markets subject to its larger participant rules. *See, e.g., Issue 4, Spring 2014* at 8–10 (consumer reporting market), at 11–14 (consumer debt collection market); *Issue 10, Winter 2016* at 11–14 (international money transfer market). For the most recent examples, *see, e.g., Issue 35, Fall 2024* (automobile finance market); *Issue 34, Summer 2024* (consumer debt collection market); *Issue 32, Spring 2024* at 4–7 (consumer reporting market); *Issue 31, Fall 2023* at 13–14 (international money transfer market); *Issue 30, Summer 2023* at 4–8 (automobile financing market), at 8–9 (consumer reporting market), at 12–13 (consumer debt collection market), at 29–30 (international money transfer market); *Issue 29, Winter 2023* at 14–15 (student loan servicing market); *Issue 28, Fall 2022* at 4–7 (automobile financing market), at 7–8 (consumer reporting market), at 16–17 (consumer debt collection market); *Issue 27, Fall 2022* at 14–25 (student loan servicing market); *Issue 26, Spring 2022* at 5–11 (consumer reporting market), at 14–16 (consumer debt collection market), at 22–25 (international money transfer market), at 25–27 (student loan servicing market).

[108] *See* 88 FR 80197 at 80201. Further, the CFPB disagrees that it is required to make findings of noncompliance in the market in order to issue this rule, for generally the same reasons (discussed below) that it is not required to make findings regarding the level of risk in the market or market failure.

[109] For example, as discussed in the impacts analysis further below in part VII, entities may improve their compliance management either in response to the possibility of an examination or in response to an examination finding regarding compliance management weaknesses. *See also CFPB Supervision and Examination Manual,* part II.A (describing how CFPB examinations conduct compliance management reviews).

consumers by reducing the resources available to those companies. Instead, CFPB supervision as provided under the rule will, as intended by Congress, promote compliance with Federal consumer financial law and otherwise facilitate the CFPB's statutory objectives. For the reasons discussed above, the CFPB concludes that the rule will help the CFPB to promote compliance with Federal consumer financial law in the market. That, in turn, will reduce risks of harm to consumers, as also discussed in the impacts analysis in part VII below.

Detecting and Assessing Risks to Consumers and Markets, Including Emerging Risks

The CFPB concludes that this rule will help the CFPB to detect and assess risks to consumers and markets from the provision of general-use digital consumer payment applications. As explained in the Proposed Rule and for the reasons elaborated further below, the CFPB agrees with comments suggesting that CFPB supervision of larger participants in this rapidly-growing and evolving market will be especially useful to the detection and assessment of emerging risks. As discussed below, the CFPB disagrees with the commenters that stated that the CFPB must first make a risk determination before establishing supervisory authority over larger participants by rule.

The CFPB concludes that establishing its supervisory authority over larger participants in this market would help it to detect and assess emerging risks for several reasons.

First, the CFPB shares the view of the group of State attorneys general and other commenters that this highly-concentrated market will continue to grow and evolve rapidly as the technology that has fueled its rapid growth also continues to evolve. As with other markets the CFPB now supervises, it is important for the CFPB to be able to closely assess whether pressure to sustain high growth in this market will drive nonbank firms to develop new and increasingly risky products.[110]

In addition, the CFPB agrees with the comments expecting that the market will continue to grow, including by expanding how general-use digital consumer payment applications help consumers to make payments in other ways. As the proposal explained, it is critical for the CFPB to be able to detect and assess emerging risks as new product offerings blur the traditional lines of banking and commerce.[111] This blurring was noted by several commenters that described a trend toward ''embedded finance'' described above and is illustrated in industry comments discussed below describing various ways that nonbanks' general-use digital payment applications serve as intermediaries between consumers and merchants.[112] Such applications also can facilitate payments from many different types of accounts consumers hold across multiple financial institutions. Supervision can detect and assess risks that may arise from a single application establishing connections that can cause payments to be made from many different consumer accounts.[113] In addition, as noted in the industry report cited by a consumer group commenter, consumers also can use payment functionalities embedded in digital applications, such as text messages, to make payments, including peer-to-peer payments.[114]

The CFPB also agrees with the group of State attorneys general that new risks may emerge as the relevant technologies in this market evolve. In this market, by using its supervisory activity as general-use digital consumer payment applications incorporate new technology, the CFPB can inform its assessment of risks to consumers and to markets.[115]

Supervision can be effective at detecting and assessing such risks. As a nonprofit commenter noted, supervision allows for rapid exchange of information outside of the adversarial legal process. The supervisory process also generally is confidential, which also facilitates the exchange of information.[116] For example, when examiners conduct a compliance management review, they can assess the strength of larger participants' compliance management as applied to the development and marketing of new products.[117] In addition, as illustrated by its work during the COVID–19 pandemic, examiners who are familiar with supervised entities can review activities across a market to identify emerging risks of consumer harm in a time of macroeconomic stress or

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[110] *Cf.* Financial Crisis Inquiry Commission Report (Feb. 25, 2011) at 104 (''The refinancing boom was over, but originators still needed mortgages to sell to the Street. They needed new products that, as prices kept rising, could make expensive homes more affordable to still-eager borrowers. The solution was risker, more aggressive, mortgage products that brought higher yields for investors but correspondingly greater risks for borrowers.''), at 414 (also noting that ''high-risk, nontraditional mortgage lending by nonbank lenders flourished in the 2000s and did tremendous damage in an ineffectively regulated environment, contributing to the financial crisis''), *https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf* (last visited Nov. 6, 2024).

[111] For example, the proposal noted how in its 2022 market-monitoring report on the convergence of payments and commerce, the CFPB described the potential for consumer financial data and behavioral data to be used together in increasingly novel ways. 88 FR 80197 at 80201 and n.43.

[112] *See* section-by-section analysis of § 1090.109(a)(1) and of ''covered payment functionality'' in 1090.109(a)(2). *See also Google LLC Embedded Finance White Paper* at 7 (''Embedded finance also offers a bonus for financial services companies: The data you collect from each transaction can help enhance customer service experience and innovate new products and experiences. The possibilities are endless for these kinds of partnerships, with high revenue and business growth potential. Before embarking on the embedded finance journey, however, you'll need to prepare'' by, among other steps, ''[p]lan[ning] to manage and analyze the vast trove of data you'll be collecting.''); CFPB *Report on Convergence of Payments and Commerce, supra,* at sec. 3.3 (''Embedded commerce'').

[113] Today, a general-use digital consumer payment application can initiate payments from multiple credit cards, prepaid accounts, and checking accounts. A general-use digital consumer payment application can facilitate payments from accounts that the provider offers through depository institution partners, or from linked accounts issued by other institutions (sometimes referred to as pass-through payments).

[114] *Google LLC Embedded Finance White Paper* at 3; Apple Cash website (''Send and Receive Money in Messages. With Apple Cash, you can send and receive money with just a text, in Messages. So it's easy to tip your dog walker, request funds from your roommate, or chip in for a coworker's gift.''), *https://www.apple.com/apple-cash/* (last visited Nov. 6, 2024).

[115] In the CFPB's experience, for some financial institutions, even the rollout of relatively conventional digital technologies can pose significant risks to consumers, including in the area of digital payments. *Cf.* CFPB, *In re: VyStar Credit Union,* Admin Proc. File No. 2024–CFPB–0013 (Oct. 31, 2024), ¶ 20 (describing how outage in the establishment of a new online banking platform of large credit union left consumers unable to engage in certain banking activities, and that ''[s]ome members' previously scheduled recurring payments were delayed or even deleted.''), *https://files.consumerfinance.gov/f/documents/cfpb-vystar-credit-union-consent-order_2024-10.pdf* (last visited Nov. 16, 2024).

[116] The CFPB treats CFPB confidential supervisory information consistent with applicable regulation; see 12 CFR part 1070. As noted above, even when Supervision highlights its findings to the public through *Supervisory Highlights,* it generally does not identify individual firms (outside of highlighting any associated enforcement actions).

[117] *See, e.g., CFPB Supervision and Examination Manual,* part I.A (page 6 of compliance management review section explaining how examiners' compliance management review includes a review of the ''processes for development and implementation of new consumer financial products or services and distribution channels or strategies, to determine degree of compliance function participation.''); *see also id.* at 4–5 (describing how examiners review product development as a component of the review of board and management oversight of compliance); *id.* at 9 (review of training of staff responsible for product development); *id.* at UDAAP Examination Procedures at 2 (review of product development documentation in connection with examiner's assessment of compliance with the prohibition against unfair, deceptive, and abusive practices).

shock.[118] As another example, through its supervisory tool, the CFPB can respond rapidly to reports of any widespread outages at larger participants by gathering information through an established supervisory relationship.[119]

Supervision of larger participants in this market also can identify new and emerging risks to consumers relating to the applicability of existing requirements of Federal consumer financial law to new products. For example, comments from consumer groups and State attorneys general suggested that non-compliance with EFTA/Regulation E and GLBA/Regulation P is common in this market, while some industry commenters stated that neither EFTA/Regulation E nor GLBA/Regulation P apply to at least some market participants. Other commenters described how some consumers may be confused about the legal protections afforded through certain payment apps. The CFPB does not define the application of those laws in this rulemaking. Through its supervisory activity, the CFPB can gather information to assess the applicability of those laws to the specific consumer financial products and services that a larger participant provides. Where the law applies and is violated, examiners can address the situation through supervisory action and where appropriate the CFPB can consider enforcement activity. In addition, such findings can help to inform what the CFPB communicates to the broader market, including through its *Supervisory Highlights* publication.

The CFPB disagrees with certain comments, summarized further above, that suggested that in a larger participant rule the CFPB is required to assess the degree or prevalence of risks to consumers, potential violations of law, or other specific harms occurring in the described market. The relevant provisions of the CFPA do not impose such requirements. While some comments did not identify any legal basis for this alleged obligation, others asserted that the obligation arises from section 1024(b)(2), which concerns the CFPB's operation of a ''risk-based supervision program.'' The CFPB believes that these comments misinterpret the scope and purpose of section 1024(b)(2). As the CFPB has previously explained,[120] that provision describes the manner in which the CFPB must ''exercise its authority under paragraph [(b)](1)'' [121] which in turn authorizes the CFPB to supervise ''persons described in subsection (a)(1).'' The Final Rule does not exercise authority provided by section 1024(b)(1). Rather, it ''describe[s],'' in part, a set of persons falling within section 1024(a)(1), by defining a category of ''larger participant[s].'' The CFPB only exercises the authority set forth in section 1024(b)(1) when it actually requires reports or conducts examinations of such persons. In exercising authority under section 1024(b)(1), the CFPB considers (and for larger participants under this Final Rule will consider) the factors set forth in section 1024(b)(2), including risks to consumers, as further described above in part I's discussion of the CFPB's prioritization process. However, the CFPA does not mandate consideration of those factors when issuing a rule that defines a category of larger participants under paragraph (a)(1).[122]

As noted above, one industry comment further argued that general principles of administrative law require the CFPB to identify concrete risks to consumers that will be mitigated by supervision in order to issue this rule. The commenter suggested that the Proposed Rule should have specified in detail what kind of compliance improvements the CFPB envisions, what activities of particular entities are currently non-compliant, why compliance will prevent particular risks to consumers, the likelihood of such risks occurring, the resulting harm to consumers, and how all of these issues compare to related markets. Elsewhere this Final Rule discusses the CFPB's statutory authority, reasons, and supporting evidence for issuing this Final Rule and explains how this Final Rule will help the CFPB to effectuate the statutory purposes of the CFPA. The CFPB disagrees that it was additionally required to consider in this rulemaking the kinds of detailed information about mitigation of concrete risks contemplated by the commenter. As explained above, there is no indication in the text of the CFPA that the CFPB is required to consider such information in issuing a larger participant rule.[123] Because the CFPB's risk-based prioritization process considers the type of information about risks described in part I above, the CFPB's supervision of larger participants ultimately may assist the CFPB in detecting and assessing risks to consumers and to markets.[124] But sections 1024(a)(1)(B) and (2) do not require the CFPB to reach conclusions regarding such matters before it can even initiate risk-based prioritization for a category of larger participants.

To the extent the industry commenter suggests the CFPB should consider such information because it asserts its own type of digital wallet product is ''low risk'' and should therefore be excluded from the market and ineligible for CFPB supervision, the CFPB does not believe that it is required to categorically exempt allegedly ''low-risk'' products within a market when issuing a rule to define larger participants of a market.[125]

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[118] *See, e.g.,* CFPB, *Prioritized Assessment FAQs* (July 20, 2020) at 1 (''The Bureau is adapting its supervision program to meet the needs of the current national emergency . . . . Through Prioritized Assessments, the Bureau will expand its supervisory oversight to cover a greater number of institutions than our typical examination schedule allows, gain a greater understanding of industry responses to pandemic-related challenges, and help ensure that entities are attentive to practices that may result in consumer harm.''), *https://files.consumerfinance.gov/f/documents/cfpb_prioritized-assessment_frequently-asked-questions.pdf* (last visited Nov. 7, 2024); *Supervisory Highlights Issue 23, Jan. 2021* (secs. 3.3, 3.5, and 3.6 of COVID–19 special edition describing supervisory observations in prioritized assessments in student loan servicing, consumer reporting, and consumer debt collection markets subject to larger participant rules), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-23_2021-01.pdf* (last visited Nov. 7, 2024).

[119] *See* CFPB, *What happens if my payment app has an outage and I can't access my account?* (Dec. 21, 2023) (describing consumer complaints as one way the CFPB collects information about outages at payment apps), *https://www.consumerfinance.gov/ask-cfpb/what-happens-if-my-payment-app-has-an-outage-and-i-cant-access-my-account-en-2145/* (last visited Nov. 8, 2024); FEDS Notes, *Offline Payments: Implications for Reliability and Resiliency in Digital Payment Systems* (Aug. 16, 2024) (describing how ''several recent high-profile outages have highlighted the need for building more reliability and resiliency in digital payment systems''), *https://www.federalreserve.gov/econres/notes/feds-notes/offline-payments-implications-for-reliability-and-resiliency-in-digital-payment-systems-20240816.html* (last visited Nov. 8, 2024).

[120] *See* 77 FR 42874 at 42883; 77 FR 65775 at 65779.

[121] 12 U.S.C. 5514(b)(2).

[122] This conclusion is reinforced by the immediately following subsection of the CFPA, 1024(a)(1)(C), which expressly references the consideration of risk. Under that provision, the CFPB has the authority to supervise any nonbank covered person that the CFPB ''has reasonable cause to determine, by order, after notice . . . and a reasonable opportunity . . . to respond . . . is engaging, or has engaged, in conduct that poses *risks to consumers* with regard to the offering or provision of consumer financial products or services.'' 12 U.S.C. 5514(a)(1)(C) (emphasis added).

[123] With respect to cross-market comparisons of risk, as explained in the Proposed Rule and in its previous larger participant rulemakings, ''[t]he Bureau need not conclude before issuing a [larger participant rule] that the market identified in the rule has a higher rate of non-compliance, poses a greater risk to consumers, or is in some other sense more important to supervise than other markets.'' 88 FR 80197 at 80200 n.24; 77 FR 65775 at 65779.

[124] *See* 12 U.S.C. 5514(b)(1)(C).

[125] Nor has the CFPB determined in this rulemaking exercising CFPA section 1024(a)(1)(B) authority that any specific market participant or larger participant poses any particular type or level of risk, low or otherwise, to consumers. Thus,

The CFPB likewise disagrees with other commenters who suggested that the CFPB is obligated to undertake a separate risk assessment of various subcomponents or sectors of the described market, or to include only the riskiest subcomponents or sectors within the larger participant definition. CFPA section 1024(a)(1)(B) provides for the issuance of rules defining ''larger participant[s] of a market'' for consumer financial products or services, and contains no language requiring exemptions for allegedly ''low-risk'' subcomponents of a market. Consistent with CFPA section 1024(b)(2), the CFPB considers whether products are lower risk, and thus less of a priority for supervisory attention, when choosing particular entities and consumer financial products and services for supervisory examinations as part of its operation of its risk-based supervision program.[126] The CFPB's operation of that risk-based supervision program is designed to prevent CFPB's supervision program from placing undue burdens on larger participants whose activities are genuinely lower risk. The CFPB also provides below further justification for the scope of the market described in this Final Rule, including regarding the inclusion of pass-through payment wallets in the market.[127]

The CFPB disagrees with the industry commenter suggesting that the CFPB may issue a rule to define larger participants of a market for consumer products or services only in cases of ''market failure.'' There is no support for this view in the text or legislative history of the CFPA. Moreover, while concerns about market failure often underlie laws and regulations imposing substantive consumer protection requirements,[128] this Final Rule does not impose substantive requirements and instead concerns the scope of the CFPB's supervisory authority, which is an authority designed to accomplish the statutory purposes established under CFPA section 1024(b)(1)(A)–(C). In that context, there is little reason to read section 1024(a)(1)(B) to impliedly bar the issuance of a larger participant rule in the absence of a demonstrated market failure.

Although the CFPB disagrees with the comments suggesting that it must make findings regarding risk to issue this larger participant rule and it does not do so here, as discussed above other commenters described various existing and emerging risks to consumers that may be associated with products and services provided by larger participants. Those comments raise legitimate concerns regarding potential risks to consumers in the market and thus provide further support for the CFPB's conclusion that this rule will help the CFPB to use its supervisory tool to detect and assess risks to consumers and the market. It is not necessary for this rule to adjudicate the nature, extent, or source of such risks, or for the CFPB to publish market-wide findings about such risks as a predicate for larger participant rulemakings. As discussed above, the CFPB incorporates information available to it about such risks (including from its market-monitoring function, among others) when prioritizing which nonbank covered persons subject to CFPA section 1024(a) it will examine.[129] In response to the nonprofit calling on the CFPB to describe in more detail the risks it would consider in prioritizing larger participants for examination in this market, part I of the Final Rule above explains in further detail the CFPB's prioritization process and the factors the CFPB considers as part of that process, consistent with the CFPA and as described in its Supervision and Examination Manual. The CFPB also expects that it will continue to periodically publish *Supervisory Highlights* to communicate key examination findings and risks identified over time on a market-by-market basis.

Ensuring Consistent Enforcement of Federal Consumer Financial Law

With regard to comments on whether the Proposed Rule would further the CFPB's statutory objective of ensuring that Federal consumer financial law is enforced consistently between nonbanks and depository institutions in order to promote fair competition,[130] the CFPB agrees with commenters who stated that the Proposed Rule would further that objective by permitting the CFPB to supervise both banks and nonbanks operating in the general-use digital consumer payment application market and by reducing the competitive advantage nonbanks may derive from being subject to less supervisory oversight. The CFPB disagrees with the commenter that characterized the Proposed Rule as a form of ''mission creep . . . outside [the CFPB's] core jurisdiction.'' The commenter did not address the CFPA's statutory objective of consistent enforcement of Federal consumer financial law without regard to an entity's status as a depository institution. In addition, the CFPB already has enforcement and rulemaking authority with respect to participants in the market; thus, those entities already fall within the CFPB's ''jurisdiction'' in significant ways.[131] The CFPB also disagrees with a related comment that described the larger participant rule as placing the CFPB in a market gatekeeper role. That comment appeared to misunderstand the function of larger participant rules, which do not regulate who enters a market but instead identify ''larger participants'' for purposes of section 1024(a)(1)(B). In addition, the CFPB disagrees with some commenters' suggestion that the rule should not be issued because of their concerns about the rule potentially making nonbanks less competitive and frustrating their innovation. As discussed below, the Final Rule adopts a significantly higher threshold, resulting in fewer market participants qualifying as larger participants. Even

although this commenter made claims regarding its product having low risk including low risk of violation of the prohibition against unfair, deceptive, and abusive acts and practices, the CFPB does not adjudicate such claims in this legislative rulemaking, for the reasons described above. In any event, the CFPB disagrees that the commenter was prevented from presenting evidence regarding the risks posed by its products. It had notice of the CFPB's reasons for the proposal and commented on them.

[126] As described above, the CFPB Supervision and Examination Manual describes the CFPB's established process for conducting risk-based prioritization of nonbank covered persons subject to its supervisory authority under CFPA section 1024(a).

[127] *See* section-by-section analysis of § 1090.109(a)(2) (definition of ''wallet functionality'').

[128] *See, e.g.,* 12 U.S.C. 4301(a) (Congressional finding in Truth in Savings Act that ''competition between depository institutions would be improved . . . if there was uniformity in the disclosure of terms and conditions on which interest is paid and fees are assessed in connection with such accounts.''); 15 U.S.C. 1601(a) (Congressional finding in Truth in Lending Act that ''competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit.'').

[129] The CFPB also provides additional responses further below to the comments suggesting it must publish the results of its market monitoring, or establish why its supervisory tool is superior to its market-monitoring tool. In any event, the CFPB has used data from its market-monitoring orders to inform the estimates published in this Final Rule, as discussed in the section-by-section analysis of the larger-participant test further below.

[130] 12 U.S.C. 5511(b)(4).

[131] The CFPB also disagrees with the industry comment suggesting that the Proposed Rule failed to account for the role of the FTC in promoting competition. As the Proposed Rule explained, it is focused on the statutory objective (codified in 12 U.S.C. 5511(b)(4)) of ensuring Federal consumer financial law ''is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition[.]'' 88 FR 80197 at 80198 n.5. The CFPB can promote consistent enforcement of Federal consumer financial law without impeding the FTC's mission; the two are compatible, and the CFPB coordinates with the FTC regarding its supervision activities more broadly.

with respect to larger participants, the CFPB does not have evidence to indicate that the Final Rule is likely to significantly affect innovation.

The CFPB also disagrees with those industry comments stating that the Proposed Rule would not promote consistent enforcement of Federal consumer financial law and fair competition because the proposed market definition included pass-through payment wallets that banks do not provide. Banks and credit unions can and do provide payment wallet functionalities. For example, very large depository institutions offer payment wallet functionalities that facilitate consumers' payments from accounts at the depository institution to make purchases online and in stores.[132] In addition, these comments appear to presuppose that the CFPB can only further the statutory objective of consistent enforcement in this rule if banks and nonbanks compete to offer precisely the same products in precisely the same manner to consumers. But the objective of consistent enforcement can also be furthered where the CFPB has the ability to supervise both nonbanks and depository institutions that play complementary roles in payment transactions. For example, when a depository institution subject to the CFPB's supervisory authority makes its accounts accessible to the consumer through a general-use digital consumer payment application provided by an unaffiliated nonbank, supervision of both the depository institution and the nonbank serves the statutory objective described above. Nonbanks may initiate payments from consumer accounts held at banks and credit unions and engage in a number of related activities that can implicate Federal consumer financial law compliance obligations.[133] In addition, the CFPB agrees with the credit union association commenter that unaffiliated payment applications can cause burdens on credit unions related to error resolution and customer service. Where the CFPB can supervise both a nonbank pass-through payment wallet and a depository institution involved in payments transactions, it is better positioned to consistently enforce applicable legal obligations with respect to the two entities. Below in the section-by-section analysis of ''wallet functionality,'' this Final Rule further discusses the reasons why pass-through payment wallets are appropriately included in the market definition.

Finally, the CFPB disagrees with the industry association commenter to the extent it was suggesting that larger participant rules cannot promote fair competition between banks and nonbanks unless they apply antitrust principles to define the market. For the reasons discussed below in the section-by-section analysis of the market definition in § 1090.109(a)(1), the purpose of antitrust law is different from the purpose of larger participant rules and the CFPB does not apply antitrust law in this rule. Nonetheless, as explained above, banks, credit unions, and their affiliates can offer and provide covered payment functionalities with general use through digital applications. In this rulemaking, the CFPB shares the goals expressed by the banking association and payment network commenters of applying consistent functional oversight to similar functional activities in this market. And as explained below in the section-by-section analysis of the market definition, the activities encompassed by the market definition are similar in how they support, digitally, a common set of payment activities that consumers engage in, such as making everyday payments to friends and family and for purchases. Relatedly, the CFPB disagrees with the industry association commenter to the extent it was suggesting that, by not including physical payment cards in the market, the Final Rule will not promote consistent enforcement of Federal consumer financial law. For the reasons discussed in the section-by-section analysis further below, the CFPB concludes the ''digital application'' component of the market definition is appropriate. The CFPB already has broad supervisory oversight of the use of physical payment cards issued by the very large banks and credit unions that it supervises. However, there is a supervisory gap over the significant role that nonbank larger participants play in facilitating the use of payment cards through general-use digital consumer payment applications. As described above, consumer adoption of general-use digital consumer payment applications is very high, indicating that consumers often prefer them to physical cards. Indeed, in some cases, such as at the time of origination or card replacement, a nonbank's general-use digital consumer payment application may be the only way for the consumer to use the payment card.[134] The Final Rule will fill this gap, which will promote consistent enforcement of Federal consumer financial law.[135]

Other Regulators' Existing Oversight Authority

With regard to comments on existing oversight of market participants, the CFPB agrees with the comment from the group of State attorneys general that stated that the rule would help existing regulatory oversight efforts in the market and would allow for increased coordination between Federal and State authorities to prevent unlawful conduct. The Bureau agrees that the existing regulatory oversight framework governing general-use digital consumer payment applications is important, but the Bureau believes that establishing its supervisory authority as part of this framework would better promote compliance with and consistent enforcement of Federal consumer

[132] For example, an industry association commenter pointed to a new digital wallet called Paze and a click-to-pay product offered by banks. *See also, e.g.,* Early Warning Services, LLC, Press Release, *Paze Hits Major Milestone: 125 million Credit and Debit Cardholders Can Check out Online* (Oct. 1, 2024) (describing ''Paze, a reimagined digital wallet offered by banks and credit unions,'' as available for use with 125 million payment card accounts issued by seven very large banks), *https://www.paze.com/paze-hits-major-milestone-125-million-credit-and-debit-cardholders-can-check-out-online* (last visited Nov. 7, 2024); *Click to Pay with American Express* (describing how depository institution offers an ecommerce payment wallet), *https://network.americanexpress.com/globalnetwork/v4/products/click-to-pay-with-american-express* (last visited Nov. 7, 2024). *See also CFPB Contactless Payments Spotlight, supra* (n.59 describing how JPMorgan previously provided the Chase Pay app to facilitate consumer payments for retail purchases).

[133] *See, e.g.,* Board of Gov. of Fed. Rsv. System, FDIC, OCC, *Joint Statement on Banks' Arrangements with Third Parties to Deliver Bank Deposit Products and Services* (July 25, 2024) at 1 (noting how under certain bank/fintech arrangements, ''banks rely on one or multiple third parties to . . . process payments (sometimes with the ability to directly submit payment instructions to payment networks); perform regulatory compliance functions; provide end-user facing technology applications; service accounts; perform customer service; and perform complaint and dispute resolution functions''), *https://www.occ.gov/news-issuances/news-releases/2024/nr-ia-2024-85a.pdf* (last visited Nov. 7, 2024). *See id.* at 1–3 (describing how deployment of new digital payment technologies create a potential for insufficient risk management to meet consumer protection obligations such as requirements under Regulation E to investigate and resolve certain payment disputes within required timeframes).

[134] PULSE, *PULSE Debit Issuer Study* (Aug. 8, 2024) at 9–10 (reporting that all surveyed issuers report provisioning debit cards to digital wallets, that 38 percent of debit cards are loaded into digital wallets, and that digital issuance of debit cards directly to such wallets is the top new capability that debit card issuers plan to introduce with 50 percent of issuers planning to add this service), *https://content.pulsenetwork.com/2024-debit-issuer-study/2024-pulse-debit-issuer-study* (last visited Nov. 7, 2024).

[135] With respect to what the commenter referred to as food delivery applications and automobile purchase applications, for the reasons discussed in the section-by-section analysis of the exclusion for certain merchant and marketplace payment activities in paragraph (C) of the definition of ''consumer payment transaction,'' the CFPB believes those are part of a distinct market.

financial law and help it to detect risks to consumers and the market. The CFPB disagrees with the industry association comment suggesting that the CFPB must determine whether the market covered by the rule is inadequately supervised before issuing a larger participant rule; no such requirement appears in the text of the CFPA.[136] The CFPB accounts for existing oversight when evaluating how to exercise its supervisory authority pursuant to CFPA section 1024(b)(2). Specifically, the CFPB takes seriously its inter-governmental coordination obligations, described below, and believes that they will promote coordination and minimize regulatory burden in connection with the CFPB's exercise of its supervisory authority over larger participants in this market and the existing regulatory oversight structure at the Federal and State levels.

For example, as required by the CFPA and explained in the Proposed Rule, the CFPB coordinates its examination activity, including at nonbanks, with State regulators.[137] One purpose of this coordination is to prevent duplication and unnecessary regulatory burden. That coordination will address commenter concerns regarding CFPB oversight of larger participants that may engage in market activity that is subject to State money transmitter laws. In addition, industry comments often recognized that providers of pass-through payment wallets that do not hold or receive funds generally are not engaged in money transmission under State laws, and thus are not subject to State-level supervision.

The CFPB also disagrees with industry comments suggesting that this rule establishing CFPB authority to supervise larger participants in this market will create CFPB supervisory activities that are unnecessarily duplicative or burdensome vis-à-vis oversight activities by the FTC and prudential regulators. Congress has adopted mechanisms to prevent unnecessarily duplicative or burdensome CFPB supervisory activities in cases where the FTC may exercise enforcement authority or prudential regulators may exercise supervisory authority over larger participants.[138] Among other things, the CFPB coordinates across its functions with the FTC, which does not have a supervisory tool.[139] In addition, the CFPA provides that the CFPB has exclusive authority with respect to the prudential regulators to supervise larger participants for purposes of assuring compliance with Federal consumer financial law.[140] Also, consistent with the requirements of CFPA section 1024(b)(3), the CFPB coordinates with prudential regulators to minimize the duplication and regulatory burden of supervisory activity pursuant to memoranda of understanding, including where appropriate at nonbank larger participants.[141] Moreover, as discussed above, nonbank larger participants engage in substantial volumes of market activity with interconnection across the U.S. financial system. CFPB supervision of nonbank larger participants can assess compliance with the requirements of Federal consumer financial law across their various market activities, which involve interactions with banks and credit unions overseen by various Federal prudential regulators. Thus, CFPB oversight of larger participants can ensure consistent enforcement of Federal consumer financial law and complement the oversight of the Federal prudential regulators.

CFPB's Existing Enforcement and Market-Monitoring Authorities

The CFPB disagrees with those industry commenters suggesting that it cannot use its larger participant rulemaking authority to establish supervisory authority in this market due to the existence of the CFPB's enforcement and market-monitoring authorities. The CFPA identifies supervision of nonbank covered persons under CFPA section 1024 as a primary function of the CFPB.[142] Sections 1024(a)(1)(B) and (2) of the CFPA specifically empower the CFPB to prescribe larger participant rules for the purpose of authorizing CFPB supervision, and those provisions contain no requirement that a larger participant rule consider the adequacy of the CFPB's other authorities or functions.[143] Given the statutory scheme in the CFPA, any larger participant rule will generally apply to nonbank covered persons that also are subject to the CFPB's market-monitoring and enforcement authorities. These comments thus appear to reflect, in large part, a policy disagreement with Congress's decision to give the CFPB the ability to supervise nonbank larger participants of markets for consumer financial products and services it defines by rule in addition to its other authorities.

Further, as the Proposed Rule noted and as also discussed above, supervision can serve an important function that is distinct from and complementary to enforcement and

[136] *See, e.g.,* 12 U.S.C. 5514(a)(1)(B), (a)(2).

[137] 88 FR 80197 at 80198 n.12. *See also* 12 U.S.C. 5514(b)(2)(D) (CFPB shall exercise its supervisory authority under 12 U.S.C. 5514(b)(1) in a manner designed to ensure that such exercise takes into consideration, among other things, the extent to which supervised nonbanks are subject to oversight by State authorities for consumer protection); 12 U.S.C. 5514(b)(3) (CFPB coordination of supervisory activities with States); Int'l Money Transfer Larger Participant Rule, 79 FR 56631 at 56632, 56638, 56643 (explaining how the Bureau will coordinate with appropriate State regulatory authorities and will consider the extent of State supervisory activity when prioritizing individual examinations.); 2013 CFPB-State Supervisory Coordination Framework (May 7, 2013) (describing process for CFPB-State coordination under information-sharing memorandum of understanding), *https://files.consumerfinance.gov/f/201305_cfpb_state-supervisory-coordination-framework.pdf* (last visited Nov. 8, 2024).

[138] Such supervisory authority may exist, for example, where (as noted by the industry commenter) prudential regulators may examine certain nonbank service providers to banks under authorities such as the Bank Service Company Act. *See generally* 12 U.S.C. 1861–67.

[139] The CFPB coordinates with the FTC consistent with its obligations under the CFPA, including 12 U.S.C. 5514(c)(3) and 5581(b)(5). *See* CFPB–FTC Memorandum of Understanding (Feb. 25, 2019) (section VII describing how CFPB coordinates its supervision and examination activities with the FTC), *https://files.consumerfinance.gov/f/documents/cfpb_ftc_memo-of-understanding_2019-02.pdf* (last visited Nov. 8, 2024).

[140] 12 U.S.C. 5514(c), (d) (describing the extent to which CFPB supervisory and enforcement authorities are exclusive with respect to nonbank covered persons described in CFPA section 1024(a)(1)). *See also* CFPA section 1025(b)(1) (similarly providing that the CFPB has exclusive authority to supervise very large depository institutions and their affiliates for the purposes listed therein, including assessing compliance with the requirements of Federal consumer financial laws).

[141] *See* 12 U.S.C. 5514(b)(3) (''To minimize regulatory burden, the Bureau shall coordinate its supervisory activities with the supervisory activities conducted by prudential regulators . . . including establishing their respective schedules for examining persons described in subsection (a)(1) [of CFPA section 1024] and requirements regarding reports to be submitted by such persons.''). *See, e.g.,* CFPB, Board of Gov. of Fed. Rsv. System, FDIC, NCUA, and OCC Memorandum of Understanding (MOU) on Supervisory Coordination (May 16, 2012) at 2 (noting how CFPA sections 1024(b)(3)–(4) and 1025(b)(2) require the CFPB to ''coordinate its supervisory activities with the supervisory activities conducted by the Prudential Regulators, including consultation regarding their respective schedules for examining Covered Institutions and requirements regarding reports to be submitted by Covered Institutions.''), *https://files.consumerfinance.gov/f/201206_CFPB_MOU_Supervisory_Coordination.pdf* (last visited Nov. 7, 2024); *see also id.* (listing objectives of the MOU, including ''[a]void[ing] unnecessary duplication of effort'' and ''[m]inimiz[ing] unnecessary regulatory burden''); *id.* at 8 (''The CFPB and Prudential Regulators will coordinate in connection with examinations that relate to Covered Supervisory Activities of Covered Institutions' Service providers'').

[142] *See* 12 U.S.C. 5511(c)(4) (listing supervision of covered persons, including nonbank covered persons, as one of the CFPB's ''primary functions'').

[143] By contrast, in allocating its supervisory resources under CFPA section 1024(b)(2) the CFPB considers, among other things, ''the extent to which such institutions are subject to oversight by State authorities for consumer protection.'' 12 U.S.C. 5514(b)(2)(D).

market monitoring.[144] For example, supervision can benefit consumers and providers by detecting compliance problems early, at a point when correcting the problems would be relatively inexpensive and before many (or many more) consumers have been harmed.[145] In addition, the CFPB conducts its supervisory activities not only for the purposes of assessing compliance with the requirements of Federal consumer financial law, but also for purposes of obtaining information about the person's activities and compliance systems or procedures and detecting and assessing risks to consumers and markets. These latter two purposes of its supervisory activities generally are distinct from its enforcement activities, which focus on addressing violations of Federal consumer financial law.[146] In addition to promoting compliance in their own right, those activities also help to inform CFPB decisions regarding when to initiate enforcement activity. Similarly, CFPB supervisory and examination activity at individual firms can inform how the CFPB conducts market-wide monitoring. The CFPB's market monitoring function also can support decisions about when to initiate supervisory activity. For example, under CFPA section 1022(c)(1), the CFPB may use its market monitoring to support its functions, including to inform its prioritization of its nonbank supervision examination activities at larger participants.[147]

The Final Rule Does Not Implicate the ''Major Questions'' Doctrine

The CFPB disagrees with comments stating that the Rule implicates the ''major questions'' doctrine, which is reserved for ''extraordinary cases'' in which the ''history and the breadth of the authority that the agency has asserted'' and the vast ''economic and political significance'' of the assertion of authority by the agency ''provide a reason to hesitate before concluding that Congress meant to confer such authority.'' [148] As noted above, the Final Rule does not impose any new substantive consumer protection requirements on larger participants. Because general-use digital consumer payment applications are consumer financial products and services as defined in the CFPA,[149] the CFPB already has enforcement authority, market-monitoring authority, and rulemaking authority with respect to nonbank covered persons participating in the market for general-use digital consumer payment applications. Whether or not the CFPB may exercise one additional form of authority—supervision—over a group of larger participants in that market is not a question of vast economic and political significance in the sense recognized by courts.[150] In this regard, the CFPB notes that one nonprofit commenter confuses the overall dollar value of transactions through digital wallets (which the commentator estimates at almost $1 trillion) with the economic impact of this larger participant rulemaking, which is of course vastly smaller.[151]

CFPB Examinations of Larger Participants

With respect to comments on the statement in the Proposed Rule noting that the CFPB's supervisory authority is not limited to the consumer financial products or services that qualified a person for supervision, the CFPB clarifies it is not relying on that position as a rationale for the Final Rule or as authority for issuing the Final Rule, and that the CFPB would finalize the market definition, market-related definitions, and larger-participant test as currently formulated in this Final Rule irrespective of the existence of that position.[152]

109(a)(1) Market Definition—Providing a General-Use Digital Consumer Payment Application

Proposed Rule

Proposed § 1090.109(a)(1) would have described the market for consumer financial products or services covered by the Proposed Rule as encompassing ''providing a general-use digital consumer payment application.'' The term would have been defined as providing a covered payment functionality through a digital application for consumers' general use in making consumer payment transaction(s). This term incorporated other terms defined in proposed § 1090.109(a)(2): ''consumer payment transaction(s),'' ''covered payment functionality,'' ''digital application,'' and ''general use.'' The term ''covered payment functionality'' would have included a ''funds transfer functionality'' and a ''wallet functionality,'' terms which proposed § 1090.109(a)(2) also would have defined.[153] The Proposed Rule sought comment on all aspects of the proposed market definition, including whether the market definition in proposed § 1090.109(a)(1) or the market-related definitions in proposed § 1090.109(a)(2), discussed in the section-by-section analysis below, should be expanded, narrowed, or otherwise modified.

Comments Received

Several commenters addressed the proposed market definition overall. The Final Rule summarizes those comments in this section-by-section analysis of the market definition in § 1090.109(a)(1). In addition, some comments addressed certain specific defined terms used in the market definition or called for

[144] 88 FR 80197 at 80212–13.

[145] *See also* CFPB Supervision Director, *What new supervised institutions need to know about working with the CFPB* (Jan. 9, 2023) (''Supervisory activities may help entities identify issues before they become systemic or cause significant harm.''), *https://www.consumerfinance.gov/about-us/blog/what-new-supervised-institutions-need-to-know-about-working-with-the-cfpb/* (last visited Nov. 7, 2024).

[146] 12 U.S.C. 5511(c)(4).

[147] *See* 12 U.S.C. 5512(c)(1).

[148] *W. Virginia* v. *EPA,* 597 U.S. 697, 721 (2022) (cleaned up).

[149] *See* nn.241–42 *infra* (noting explanation in Proposed Rule, 88 FR 80197 at 80205 nn.64–65).

[150] *Cf., e.g., Biden* v. *Nebraska,* 143 S. Ct. 2355, 2373–74 (2023) (citing an estimate that the agency's action would ''cost taxpayers between '$469 billion and $519 billion' '' and that it implicated a ''matter of earnest and profound debate across the country'').

[151] Similarly, the CFPB's statements in press materials cited by the commenter do not suggest that this rulemaking would have a vast economic impact. The costs and benefits of this rulemaking are further discussed below. The CFPB also disagrees with the commenter that section 1024(a)(1)(B) would need to refer specifically to ''digital wallets'' to authorize this rulemaking. By that logic, there could be no larger participant rulemakings because section 1024(a)(1)(B) refers to markets for ''other consumer financial products or services'' without expressly identifying particular consumer financial products and services.

[152] Nonetheless, the CFPB notes that it explained the basis for this interpretation in its first larger participant rulemaking, for the consumer reporting market, where it noted that the ''Dodd-Frank Act authorizes the Bureau to supervise 'covered person[s]' described in 12 U.S.C. 5514(a)(1)(A) through (E)[ ]'' and that supervision of certain other activities of such persons ''is consistent with the purposes that the Dodd-Frank Act sets out for the Bureau's supervisory activities'' set forth in 12 U.S.C. 5514(b)(1). *See* 77 FR 42874 at 42880; *see also* 12 U.S.C. 5514(a)(1)(B) (providing that ''this section shall apply to any covered person'' that is a nonbank ''larger participant of a market for other consumer financial products or services'' as defined by rule); 12 U.S.C. 5514(b)(1) (providing that ''[t]he Bureau shall require reports and conduct examinations on a periodic basis of persons described in [12 U.S.C. 5514(a)(1)] for'' certain listed purposes). The CFPB disagrees with certain commenters' suggestion that the reference to ''relevant product markets and geographic markets'' in the provision describing the operation of the CFPB's risk-based supervision program (12 U.S.C. 5514(b)(2)) was intended to impliedly limit the scope of the CFPB's supervisory authority under 12 U.S.C. 5514(a)(1) and (b)(1) to only the consumer financial products and services described in the larger participant rule. The CFPB also disagrees that this interpretation implicates the major questions doctrine for reasons discussed above in the CFPB's response to other comments about that doctrine.

[153] The term ''consumer payment transaction(s)'' also would have incorporated another term—''State,'' which proposed § 1090.109(a)(2) would have defined.

certain exclusions or additions to the market by modifying those defined terms. The Final Rule summarizes and responds to those comments in the section-by-section analysis of the market-related definitions in § 1090.109(a)(2) below.

As discussed above, some commenters expressed support for the Proposed Rule to establish supervisory authority over the market that includes funds transfer apps and wallet functionalities with general use that nonbank covered persons provide to consumers through digital applications. For example, as described above, a group of State attorneys general stated that the CFPB's supervisory oversight of larger participants in this market would help to promote compliance with Federal consumer financial law and to detect and assess risks posed by this emerging financial market and market participants. Banking and credit union associations, as well as a payment network and nonprofit, also supported CFPB supervisory oversight of larger participants in the proposed market, as described in the summary of general comments above. As also described above, consumer group comments also were supportive of the scope of the market activities defined in the Proposed Rule, while calling for certain scope expansions, as discussed further below. In addition, an industry association expressed general support for the proposal to define a market that allows the CFPB to oversee entities with varied business models.

Other commenters disagreed with the approach to market definition in the Proposed Rule. For example, some industry commenters stated that larger participant rules must apply antitrust law market definition principles because, in their view, the statutory provision in CFPA section 1024(a)(1)(B) authorizing CFPB rules to define larger participants of ''a market'' incorporates those principles. Some of these commenters did not provide a legal basis for this view. Others, such as three industry trade associations, cited Congress' use of the phrase ''relevant product markets'' in an adjacent provision, CFPA section 1024(b)(2), and suggested that the term ''market'' in section 1024(a)(1)(B) is implicitly limited by the phrase ''relevant product market.'' [154] They further suggested that the terms ''market'' and ''relevant product market'' should be understood to incorporate antitrust case law discussing the boundaries of a market for purposes of evaluating the viability of an antitrust claim, including cases holding that a group of products are in the same market under antitrust law if they are reasonably interchangeable by consumers for the same purposes.[155] Two of these industry associations also stated that Congress included the requirement in CFPA section 1024(a)(2) that the CFPB consult with the FTC prior to issuing a larger participant rule because of the FTC's role in enforcing Federal antitrust laws.[156] These commenters therefore concluded that a larger participant rule must define ''a market'' that qualifies as a ''relevant product market'' within the meaning of antitrust law.[157]

Those commenters and several other comments from industry, nonprofits, and Members of Congress also disagreed with the proposed market on the grounds that it was overbroad, conflating several markets into one. For example, a comment from Members of Congress stated that in their view, the proposal sought to cover different markets such as peer-to-peer services, stored value accounts, neobanking, merchant payment processing, and payment credential management.[158] In addition, some industry associations stated that the proposed market would not qualify as a valid market because it groups together four different types of activities that, in their view, are not economic substitutes. They stated that these activities function in different ways and meet different needs and use cases. They described four of these activities as follows: (1) drawing from a stored balance held by the company; (2) routing funds held in a third-party bank account for transmission to a recipient; (3) charging or offering a payment method for consumer purchases in a manner that is excluded from State money transmitter regulations; [159] and (4) storing and transmitting payment credentials without participating in the flow of funds from the consumer to the recipient. They also stated that digital applications for person-to-person transfers and digital applications for processing payments for merchants are different and present different risks of consumer harm. Because these activities in their view constitute separate markets, they stated that the Proposed Rule deviated without justification from previous larger participant rules that did not encompass multiple markets.[160]

More broadly, an industry association also stated that the market includes ''P2P'' and digital wallet functionalities that, in their view, are not reasonably interchangeable because they provide ''similar'' but ''differentiated'' services to consumers. Another industry association stated that consumers rely on funds transfer functionalities and wallet functionalities in different ways, and that these functionalities sometimes, but not always, may be interrelated. They stated that the CFPB should do a ''piecewise analysis'' of these functionalities, separately analyzing how consumers rely upon them. They stated that wallet functionalities initiate funds transfers but are subject to Regulation E only when they store funds. They suggested that the Proposed Rule did not establish a purpose for including wallet functionalities in the market when they do not store funds. An industry firm and two nonprofits suggested that wallet functionalities that do not store funds instead facilitate consumers' payments for purchases from merchants by storing and transmitting payment credentials for accounts held at third-party financial institutions the CFPB already supervises. They described that activity as part of a separate market from the other payment functionalities included in the proposed market. They stated that the CFPB's proposal to include such wallet functionalities in the proposed market does not reflect the sensitivity the CFPB has shown to differences among other consumer financial products and services, such as consumer reporting, consumer debt collection, and student loan servicing, by covering them in separate larger

[154] Section 1024(b)(2) calls for the CFPB to exercise its authority in CFPA section 1024(b)(1) to require reports and examinations of nonbank covered persons described in CFPA section 1024(a)(1) ''in a manner designed to ensure that such exercise . . . is based on the assessment by the Bureau of the risks posed to consumers in the relevant product markets and geographic markets,'' and taking into consideration certain factors further specified in CFPA section 1024(b)(2).

[155] *See, e.g., United States* v. *E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 395 (1956). One commenter also cited a European regulation in support of its position.

[156] The summary and response to comments regarding the FTC consultation process is included in part IV above.

[157] Two of the industry associations also indicated that the Proposed Rule did not do so because antitrust law market definition requires examining the factors that influence consumer choices, and the Proposed Rule did not discuss those factors.

[158] However, as discussed above, the market is not based on providing a stored value account. And as discussed below under ''covered payment functionality,'' the market definition generally does not apply to merchant payment processors.

[159] They added that State money transmitter regulation excludes this activity because, in their view, the activity poses low risks.

[160] As an example, they cited the international money transfer larger participant rule in which the CFPB declined to include the domestic money transfer market.

participant rulemakings defining separate markets.[161]

A nonprofit commenter described the proposed market as being composed of multiple sectors, including the first three groups of activities listed by the industry association comments described above, as well as what they described as fully online fintech firms such as ''neobanks'' and money transmitters. In its view, consumers interact with these products differently and rely on them for different purposes, and each presents different consumer harms.

Response to Comments Received

As an initial matter, the CFPB disagrees with some industry commenters' novel suggestion that larger participant rules must define a market that would qualify as a market under antitrust law. In the CFPB's international money transfer larger participant rulemaking, large providers of international money transfers urged the CFPB to take the opposite position—*i.e.,* to state that larger participant rules do not define ''markets'' for purposes of antitrust law. In response, the CFPB so clarified.[162]

Having carefully considered commenters' arguments, the Final Rule maintains the position announced in the international money transfer larger participant rule for several reasons. As explained below, the market definition in the Final Rule fits within a more general understanding of the term ''market'' reflected in CFPA section 1024(a), which does not require application of antitrust law. First, commenters have not identified any language in CFPA section 1024, or any legislative history, that expressly refers to antitrust statutes, antitrust caselaw, or antitrust concepts of a market such as substitutability and reasonable interchangeability. Instead, the commenters' argument depends on an attenuated and unpersuasive argument that (1) reads the term ''market'' in section 1024(a)(1)(B) as being implicitly limited by the phrase ''relevant product market'' in a separate provision, section 1024(b)(2); and then (2) further suggests that the phrase ''relevant product market'' in section 1024(b)(2) was meant to implicitly import antitrust concepts of substitutability and reasonable interchangeability into the CFPB's larger participant rulemakings under section 1024(a)(1)(B). Second, section 1024(a)(1)(B) gives authority to the CFPB to define by rule a larger participant of ''a market for *other* consumer financial products or services[.]'' [163] That phrasing is meaningful because CFPA section 1024(a) enumerates, in paragraphs (A), (D), and (E) three categories of consumer financial products and services over which the CFPB has supervisory authority. Legislative history suggests that Congress understood each to be a separate ''market'' in a general sense.[164] The first category encompasses an array of different services that broadly relate to mortgage loans (the ''origination, brokerage, or servicing of [mortgage] loans'' and also ''loan modification and foreclosures relief services in connection with such loans'').[165] Another category is ''private education loans,'' which are generally understood to be part of a broader market for educational financing that also includes Federal student loans.[166] The third category is ''payday loans,'' which are understood to compete with other types of higher-cost credit such as title loans and installment loans.[167] These categories thus do not describe consumer financial products and services that correspond to the strict antitrust conception of a market, which undercuts the suggestion that the term ''market'' in section 1024(a)(1)(B) should be understood to implicitly incorporate antitrust concepts.[168] Third, the purpose of defining a ''relevant product market'' under antitrust law is to determine whether a firm can exert monopoly power in a market and thereby profit from supra-competitive pricing.[169] Market power and the analysis of it generally is the domain of antitrust law, not the Federal consumer financial law over which the CFPB has authority. Commenters have not presented any persuasive reason why Congress would have wanted the terms

[161] This commenter and another industry association suggested this approach was inconsistent with how a previous larger participant rule engaged in ''tailor[ing]'' of the rule. 78 FR 73383 at 73397. However, the quoted portion of the previous rule addressed the tailoring of the larger-participant test to the market at hand, which was not the subject of the comments described here.

[162] *See* Comment on proposed international money transfer larger participant rule by Dolex Dollar Express, Inc., MoneyGram Payment Systems, Inc., RIA Financial Services, Sigue Corporation, and Western Union Financial Services, Inc. (April 1, 2014) (2014 Industry Comment Letter) at 5 (''[T]he term 'market' for purposes of defining a larger participant should not be used in the absence of cautionary language to make clear that the term is not reflective of a Bureau determination of 'market' for antitrust purposes.''), *https://www.regulations.gov/comment/CFPB-2014-0003-0014* (last visited Nov. 7, 2024); CFPB, Final International Money Transfer Larger Participant Rule, 79 FR 56631 at 56635 n.43 (stating in response to comment that in its larger participant rulemakings ''[t]he Bureau neither defines markets for purposes of antitrust law, nor intends the market definition in this Final Rule to be used for any purpose other than determining larger-participant status'').

[163] 12 U.S.C. 5514(a)(1)(B).

[164] The Senate Report to the CFPA describes the ''mortgage market'' that is the subject of CFPA section 1024(a)(1)(A) as ''consist[ing] of more than 25,000 lenders, servicers, brokers, and loan modification firms that would be subject to Bureau supervision and enforcement.'' S. Rep. 111–176 (Apr. 30, 2010) at 163.

[165] 12 U.S.C. 5514(a)(1)(A); *see, e.g.,* CPFB, Final Rule, Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 FR 10696, 10699 (Feb. 14, 2013) (providing an overview of the ''mortgage servicing market'' within the context of the ''mortgage market'' that is ''broader'').

[166] 12 U.S.C. 5514(a)(1)(D); *see, e.g.,* CFPB, Final Rule, Defining Larger Participants of the Student Loan Servicing Market, 78 FR 73383, 73385 (Dec. 6, 2013) (''[t]he student loan servicing market is comprised of entities that service Federal and private student loans that have been disbursed to pay for post-secondary education expenses''); Kelly D. Edmiston, Lara Brooks, and Steven Shepelwich, Fed. Rsv. Bk. of Kansas City Research Working Paper 12–05, ''Student Loans: Overview and Issues (Update)'' (Aug. 2012 rv. Apr. 2013) at 4 (''The student loan market is made up of federal and 'private' student loans. Federal student loans are those that are listed under Title IV of the Higher Education Act. Private student loans are those made by depository and non-depository financial institutions (banks) and non-profit lenders (states).''), *https://www.kansascityfed.org/documents/5428/rwp12-05edmistonbrooks shepelwich.pdf* (last visited Nov. 7, 2024).

[167] 12 U.S.C. 5514(a)(1)(E); *see, e.g.,* CFPB, Final Rule, Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 FR 54472, 54475 (Nov. 17, 2017) (referring to payday loans as part of a ''broader set of liquidity loan products that also includes certain higher-cost longer-term installment loans'' that are sometimes referred to as ''payday installment loans''); NCUA, Final Rule, Payday Alternative Loans, 84 FR 51942 (Oct. 1, 2019) (authorizing credit unions to originate certain higher-cost installment loans with a term of up to 12 months to compete with payday loans).

[168] Similarly, larger participant rulemakings only apply to nonbank covered persons, and not to insured depository institutions, insured credit unions, and certain of their affiliates that may compete with nonbanks (and that may be subject to CFPB supervision under section 1025 or certain CFPB supervisory activities described under section 1026). *See* 12 U.S.C. 5514(a)(3)(A). If Congress had intended larger participant rulemakings to define a market for antitrust purposes, it presumably would have expressly accounted for how insured depository institutions, insured credit unions, and certain of their affiliates participate in such markets too.

[169] *See, e.g.,* Thomas G. Krattenmaker, Robert H. Lande, Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law,* 76 Geo. L.J. 241, 255 (1987) (noting that ''antitrust law now requires proof of actual or likely market power or monopoly power to establish most types of antitrust violations'' and ''market power and market definition are closely related, because a relevant market is that group of firms that significantly constrains each other's pricing and output decisions.''), *https://www.justice.gov/archives/atr/monopoly-power-and-market-power-antitrust-law* (last visited Nov. 7, 2024); Louis Kaplow, *On the Relevance of Market Power,* 130 Harv. L. Rev. 1303, 1304 n.1 & 1366 (2017) (noting that ''[i]t is familiar that market power is a prerequisite for most types of competition law violations[,]'' listing different violations that depend on establishing market power, and noting how the ''relevant market'' is the frame of reference for assessing whether a firm has monopoly power for purposes of a Sherman Act violation).

''market'' and ''relevant product market'' in section 1024 to be limited by reference to antitrust laws that the CFPB does not enforce and that do not concern the CFPB's supervisory function.

In addition, the CFPB disagrees with comments suggesting that the FTC consultation requirement in section 1024(a)(2) compels the conclusion that the term ''market'' should be interpreted by reference to antitrust law.[170] The commenters cite no legislative history or other evidence supporting their position, and the provision itself does not reference the FTC's competition mission or its Bureau of Competition. The FTC also has a consumer protection mission [171] and it has certain overlapping authority with the CFPB over nonbanks that provide consumer financial products and services, which generally would include nonbanks that qualify for supervision as a larger participant.[172] Given that overlap, the CFPA includes various provisions requiring the CFPB to coordinate or consult with the FTC.[173] In that context, there is little reason to interpret the consultation requirement in section 1024(a)(2) as reflecting an unstated Congressional intention that the term ''market'' be interpreted by reference to antitrust law.[174]

More generally, the CFPB agrees with the comments that expressed support for the proposed market definition as describing a set of activities that most consumers in the United States regularly rely upon to conduct a significant portion of their everyday payments. These everyday financial transactions involve making payments to multiple unaffiliated persons, as described further below in the section-by-section analysis of the revised definition of ''general use'' adopted in the Final Rule. The universe of potential recipients for consumer payment transactions can vary from one general-use digital consumer payment application to another. Some peer-to-peer payment applications facilitate payments to multiple consumers. Others facilitate payments to multiple unaffiliated merchants. As discussed further below, the general trend in the market is to facilitate payments to some combination of both. That is, many of the well-known market participants bundle together different payment methods for consumers to make payments to friends, family, and merchants.

Depending on the market participant and which payment method the consumer selects, the general-use digital consumer payment application provider may hold the funds used to make a payment or they may be held by a third-party financial institution. Regardless of who holds the funds used for a payment, market participants share the common activity of facilitating consumer payments transactions by providing payments data processing products and services to consumers through digital applications.[175] In light of these considerations, and as further discussed below, the Final Rule reasonably defines a market that comfortably fits within the parameters Congress set for markets in CFPA section 1024(a)(a)(1)(B).[176]

The CFPB disagrees with the conclusions by some industry and nonprofit commenters that the proposed market does not describe a valid ''market'' for purposes of CFPA section 1024(a)(1)(B).[177] That includes industry comments suggesting that the CFPB cannot reasonably define a single market that encompasses consumer financial products and services that facilitate digital payments with different purposes, such as payments to friends and family and payments for purchases. Similarly, the CFPB disagrees with comments suggesting that it cannot reasonably define a market that encompasses the facilitation of consumer payments using different payment methods or accounts, such as stored value accounts held with the market participant, third-party banak accounts, and payment cards issued by third party financial institutions such as debit cards and credit cards. These comments appear to rely on an unduly narrow view of the meaning of the term ''market'' in the CFPA, which as discussed above in response to antitrust-related comments Congress used in a more general sense. To that end, the Final Rule reasonably defines a market that comports with the range of ''markets'' in subsections (A), (D), and (E) of section 1024(a)(1) that Congress appears to have referenced in using the term ''other markets'' in section 1024(a)(1)(B).

In addition, these comments ignored or did not adequately account for how often companies provide a single general-use digital payment application with covered payment functionalities that facilitate consumer payment transactions with either purpose (to pay friends and family and to make purchases), often offering multiple payment methods for transactions with either purpose. In the CFPB's experience and expertise, informed by its market monitoring and other activities, well-known market participants increasingly provide

[170] *See* 12 U.S.C. 5514(a)(2).

[171] *See, e.g., What the FTC Does, https://www.ftc.gov/news-events/media-resources/what-ftc-does* (last visited Nov. 7, 2024) (noting ''the Agency's two primary missions: protecting competition and protecting consumers'').

[172] 12 U.S.C. 5581(b)(5)(A) (transferring FTC's authority to prescribe rules under an enumerated consumer law to the CFPB, but not its enforcement authority).

[173] *See, e.g.,* 12 U.S.C. 5514(c)(3) (requiring CFPB and FTC agreement for coordinating on enforcement actions regarding nonbanks subject to its supervisory authority); 12 U.S.C. 5581(b)(5)(D) (requiring coordination between CFPB and FTC in certain rulemakings ''that apply to a covered person or service provider with respect to the offering or provision of consumer financial products and services[.]'').

[174] In addition, it is not necessary to define an antitrust market for the rule to help the CFPB to ensure consistent enforcement of Federal consumer financial law between nonbanks and depository institutions in order to promote fair competition. For the reasons discussed in the response to general comments above, the CFPB concludes the Final Rule would serve that purpose based on the market it defines.

[175] *See also* discussion under ''covered payment functionality'' of comments seeking exclusion of nonbanks providing payment services in partnership with banks. Some market activity such as that of P2P payment apps often consists of consumer financial products and services that rely upon both funds transmitting and payments data processing, while other types of market activity, such as pass-through payment wallets, may be more limited to payments data processing. As the CFPB recently explained in another rulemaking, CFPA section 1002(15)(A)(vii) encompasses activity that ''extends beyond payment processing to broadly include other forms of financial data processing, including where the financial data are processed in connection with other financial or non-financial products and services.'' 88 FR 74796, 74842 (Oct. 31, 2023) (proposed rule); *see also* 89 FR 90838 at 90955 (same point in final rule). Providing payments data processing in connection with funds transmitting is simply one example of this. *See also* CFPA section 1002(5)(A) (defining a ''consumer financial product or service'' as including a financial product or service that is described in ''one or more categories under'' CFPA section 1002(15)).

[176] Contrary to the suggestion of some commenters, grouping activities that are in some ways different into a single market is not a departure from previous larger participant rulemakings. *See* 77 FR 42874 at 42886 (consumer reporting larger participant rule concluding that ''resellers, national credit repositories, specialty consumer reporting agencies, analyzers, and others engaged in consumer reporting activities as defined in the final rule are properly included in a single market'' because ''[t]hese different types of firms all participate in the process of preparing consumer financial information for use in decisions regarding consumer financial products or services''); 77 FR 9592 at 9598 (Feb. 17, 2012) (discussing difficulty separating business models of third-party debt collectors, debt buyers, and collection attorneys because ''[s]ome third-party debt collectors also buy debt, and debt buyers may utilize in-house or third-party collectors. Similarly, collection attorneys and law firms may, in addition to representing debt owners, buy debt and collect on their own behalf.'').

[177] To the extent commenters criticized the proposed market as invalid based on its limitation to payment functionalities provided through ''digital applications'' with ''general use,'' the Final Rule discusses those comments in the section-by-section analysis of those defined terms below.

general-use digital consumer payment applications that bundle together options to make payments for these different purposes and payment methods, often in a manner that appears seamless to the consumer as described below. This assessment, focusing on the commonality across market participants' activities, also is consistent with market research described in the Proposed Rule and discussed further below, and even some industry associations' own presentation of these activities in other settings.[178]

Many well-known market participants bundle offerings of both peer-to-peer (P2P) and payments for purchases—sometimes in a formal and explicit manner, other times less so. Comments from several Members of Congress highlighted the degree to which sole proprietors and other small businesses rely on market participants to accept payments. While larger merchants may accept these payments by entering into formal merchant acceptance agreements, small businesses such as sole proprietors may simply enroll their bank account in a P2P payment service to receive funds from consumers.[179] As the Proposed Rule noted, by 2022, an industry report found that 82 percent of small business merchants surveyed accepted at least one P2P payment option.[180] Research by a major payment network similarly describes how small and medium businesses are paid not only through ''mobile wallets'' but also through ''mobile payment apps.'' [181] Moreover, recent market research found that nearly half of U.S. consumers surveyed reported using a P2P app for purposes such as making purchases with payment cards and bill pay functions. The report concluded that ''P2P apps are at an inflection point, transitioning from single-purpose apps to additional, more robust, and often-bundled product features.'' [182]

Meanwhile, as suggested by comments from consumer groups, other digital wallets gained market share by offering formal merchant acceptance but then began to promote a P2P payment feature.[183] For example, as consumer group commenters pointed out, PayPal, which initially grew as a payment functionality for merchants selling goods and services through an affiliated company's online marketplace, has long since graduated to offering a broader range of services including peer-to-peer payments.[184]

In addition, the most recent Federal Government diary and survey on consumer payment choice results continue to illustrate how mobile app/online payment accounts generally are understood as supporting both ''purchases and person-to-person payments[.]'' [185] That project groups together nonbank payment apps such as PayPal, Venmo, Apple Pay, Google Pay, Cash App, and Samsung Pay under the

[178] This trend predates 2024. *See, e.g.,* Testimony of Scott Talbott, Sr. Vice President of Government Affairs, Electronic Transactions Association (ETA), House Cmttee. on Fin. Servs, Serial No. 117–82 (Apr. 28, 2022) at 52 (''Digital wallets can be defined broadly to include mobile and other online applications that allow users to process payments, access account information, and pay for services. Digital wallets provide users with access to stored payment credentials, which may include a credit or debit card, bank account, or, less commonly, a prepaid or gift card linked to the phone or app. This technology has gained popularity with consumers as a safe and convenient way to transmit funds in multiple settings, including for online purchases, payments at brick-and-mortar retailers, and person-to-business (*i.e.,* bill pay) and P2P transfers. The concept of the digital wallet has been swiftly embraced by the public due to its ease of use. The user just has to download and register a mobile wallet on his or her phone.''), *https://www.congress.gov/117/chrg/CHRG-117hhrg47649/CHRG-117hhrg47649.pdf* (last visited Nov. 7, 2024).

[179] One government report estimated that in tax year 2017, three P2P apps alone filed U.S. tax reports (at a reporting threshold of $20,000) disclosing nearly $200 billion in payments to businesses through those platforms. Treasury Inspector General For Tax Administration, *The Internal Revenue Service Faces Challenges in Addressing the Growth of Peer-to-Peer Payment Application Use,* Report No. 2021–30–022 (Apr. 22, 2021) at 6 (Figure 3), *https://www.tigta.gov/sites/default/files/reports/2022-07/202130022fr_4.pdf* (last visited Nov. 7, 2024). In some contexts, the bundling of the two types of payments has been so seamless that the payment apps themselves have not been able to effectively disentangle personal payments from purchases. *See* 26 U.S.C. 6050W (''Returns relating to payments made in settlement of payment card and third party network transactions''); IR–2023–221 (Nov. 21, 2023) (describing phase-in transition years where reporting not required unless payees receive over $20,000 for more than 200 transactions in tax year 2023, and more than $5,000 for tax year 2024), *https://www.irs.gov/newsroom/irs-announces-delay-in-form-1099-k-reporting-threshold-for-third-party-platform-payments-in-2023-plans-for-a-threshold-of-5000-for-2024-to-phase-in-implementation* (last visited Oct. 24, 2024).

[180] *TSG: Merchants Offering P2P Payments* (reporting results of TSG and Electronic Transactions Association survey of over 500 small businesses merchants), *cited in* Proposed Rule at n.30. For example, some of these apps began by offering only P2P payments focused on paying friends and family, but then leveraged that feature to gain formal merchant acceptance. *See, e.g.,* eBay, *eBay Launches Venmo as a Payment Option, a Continued Push to Expand Ways to Pay and Invest in Digital Natives* (June 13, 2024), *https://www.ebayinc.com/stories/news/ebay-launches-venmo-as-a-payment-option-a-continued-push-to-expand-ways-to-pay-and-invest-in-digital-natives* (last visited Nov. 7, 2024); James Pothen, *Cash App exec hints at Square integration* (June 3, 2024), *https://www.paymentsdive.com/news/square-cash-app-pos-p2p-block-jack-dorsey-retail-point-of-sale-strategy/717753/* (last visited Nov. 7, 2024).

[181] VISA Global Back to Business Study (7th ed. 2023) (describing multinational survey of plans for digital payment option acceptance by small and micro businesses (SMBs) including in the United States indicating 55 percent of SMBs planned to accept ''mobile payment apps'' in 2023 and 50 percent planned to accept ''mobile wallets''), *https://usa.visa.com/content/dam/VCOM/blogs/visa-back-to-business-7-one-pager-september-2023.pdf* (last visited Nov. 7, 2024). A recent Forbes survey similarly described how both ''digital wallet apps'' and ''[p]eer-to-peer apps'' are popular ways for consumers to make retail purchases. Amanda Claypool, *53% Of Americans Use Digital Wallets More Than Traditional Payment Methods: Poll* (updated Aug. 25, 2023), *https://www.forbes.com/advisor/banking/digital-wallets-payment-apps/* (last visited Nov. 7, 2024). For example, Amazon, which provides Amazon Pay, also had a brief partnership with Venmo. *See* PYMNTS.COM, *Venmo No Longer Accepted on Amazon in January* (Dec. 7, 2023), *https://www.pymnts.com/amazon-payments/2023/amazon-will-discontinue-venmo-payments-in-january/* (last visited Nov. 7, 2024).

[182] Marqueta, 2024 State of Payments Report at 39, *https://www.marqeta.com/state-of-payments* (last visited Aug. 1, 2024). *See also* Press Release, *Venmo Introduces the Ability to Schedule Payment Requests* (Oct. 9, 2024) (reporting that ''more than 84% of consumers have used a peer-to-peer service with common payments including monthly rent, utilities, and other regular living expenses[]'' as found in a 2022 survey by Lending Tree at *https://www.lendingtree.com/personal/peer-to-peer-services-survey/* (last visited Nov. 7, 2024)), *https://newsroom.paypal-corp.com/2024-10-09-Venmo-Introduces-the-Ability-to-Schedule-Payments-and-Requests* (last visited Nov. 7, 2024).

[183] Apple, *New features come to Apple services this fall* (June 11, 2024) (describing new ''Tap to Cash'' feature that can be used with existing Apple Cash stored value product), *https://www.apple.com/newsroom/2024/06/new-features-come-to-apple-services-this-fall/* (last visited Nov. 7, 2024); Business Wire, *VISA Reinvents the Card, Unveils New Products for Digital Age* (May 15, 2024) (provider of Click-to-Pay ecommerce wallet describing new mobile device app-based feature for VISA cards ''Tap to P2P (person-to-person): Allows money to be sent between family and friends''), *https://www.businesswire.com/news/home/20240515563838/en/* (last visited Nov. 7, 2024).

[184] *Compare* PayPal, Inc. Form S–1 (Sept. 28, 2001) at 5 (''We depend on online auction transactions for a significant percentage of our payment volume.''), *https://www.sec.gov/Archives/edgar/data/1103415/000091205701533855/a2059025zs-1.htm, with* eBay Press Release, *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/* (last visited Nov. 7, 2024) & PayPal, *Send money to just about anyone, anywhere* (website FAQ describing how consumers can use the PayPal app to ''[s]end money online to friends and family in the US''), *https://www.paypal.com/us/digital-wallet/send-receive-money/send-money* (last visited Nov. 7, 2024). *See also* PayPal Holdings, Inc. Form 10–K (Feb. 2, 2024) (PayPal 2023 10–K) at 8 (''Our Venmo digital wallet in the U.S. is a leading mobile application used to move money between our customers and to make purchases at select merchants.''), *https://www.sec.gov/Archives/edgar/data/1633917/000163391724000024/pypl-20231231.htm.*

[185] Berhan Bayeh, Emily Cubides & Shaun O'Brien, Fed. Rsv. Fin. Svcs. FedCash Services, *2024 Findings from the Diary of Consumer Payment Choice* (May 2024) (2024 Diary Findings) at 5–6 (Figure 3 grouping together ''purchases and P2P payments'' and describing growth in proportion made ''online or remotely'' versus ''in-person''), *https://www.frbservices.org/binaries/content/assets/crsocms/news/research/2024-diary-of-consumer-payment-choice.pdf* (last visited Nov. 7, 2024). The Proposed Rule noted how the Federal Government publishes the results of an annual diary and survey on consumer payment choice. 88 FR 80197 at 80200 n.25 (citing report on 2022 diary and survey by Federal Reserve System staff).

common heading ''online payment accounts.'' [186] Other surveys, market research, and even a foreign regulator similarly refer collectively to both uses—payments to other consumers and payments for purchases.[187]

In addition, commenters claiming that the rule encompassed multiple markets rather than a single market did not provide evidence regarding consumer understanding to support their claims. By contrast, through its experience and expertise developed through its market monitoring and other activities, the CFPB has seen that several well-known general-use digital consumer payment applications engage in many of the activities industry commenters characterized as distinct markets. For example, when consumers open what some describe as a peer-to-peer payment app, now they often may access a screen to send money to other persons they identify, whether consumers or businesses.[188] In addition, market participants often design their general-use digital consumer payment application so that a single screen can display all available methods for making a given payment, including prepaid accounts, debit cards linked to deposit accounts, and credit cards, whether issued by the digital application provider or by third-party financial institutions.[189] The CFPB therefore declines to differentiate the market in ways suggested by industry commenters that do not align with the more seamless, undifferentiated common user experience that well-known market participants themselves create for consumers.

Even when firms choose to discontinue offering payments to other consumers,[190] or have not yet enabled that capability in the United States,[191] their general-use digital payment applications still comprise part of the overall market described in the Final Rule, which includes but is not limited to digitally facilitating consumer payment transactions for purchases.

Final Rule

For the reasons described in this Final Rule, including the CFPB's consideration of and responses to the comments on the Proposed Rule, the CFPB concludes that the set of activities covered by the market definition in the Final Rule, all of which digitally facilitate consumer payment transactions to multiple unaffiliated persons, regardless of the payment method, source, or account used to fund the payment, reasonably describes a market for purposes of CFPA section 1024(a)(1)(B). In addition, the Final Rule makes several revisions to market-related definitions as described in the section-by-section analysis of § 1090.109(a)(2) below. Because the

[186] *2023 Survey and Diary of Consumer Payment Choice Tables* (table 1 reporting survey results indicating that 71.8 percent of U.S. consumers adopted online payment accounts as of 2023), *https://www.atlantafed.org/-/media/documents/banking/consumer-payments/survey-diary-consumer-payment-choice/2023/tables_dcpc2023.pdf* (last visited Nov. 7, 2024). That survey also reported that ''[s]even in 10 consumers made at least one payment using a phone or tablet in the 12 months ending October 2023.'' Kevin Foster, Claire Greene & Joanna Stavins, Fed. Rsv. Bk. of Atlanta Research Data Report No. 24–1, *2023 Survey and Diary of Consumer Payment Choice: Summary Results* (June 3, 2024) at 16–17 (''On average, 13 mobile payments per consumer were reported'' for October 2023, of which ''10 were for purchases, two for bills, and one to pay another person''), *https://www.atlantafed.org/-/media/documents/banking/consumer-payments/survey-diary-consumer-payment-choice/2023/sdcpc_2023_report.pdf* (last visited Nov. 7, 2024).

[187] *See, e.g.,* Claire Greene, Fumiko Hayashi, Alicia Lloro, Oz Shy, Joanna Stavins & Ying Lei Toh, *Defining Households That Are Underserved in Digital Payment Services,* Fed. Rsv. Bk. of Atlanta Research Data Report No. 24–3 (Sept. 9, 2024), sec. 3.1 (describing a ''(sub)component of financial inclusion relating to digital payments (a subset of payments), which we term digital payments inclusion. Digital payments are payments made through a digital device or channel, such as electronic fund transfer (for example, automated clearing house [ACH] and instant payments); debit, prepaid, or credit card; closed-loop online payment services offered by online payment service providers (for example, PayPal and Cash App); and cryptocurrency transfer.''), table 1 (describing examples of digital payments with wide acceptance by merchants, billers, and individuals), *https://www.atlantafed.org/-/media/documents/banking/consumer-payments/research-data-reports/2024/10/10/03--defining-households-that-are-underserved-in-digital-payment-services.pdf* (last visited Nov. 7, 2024); Pengfei Han & Zhu Wang, *Technology Adoption and Leapfrogging: Racing for Mobile Payments,* Fed. Rsv. Bk. of Richmond Working Paper No. 21–05R (Mar. 2021 rev. May 1, 2024) (Racing for Mobile Payments) at 6 (''Following Crowe et al. (2010), we define a mobile payment to be a money payment made for a product or service through a mobile phone, regardless of whether the phone actually accesses the mobile network to make the payment. Mobile payment technology can also be used to send money from person to person.''), *https://www.richmondfed.org/-/media/RichmondFedOrg/publications/research/working_papers/2021/wp21-05r.pdf* (last visited Nov. 7, 2024); U.S. Dept. of Treasury, *Assessing the Impact of New Entrant Non-bank Firms on Competition in Consumer Finance Markets* (Nov. 2022) at 13 (''New entrant non-bank firms offer digital applications to make payments online and through mobile devices that have expanded accessibility for consumers. These payments firms generally provide a front-end digital user interface for consumers to make payments to other parties (other consumers or, increasingly, businesses) on the same platform.''), *https://home.treasury.gov/system/files/136/Assessing-the-Impact-of-New-Entrant-Nonbank-Firms.pdf* (last visited Nov. 7, 2024); Pew Research Center, *Who Uses Mobile Payments?* (May 26, 2016) at 1 (defining ''[m]obile payment users'' as ''consumers who have made an online or point-of-sale purchase, paid a bill, or sent or received money using a Web browser, text message, or app on a smartphone''), *https://www.pewtrusts.org/-/media/assets/2016/05/who_uses_mobile_payments.pdf* (last visited Nov. 7, 2024); Pew Research Center, *Are Americans Embracing Mobile Payments?* (Oct. 3, 2019) at 3 (defining ''mobile payment'' and ''mobile payment apps'' in similarly broad manner), *https://www.pewtrusts.org/-/media/assets/2019/10/mobilepayments_brief_final.pdf* (last visited Nov. 7, 2024); U.K. Payment Systems Regulator & Financial Conduct Authority, *Call for Information: Big tech and digital wallets,* Doc. CP24/9 (July 2024), sec. 2.1–2.3 (''Digital wallets can be defined as apps, software or online services that allow consumers to make payments, quickly and conveniently, using mobile phones or other electronic devices . . . . Some digital wallets facilitate retail transactions, others allow peer-to-peer payments, and others do both . . . . Digital wallets can be either 'staged' [by holding funds] or 'pass-through' [because they do not hold funds themselves but instead allow users to make payments from a payment card] . . . . While the features and functionality of digital wallets vary, in general terms, they offer consumers a quick and convenient way to make payments.''), *https://psr.org.uk/media/yqinyhhn/cp24-9-cfi-digital-wallets-july-2024-v2.pdf* (last visited Nov. 7, 2024).

[188] *See, e.g.,* Venmo, *Show some local love: Pay businesses—like your favorite neighborhood spots—the same easy way you pay friends on Venmo* (describing how consumer can use a merchant's Venmo QR code to identify the merchant as a payment recipient), *https://venmo.com/pay/businesses/* (last visited Nov. 7, 2024); Venmo, *Adding & Removing Friends* (describing how consumers can use QR codes from other consumers to identify them as recipients), *https://help.venmo.com/hc/en-us/articles/217532217-Adding-Removing-Friends* (last visited Nov. 7, 2024); Block Investor Day 2022, *Cash App* at 8 (stating that Cash App ''started with peer-to-peer payments'') & at 71 (showing screenshot of how a consumer can add a business account to receive payments), *https://s29.q4cdn.com/628966176/files/doc_presentations/2022/05/Cash-App-Block-Investor-Day-2022.pdf* (last visited Nov. 7, 2024). Other payment apps also bundle money transfers to individual consumers and bill pay functionalities. *See, e.g.,* Western Union, *Send and Track Money Online* (U.S. consumer home page describing how a consumer can use the Western Union app to ''[s]end money, pay bills, check exchange rates, or start a transfer in the app and pay in-store-all on the go.''), *https://www.westernunion.com/us/en/home.html* (last visited Nov. 7, 2024).

[189] *See, e.g.,* Apple, *Wallet Carry one thing. Everything* (consumer-facing website showing screenshot of Apple Wallet displaying payment methods including a Discover credit card, an Apple Cash prepaid account card, and an Apple MasterCard), *https://www.apple.com/wallet/* (last visited Nov. 7, 2024); PayPal, *Add. Pay. Earn. Smile* (consumer-facing website showing screenshot of PayPal payment method screen where consumer can ''[u]se your bank or cards to pay or send money''), *https://www.paypal.com/us/digital-wallet/ways-to-pay/add-payment-method* (last visited Nov. 7, 2024).

[190] *See, e.g.,* Google, *Simplifying our payment apps in the U.S.* (Feb. 22, 2024) (announcing that effective June 4, 2024, the U.S. version of the Goole Pay app will no longer be available to send money to other consumers but that consumers can continue to use Google Pay to check out online and to tap-to-pay in stores), *https://blog.google/products/google-pay/payment-apps-update/?sjid=232731559998132243-NA* (last visited Nov. 7, 2024).

[191] *See* Amazon, *Unified Payment Interface (UPI) FAQs* (describing how consumers in India can use the Amazon Pay Unified Payment Interface to send money to other consumers), *https://www.amazon.in/gp/help/customer/display.html?nodeId=202212990* (last visited Nov. 7, 2024).

market definition incorporates those defined terms, those revisions also affect the scope of the market the Final Rule defines.

109(a)(2) Market-Related Definitions

Proposed § 1090.109(a)(2) would have defined several terms that are relevant to the proposed market definition described above. Below the CPFB summarizes and responds to comments on each proposed definition and describes changes to these definitions in the Final Rule, which also numbers each definition for clarity.

Consumer Payment Transaction(s)

Proposed Rule

The proposed market definition would have encompassed providing covered payment functionalities through a digital application for a consumer's general use in making consumer payment transactions. Proposed § 1090.109(a)(2) would have defined the term ''consumer payment transactions'' to mean 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.[192] The proposed definition would have clarified that, except for transactions excluded under paragraphs (A) through (D), the term applies to transfers of consumer funds and transfers made by extending consumer credit. Paragraphs (A) through (D) of the proposed definition would have excluded the following four types of transactions: (A) An international money transfer as defined in § 1090.107(a) of this part; (B) A transfer of funds that is (*1*) linked to the consumer's receipt of a different form of funds, such as a transaction for foreign exchange as defined in 12 U.S.C. 5481(16), or (*2*) that is excluded from the definition of ''electronic fund transfer'' under § 1005.3(c)(4) of this chapter; (C) A payment transaction conducted by a person for the sale or lease of goods or services that a consumer selected from an online or physical store or marketplace operated prominently in the name or such person or its affiliated company; and (D) An extension of consumer credit that is made using a digital application provided by the person who is extending the credit or that person's affiliated company.[193]

The first component of the proposed definition of ''consumer payment transaction'' was that the payment transaction must result in a transfer of funds by or on behalf of the consumer. This component therefore would have focused on the sending of a payment, and not on the receipt. The proposed definition would have encompassed a consumer's transfer of their own funds—such as funds held in a linked deposit account or in a stored value account. It also would have encompassed a creditor's transfer of funds to another person on behalf of the consumer as part of a consumer credit transaction.[194] For example, a nonbank's wallet functionality may hold a credit card account or payment credential that a consumer uses to obtain an extension of credit from an unaffiliated depository institution. If the consumer uses the digital wallet functionality to purchase nonfinancial goods or services using such a credit card, the credit card issuing bank may settle the transaction by transferring funds to the merchant's bank for further transfer to the merchant, and a charge may appear on the consumer's credit card account. That transfer of funds may have constituted part of a consumer payment transaction under the Proposed Rule regardless of whether it is an electronic fund transfer subject to Regulation E.[195]

The CFPA did not include a specific definition for the term ''funds'' used in the Proposed Rule. As the Proposed Rule explained, that term is used in various provisions of the CFPA, including in section 1002(15)(A)(iv), which defines the term ''financial product or service'' to include ''engaging in deposit-taking activities, transmitting or exchanging funds, or otherwise acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer.'' [196] Without fully addressing the scope of that term, the Proposed Rule interpreted the term ''funds'' in the CFPA to not be limited to fiat currency or legal tender, and to include digital assets that have monetary value and are readily useable for financial purposes, including as a medium of exchange, such as crypto-assets, which are sometimes referred to as virtual currency.[197]

The second component of the proposed definition of ''consumer payment transaction'' was that the consumer must be physically located in a State, a term the proposal would have defined by reference to jurisdictions that are part of the United States as discussed in the section-by-section analysis below. The CFPB requested comment on this limitation.

The third component of the proposed definition of ''consumer payment transaction'' was that the funds transfer must be made to another person besides the consumer. For example, the other person could be another consumer, a business, or some other type of entity. This component would have distinguished the proposed market for general-use digital payment applications that facilitate payments consumers make to other persons from adjacent but distinct markets that include other consumer financial products and services, including the activities of taking deposits; selling, providing, or issuing of stored value; and extending consumer credit by transferring funds directly to the consumer. For example, this component of the proposed definition would have excluded 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, such as loading or redemptions, as well as a consumer's withdrawals from their own deposit account such as by an automated teller machine (ATM).

The fourth component of the proposed definition of ''consumer payment transaction'' is that the funds transfer must be primarily for personal, family, or household purposes.[198] As a

[192] The Proposed Rule would have defined the term ''consumer payment transaction'' for purposes of the Proposed Rule. Payment transactions that are excluded from, or otherwise do not meet, the definition of ''consumer payment transaction'' in the Proposed Rule would not have been covered by the market definition in the Proposed Rule. However, persons facilitating those transactions may still have been subject to other aspects of the CFPB's authorities besides its larger participant supervisory authority established by the Proposed Rule.

[193] Subpart A of the CFPB's existing larger-participant rule includes a definition of ''affiliated company'' that would have applied to the use of that term in the Proposed Rule. *See* 12 CFR 1090.101.

[194] In certain circumstances, consumer credit transactions would have been excluded from the proposed definition of ''consumer payment transaction,'' for example as described in the exclusion in proposed paragraph (D) discussed below.

[195] *See also generally* § 1005.12(a) (describing relationship between Regulation E and other laws including the Truth in Lending Act and its implementing regulation, Regulation Z).

[196] 12 U.S.C. 5481(15)(A)(iv).

[197] *See generally* U.S. Treas. Fin. Stability Oversight Council, *Report on Digital Asset Financial Stability Risks and Regulation* (Oct. 3, 2022) at 7 (''For this report, the term 'digital assets' refers to two categories of products: 'central bank digital currencies' (CBDCs) and 'crypto-assets.' This report largely focuses on crypto-assets. Crypto-assets are a private sector digital asset that depends primarily on cryptography and distributed ledger or similar technology. For this report, the term crypto-assets encompasses many assets commonly referred to as 'coins' or 'tokens' by market participants.''), *https://home.treasury.gov/system/files/261/FSOC-Digital-Assets-Report-2022.pdf* (last visited Oct. 23, 2023).

[198] Under a relevant definition of consumer financial products and services in CFPA section 1002(5)(A), a financial product or service is a

result, the Proposed Rule would have defined the relevant market activity (providing a general-use digital consumer payments application) by reference to its use with respect to consumer payment transactions. Although a general-use digital consumer payment application also could help individuals to make payments that are not for personal, family, or household purposes, such as purely commercial (or business-to-business) payments, those payments would not have fallen within the proposed definition of ''consumer payment transaction.''

In addition, the proposed definition of ''consumer payment transaction'' would have excluded four types of transfers. First, paragraph (A) of the proposed definition would have excluded international money transfers as defined in § 1090.107(a). The CFPB defined larger participants in a market for international money transfers in its 2014 rule.[199] In proposing this larger participant rule, the CFPB did not propose to alter the international money transfer larger participant rule. Rather, the CFPB proposed this larger participant rule to define a separate market, focused on the use of digital payment technologies to help consumers make payment transactions that are not international money transfers as defined in the international money transfer larger participant rule. Accordingly, the proposed definition of ''consumer payment transaction'' would have excluded an international money transfer as defined in § 1090.107(a). As the Proposed Rule explained, to the extent that nonbank international money transfer providers facilitate those transactions, whether through a digital application or otherwise,[200] that activity remains part of the international money transfer market, and the CFPB may be able to supervise such a nonbank if it meets the larger-participant test in the international money transfer larger participant rule.

Second, for clarity, paragraph (B) of the proposed definition of ''consumer payment transaction'' would have excluded a transfer of funds by a consumer (*1*) that is linked to the consumer's receipt of a different form of funds, such as a transaction for foreign exchange as defined in 12 U.S.C. 5481(16), or (*2*) that is excluded from the definition of ''electronic fund transfer'' under § 1005.3(c)(4) of this chapter. Paragraph (*1*) of this proposed exclusion would have clarified, for example, that the market as defined in the Proposed Rule does not include transactions consumers conduct for the purpose of exchanging one type of funds for another, such as exchanges of fiat currencies (*i.e.,* the exchange of currency issued by the United States or of a foreign government for the currency of a different government). Paragraph (*2*) would have clarified that transfers of funds the primary purpose of which is the purchase or sale of a security or commodity in circumstances described in Regulation E section 3(c)(4) and its associated commentary also would not have qualified as consumer payment transactions for purposes of the Proposed Rule.[201]

Third, proposed paragraph (C) would have excluded a payment transaction conducted by a person for the sale or lease of goods or services that a consumer selected from an online or physical store or marketplace operated prominently in the name of such person or its affiliated company.[202] This exclusion would have clarified that, when a consumer selects goods or services in a store or website operated in the merchant's name and the consumer pays using account or payment credentials stored by the merchant who conducts the payment transaction, such a transfer of funds generally is not a consumer payment transaction included within the market defined by the Proposed Rule.

This exclusion also would have clarified that when a consumer selects goods or services in an online marketplace and pays using account or payment credentials stored by the online marketplace operator or its affiliated company,[203] such a transfer of funds generally is not a consumer payment transaction included within the market defined by the Proposed Rule. For such transactions to qualify for this exclusion, the funds transfer must have been for the sale or lease of a good or service the consumer selected from a digital platform operated prominently in the name (whether entity or trade name) of an online marketplace operator or their affiliated company.[204] However, this proposed exclusion would not have applied when a consumer uses a payment or account credential stored by a general-use digital consumer payment application provided by an unaffiliated person to pay for goods or services on the merchant's website or an online marketplace. For example, when a consumer selects goods or services for purchase or lease on a website of a merchant, and then from within that website chooses an unaffiliated person's general-use digital consumer payment application as a payment method, then proposed paragraph (C) would not have excluded the resulting consumer payment transaction.

The Proposed Rule explained that the CFPB proposed this exclusion to the definition of ''consumer payment transaction'' to clarify the scope of the proposed market and to clarify which transactions count toward the proposed threshold in the larger-participant test in proposed § 1090.109(b). For example, some online marketplace operators may provide general-use digital consumer payment applications for consumers to use for the purchase or lease of goods or services the consumer selects on websites of unaffiliated merchants. Absent the proposed exclusion in paragraph (C), the providing of such a general-use digital consumer payment application could result in counting all transactions through such an application, including for goods and services the consumer selects from the online marketplace, toward the larger-participant test threshold in proposed § 1090.109(b). Yet the Proposed Rule noted that the CFPB was not seeking to define a market or determine larger-participant status in this rulemaking by reference to payment transactions conducted by merchants or online marketplaces through their own payment functionalities for their own sales transactions. The CFPB therefore believed it was appropriate to propose excluding the former type of payment

consumer financial product or service when it is offered or provided for use by consumers primarily for personal, family, or household purposes. 12 U.S.C. 5481(5)(A).

[199] 79 FR 56631.

[200] *See* CFPB, *Remittance Rule Assessment Report* (Oct. 2018, rv. April 2019) at 143 (describing trends including ''widespread use of mobile phones to transfer remittances and the growth of online-only providers[]''), *https://files.consumerfinance.gov/f/documents/bcfp_remittance-rule-assessment_report.pdf* (last visited Oct. 25, 2023).

[201] 12 CFR 1005.3(c)(4).

[202] *See* 12 CFR 1090.101 (definition of ''affiliated company'').

[203] The Proposed Rule noted that a common industry definition of an online marketplace operator is an entity that engages in certain activities, including ''[b]ring[ing] together [consumer payment card holders] and retailers on an electronic commerce website or mobile application'' where ''[i]ts name or brand is: []Displayed prominently on the website or mobile application[;] Displayed more prominently than the name and brands of retailers using the Marketplace[; and is p]art of the mobile application name or [uniform resource locator.]'' 88 FR 80197 at 80203 n.59 (citing VISA, *Visa Core Rules and Visa Product and Service Rules* (Apr. 15, 2023) (''VISA Rules''), Rule 5.3.4.1 (defining the criteria for an entity to qualify as a ''Marketplace'' for purposes of the VISA Rules), Oct. 2024 edition last updated Apr. 2023, *https://usa.visa.com/dam/VCOM/download/about-visa/visa-rules-public.pdf* (last visited Nov. 7, 2024)).

[204] The Proposed Rule noted that this aspect of the example is consistent with what some significant payments industry standards consider to be a digital marketplace. *See id.*

transactions from the market defined in the Proposed Rule.

The Proposed Rule explained how, in this regard, the scope of the proposed term ''consumer payment transaction'' is narrower than the CFPB's authority under the CFPA, which can extend to payment transactions conducted by merchants or online marketplaces for sales through their own platforms under certain circumstances. The CFPA defines a consumer financial product or service to include ''providing payments or other financial data processing products or services to a consumer by any technological means, including processing or storing financial or banking data for any payment instrument . . .'' [205] The Proposed Rule explained that such activities generally are consumer financial products or services under the CFPA unless a narrow exclusion for financial data processing in the context of the direct sale of nonfinancial goods or services applies.[206] The Proposed Rule explained 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 sold directly by that merchant or online marketplace operator. Other purposes beyond payments for direct sales could include using or sharing such data for targeted marketing, data monetization, or research purposes. The Proposed Rule explained that the exclusion also would 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.

Finally, proposed paragraph (D) would have excluded an extension of consumer credit that is made using a digital application provided by the person who is extending the credit or that person's affiliated company. As the Proposed Rule explained, the CFPB proposed this exclusion so that the market definition does not encompass consumer lending activities by lenders through their own digital applications. In this rulemaking, the CFPB did not propose to define a market for extending consumer credit, as it did, for example, in the larger participant rule for the automobile financing market.[207] As a result of this proposed exclusion, for example, a nonbank would not have been participating in the proposed market simply by providing a digital application through which it lends money to consumers to buy goods or services.[208]

Comments Received

Some commenters addressed certain terms in the proposed definition of ''consumer payment transaction'' including, in relation to its reference to the ''transfer of funds,'' how the Proposed Rule stated that the CFPB interprets ''funds'' to include digital assets in certain circumstances, as described above. A few commenters also commented on how the Proposed Rule sought to define covered transactions based on the location of the consumer in a State. Finally, some commenters addressed certain proposed exclusions from the definition, including specifically paragraphs (C) and (D).

Many of the comments on the proposed definition of ''consumer payment transaction'' related to the proposed inclusion of certain transfers of digital assets in this definition, when they transfer ''funds'' under the CFPA. Several consumer groups and a nonprofit expressed general support for including digital assets within the market definition. The nonprofit stated that the firms providing cryptocurrency products and services have been marked by a wide assortment of investor and consumer abuses. Consumer groups agreed, noting that reports coming out of the late 2022 downturn in the sector illustrated that that consumers would benefit from broader oversight, including CFPB supervision of digital assets activities involved in consumer payment transactions. They stated that such oversight could address risks consumers have faced, such as improper restrictions that distressed digital asset platforms have placed on consumers' access to hosted digital asset wallets. The consumer groups also stated that consumers increasingly are relying on cryptocurrencies for consumer payment transactions, as industry emphasizes a long-term strategy of promoting such activity. They cited examples of a long-time, well-known market participant introducing a stablecoin expressly to facilitate consumer purchases, and another digital asset firm contracting with merchants for acceptance of crypto assets the firm holds for consumers. A banking industry association also supported the coverage of virtual currency and crypto assets, which it stated consumers use for personal, family, and household purposes, and should be regulated on par with fiat currency consistent with the ''same activity, same risk, same regulation'' principle. An individual commenter agreed that crypto asset users face significant risks, and called for the Final Rule to clarify how it applies to digital assets.

On the other hand, for several reasons described below, several nonprofits, providers of digital asset products and services, and digital asset industry associations, banking industry associations, and other industry associations opposed inclusion of digital assets in the market definition. They called for exclusion of these transactions from the rule and, if warranted, a re-proposal based on addressing the various issues they described; a payment network and nonprofit added that, to facilitate regulatory certainty and transparency and avoid unintended consequences, the Final Rule should only apply to fiat currency and legal tender. They stated that the rule should accomplish that goal by limiting the interpretation of ''funds.'' [209]

First, some industry commenters stated that the CFPB should not adopt this aspect of the Proposed Rule because, in their view, the CFPB has not

[205] 12 U.S.C. 5481(15)(A)(vii).

[206] ''[A] person shall not be deemed to be a covered person with respect to financial data processing solely because the person . . . is a merchant, retailer, or seller of any nonfinancial good or service who engages in financial data processing by transmitting or storing payments data about a consumer exclusively for purpose of initiating payments instructions by the consumer to pay such person for the purchase of, or to complete a commercial transaction for, such nonfinancial good or service sold directly by such person to the consumer[.]'' 12 U.S.C. 5481(15)(A)(vii)(I). The Proposed Rule stated that this narrow exclusion is descriptive of the limited role that many merchants play in processing consumer payments or financial data. 88 FR 80197 at 80204 n.62.

[207] 12 CFR 1090.108.

[208] Thus, to the extent consumer credit transactions would have fallen within the proposed definition of consumer payment transactions, this would have been because the relevant market participant engaged in covered payment-related activities beyond extending credit to the consumer. For example, a nonbank may provide a wallet functionality through a digital application that stores payment credentials for a credit card through which an unaffiliated depository institution or credit union extends consumer credit. The CFPB proposed a market definition that would have reached that nonbank covered person's activities because their role in the transaction is to help the consumer to make a payment, not to themselves extend credit to the consumer.

[209] As discussed at the outset of the section-by-section analysis above, an industry association commenter also stated that if the CFPB excludes digital assets from the Final Rule, then the CFPB precludes its examination of that activity by larger participants under the Final Rule. The CFPB summarizes and responds to that comment separately above.

conducted adequate market monitoring of digital assets activities and does not in general have data, experience, or expertise in this area sufficient to assess risk to consumers and finalize a regulation covering them. One industry commenter added that the CFPB would have benefited from issuing market-monitoring orders to larger digital asset firms as the CFPB had done to Big Tech firms offering consumer payment applications that transfer U.S. dollars. One commenter stated that the Proposed Rule did not rely on public blockchain data from industry sources such as Elliptic, Chain Analysis, and TRM, as well as trends data published by Circle, and insufficiently disclosed any data on which it did rely.

Second, several comments from industry, nonprofits, and some Members of Congress stated that the Proposed Rule did not consider the impact of covering digital assets. For example, some industry commenters stated that the Proposed Rule underestimated the number of larger participants, citing uncertainty over the rule's application to digital assets and ineligibility for the proposed small business exclusion by small businesses in the digital assets sector that are based abroad, organized as nonprofits, or dominant in their field. Further, some industry associations, digital assets firms, and a nonprofit stated that it was uncertain which digital assets transactions would be covered because it is uncertain which are for personal, family, or household purposes. In addition, some commenters suggested that the Proposed Rule would impose significant burdens on the digital asset sector, whether due to the proposed interpretation of ''funds'' in the CFPA as including digital assets which they viewed as a change in substantive consumer protections, or to what they anticipated would be exposure to potentially arbitrary and shifting CFPB interpretations as to whether Regulation E covers digital assets.[210] Finally, an industry firm stated that the Proposed Rule did not adequately consider the potential for digital asset firms to pass through costs of this rule to consumers. Some Members of Congress and an industry association added that covering digital assets would discourage competition and innovation in payments.

In addition, many of these commenters emphasized potential impacts of what they described as the proposal's apparent coverage of so-called ''unhosted'' or ''self-hosted'' digital asset wallets. They stated that providers of these products and services must be excluded from the rule because they are merely providing software with no ongoing customer relationship or intermediary role, no access to information about the existence, nature, or use of any digital asset held in the wallet, and no control over the use of the wallet for any purpose including to make payments.[211] They added that unhosted digital asset wallets cannot block transactions, reverse transactions to correct unauthorized transfers, close accounts, or track or monetize consumer data. As such, they stated that they also do not know whether the wallet holds funds at all (even under the CFPB's interpretation) versus other uses of distributed ledger technology including an estimated 1.8 million types of crypto assets, nonfungible tokens (NFTs), and loyalty points among others. They stated they do not know where the consumer is located for the purposes of the proposed definition of ''consumer payment transaction.'' They also stated they do not know when a transaction occurs at all much less whether it is a consumer payment transaction. They stated that the lack of provider collection of such data is a critical feature of their product from the perspective of the consumer, and that this feature reduces risk to consumers.

Third, some commenters raised legal objections to including digital assets in the rulemaking or certain digital asset products and services. For example, some industry commenters disagreed generally with the proposal's interpretation of ''funds'' as including digital assets. These commenters stated that the CFPB did not provide sufficient reasoning or evidence to support what they viewed as a change in its legal position, that the interpretation ran contrary to the statute, Congress' understanding at the time of its enactment,[212] relevant case law, and the ''major questions'' doctrine,[213] that digital asset products and services are not part of a consumer financial products or services market because they are not provided for use by consumers primarily for personal, family, or household purposes, and that the CFPA precludes CFPB oversight over such activities overseen by the SEC or CFTC.[214] Some commenters stated more specifically that the CFPB lacks authority over unhosted digital asset wallets because, for example, they function similarly to a web browser or password manager with a variety of uses beyond payments,[215] they have no more power to intervene in a consumer payment transaction than an internet service provider, and these activities are eligible for the ''electronic conduit services'' exception in CFPA section 1002(15)(C)(ii).

With respect to other aspects of the proposed definition of ''consumer payment transaction'' beyond the context of digital assets, two commenters addressed the part of the proposed definition of ''consumer payment transaction'' that limited the term to payments by or on behalf of a consumer ''located in a State'' in the United States as described above. A nonprofit stated that a survey indicated that the majority of its members (59 percent) did not believe that larger participants would be able to determine whether the consumer is located within a State, such as based on the consumer's internet Protocol address at the time of a transaction. An industry association stated that this part of the proposed definition was overbroad because it extended beyond Federal consumer financial laws that the Proposed Rule identified as applicable in the market. Specifically, the commenter stated that basing market scope on the location of

[210] One industry association stated that the Final Rule should clarify that it does not serve as a basis for subjecting virtual currencies or other digital assets to Regulation E. Another trade association called for the CFPB to consult with stakeholders in industry, other agencies, and Congress to understand the potential implications of applying Regulation E in this context.

[211] One commenter stated that an exclusion for what it called ''unhosted'' digital asset wallets would be consistent with FinCEN 2019 guidance that they described as excluding software providers of unhosted digital asset wallets from the scope of Federal money transmitter regulation. Another commenter stated that the First Amendment of the U.S. Constitution protects software code writing as speech, and that the proposed small business concern exclusion discriminated between speakers based on the size of their business, constituting speaker and viewpoint discrimination that it did not believe would survive strict constitutional scrutiny.

[212] Some commenters noted that very few cryptocurrencies existed as of 2010, and noted that stablecoins were not introduced until several years later.

[213] These commenters pointed to the size of digital asset activity, including an estimated $130 billion U.S. stablecoin market, as well as varied uses of digital assets and efforts in Congress to enact a legislative oversight framework.

[214] In addition, a nonprofit commenter and other industry commenters stated that the CFPB should not finalize this aspect of the Proposed Rule because, in their view, it reflects inadequate coordination by the CFPB across government as called for under an executive order relating to digital assets and reflects inadequate CFPB consultation with the SEC and CFTC, which have asserted regulatory authority over digital assets.

[215] This commenter added that, although the Proposed Rule did not specifically address covering unhosted digital asset wallets and thus such coverage may not have been intended, based on the interpretation of ''funds'' in the Proposed Rule, its proposed definition of ''covered payment functionality'' could be viewed as reaching them, which, as noted, would be legally impermissible in its view.

the consumer leads the market to include electronic fund transfers that are not covered by Regulation E, such as payments that foreign firms facilitate for foreign nationals who do not reside in the United States, including while traveling within the United States.[216] They suggested that, in order to avoid being subject to a U.S. supervisory regime, foreign providers may abandon support of such foreign national customers when traveling in the United States. They also pointed to foreign providers' provision of payment accounts located outside the United States as another example that they believed generally falls outside of Regulation E. As a result, they called for narrowing the transactions included in the market. In addition to the proposed limitation requiring that the consumer be located in a State in the United States, in their view, the definition of ''consumer payment transaction'' also should be limited to U.S. residents making payments from payment cards or stored value accounts issued by U.S. financial institutions. In their view, those additional limitations would better align the scope of the market with the scope of regulations the CFPB proposes to apply in its examination of larger participants, including Regulation E, whose scope with respect to transnational activity is described in its comment 3(a)–3.

Commenters presented a range of views on the exclusion in paragraph (C) of the proposed definition of ''consumer payment transaction'' for payment transactions conducted by merchants or marketplaces for the sale or lease of goods or services the consumer selected from a store or marketplace the merchant or marketplace operates prominently in its name or the name of an affiliated company. Some commenters also addressed the statement in the Proposed Rule describing circumstances in which merchant or marketplace payment processing activities that fall outside the proposed market definition because they are excluded by paragraph (C) nonetheless may qualify as a consumer financial product or service under the CFPA.

Consumer group commenters generally opposed the proposed exclusion in paragraph (C). One consumer group noted stated that certain nonbank payments companies sell consumers' payments data, including information about how much people spend, where, and on what, as described in a 2023 report the commenter published and linked to in its comment.[217] In their view, to the extent a marketplace collects payments data and uses it for purposes beyond completing the payment transaction, the marketplace should be brought under supervisory authority, including when ''its transactions fall within its own marketplace[.]'' Meanwhile, other consumer groups stated that marketplace payment functions can comprise a significant portion of the marketplace's revenues, can expand into or spin off as general-use digital consumer payment apps, and also can engage in practices that the FTC has alleged to violate competition laws.

A law firm commenter agreed that the rule should exclude payment transactions conducted by online marketplaces for sales through their own platforms. This commenter stated that consumers seek out online marketplace platforms for their ability to sell goods and services including primarily from third-party retailers hosted on the marketplace. It called for clarifying the definition of marketplace in proposed paragraph (C) to better achieve the CFPB's stated goal of excluding payment transactions conducted by merchants for their own sales and payment transactions conducted by online marketplaces for sales made through their platform. As noted, the scope of the exclusion in proposed paragraph (C) would apply to marketplaces operated prominently in the name of the person that conducts the payment transaction. This commenter described this aspect of the exclusion as unduly focused on branding. It stated that different online marketplace operators have different levels of branding and name display, suggesting uncertainty about which marketplaces would have qualified under the ''prominently'' standard. To the extent that a platform did not meet the ''prominently'' standard in the Proposed Rule, in the view of this commenter, the exclusion would be arbitrary because a platform would be ineligible despite being a marketplace as defined in a Federal law administered by the FTC, despite consumers still plainly understanding it to be a marketplace, and despite the platform presenting different consumer protection concerns as the Proposed Rule recognized was the case for excluded marketplaces. For all of these reasons, it stated that the Final Rule should adopt the definition of ''online marketplace'' Congress adopted in the Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers Act (INFORM Act).[218] That statute defined a marketplace based on its function, and not its level of name branding. The commenter added that, by incorporating the INFORM Act definition, the exclusion would apply both when the marketplace is paid and when a third-party seller selling through the marketplace is paid.

Some industry commenters addressed whether the Rule should include consumer payment transactions consumers initiate through ''buttons'' on merchant websites. One industry association indicated that it was important for the rule to provide for universal coverage of digital wallets, including those a consumer uses by pressing a payment button a checkout screen on a merchant website. It suggested that broad coverage was important to achieve consistent supervision across providers, which promotes competition. On the other hand, some industry commenters called for adding an exclusion for what they described as express checkout options that nonbanks facilitate for third-party merchant websites and apps, including ''buy buttons.'' [219] One industry association called for the rule to clarify that payment checkout buttons are excluded from the market because they do not function generally across merchants but instead require individual merchant acceptance agreements.[220] Another industry association cited research indicating that many online merchants including small businesses facilitate consumers' purchases by offering these buttons, and suggested that the Proposed Rule was unnecessarily directing its coverage to merchant payment processing.[221]

[216] They also suggested that Regulation P may not apply to those transactions.

[217] R.J. Cross, *How Mastercard sells its 'gold mine' of transaction data* (Sept. 30, 2023, updated June 17, 2024), *https://pirg.org/edfund/resources/how-mastercard-sells-data* (last visited Nov. 7, 2024).

[218] 15 U.S.C. 45f(f)(4).

[219] A few industry commenters suggested that the integration of general-use digital consumer payment applications into merchant websites through payment buttons does not pose any risk to consumers, and that this type of activity should not be included in the market definition. The CFPB considers and responds to comments related to risks to consumers separately in the response to general comments above.

[220] This commenter cited this fact as supporting its view that such checkout buttons do not have ''general use''—which the Final Rule discusses in the section-by-section analysis of that term further below. To ensure full consideration of all related comments, the CFPB also describes that comment here in the context of other comments regarding checkout buttons associated with general-use digital consumer payment applications provided by nonbank covered persons.

[221] As discussed in the impacts analysis in parts VII and VIII, a comment from certain Members of Congress also stated that providers of general-use digital consumer payment apps could pass the cost of the rule onto merchants, including small

Some industry and nonprofit commenters appeared to have interpreted the statement in the preamble regarding the scope of the CFPB's authority under CFPA section 1002(15)(A)(vii) as potentially intended to narrow or alter the scope of the exclusion in paragraph (C). For example, several Members of Congress, stated that the scope of the market definition was ambiguous because, on the one hand, the Proposed Rule excluded merchant and marketplace payment functions in circumstances described in paragraph (C), but on the other hand, the preamble of the Proposed Rule stated that the statutory exclusion in CFPA section 1002(15)(A)(vii)(I) does not apply to these functions when they use payments data for purposes beyond processing a payments transaction. Similarly, an industry association commenter suggested that, due to the proposal's interpretation of 1002(15)(A)(vii)(I), the Proposed Rule would apply to merchants processing payments on their own behalf because retailers widely use financial data for purposes beyond processing transactions. Because it did not understand the CFPB to be seeking to cover merchants' payment processing in this rule, it called for the CFPB to remove this interpretation from the Final Rule to ensure that its scope is focused on the general-use digital consumer payment applications that create risks to consumers that the CFPB has identified. Another industry association suggested that the interpretation appeared designed to increase CFPB scrutiny of merchants through supervision. In their view, if the CFPB exercises jurisdiction over merchants on the basis described in the interpretation above, that could make it more difficult for merchants to combat fraud, cause merchants to raise prices or reduce discounts, and cause merchants to decrease reliance on newer, competitive forms of payment. Finally, a law firm also indicated it was unclear whether the interpretation of the CFPA was intended to narrow the scope of paragraph (C).

In addition to expressing uncertainty regarding its impact on the scope of paragraph (C), some industry commenters disagreed with the Proposed Rule's interpretation of the CFPB's payments processing authority in CFPA section 1002(15)(A)(vii). In particular, they asserted that the proposal's interpretation of the exclusion in CFPA section 1002(15)(A)(vii)(I) was invalid because it would have the result that many merchants would not satisfy the exclusion. In addition to the comments described above, comments from two industry associations stated that merchants use payments data for a variety of purposes that they described as beneficial to consumers, such as research, fraud prevention, targeted marketing of discounts, and even routing of transactions consistent with Federal Reserve Regulation II to reduce the cost of payment acceptance. Because they viewed those uses as potentially for purposes other than initiating the payment transaction, these commenters believed that merchants would almost never be eligible for the exclusion in 1002(15)(A)(vii)(I) under the CFPB's interpretation of it. One of these commenters added that that result would contravene general intent of Congress to exclude merchants from the CFPA, including pursuant to CFPA section 1027(a). Relatedly, they stated that the proposed interpretation would harm consumers by disincentivizing merchants from engaging in all of these uses of consumer payments data. On the other hand, a consumer group supported the proposal's interpretation of the exclusion in CFPA section 1002(15)(A)(vii)(I). This commenter stated that digital wallets collect and monetize high amounts of consumer data, including through transactions that occur on marketplaces, without oversight.

Some commenters addressed the inclusion of consumer credit transactions in the proposed definition of ''consumer payment transactions'' in general, as well as the related exclusion in paragraph (D) for extensions of credit made using a digital application provided by the person extending credit or its affiliated company.

With respect to the inclusion of consumer credit transactions generally, several commenters including an industry provider and two nonprofits generally recognized that pass-through payment wallets facilitate both debit card and credit card transactions (among other types of transactions). However, a nonprofit commenter disagreed with the proposal's inclusion of a creditor's transfer of funds in the definition of ''consumer payment transaction.'' In its view, expanding the scope of CFPB supervisory authority beyond electronic funds transfers subject to Regulation E could lead companies to invest less in tokenization and anti-fraud technologies and could disincentivize allocation or use of credit for consumers who prefer general-use digital consumer payment applications.

With respect to the proposed exclusion in paragraph (D), an industry association stated that the Final Rule should clarify that this exclusion applies to nonbanks that partner with other financial institutions to offer consumer credit products that fund consumer payment transactions. The commenter stated that in these arrangements, the nonbank may provide a consumer-facing digital application through which the consumer accesses an extension of credit made and issued by a third-party financial institution. It stated that the third-party financial institution extends credit by transferring funds directly to the consumer (which the commenter stated would not qualify as a payment by the consumer to another person). Through its mobile application, the nonbank then may facilitate the consumer's use of those funds to make a payment.

A banking trade association and a payment network stated that it was uncertain whether the proposed market included the extension of credit through what it referred to as buy-now-pay-later (BNPL) applications. It stated that the rule should provide illustrative examples of covered consumer credit products and clarify whether BNPL applications are eligible for the proposed exclusion in paragraph (D) in light of uncertainty as to whether BNPL providers are extending credit. They also stated that it was unclear why the CFPB would exclude BNPL applications, since they function similarly to other activities described in the Proposed Rule and also have grown rapidly as a means for consumers to pay for the purchase of goods and services. They stated that the CFPB should include participants in what they referred to as the BNPL market within the scope of this rule, or in a separate larger participant rulemaking.

Finally, several consumer groups called for the rule to clarify whether proposed paragraph (D) applies to funds transfers by earned wage advance products and services, given that some nonbanks that provide those products and services claim not to be extending consumer credit.

Response to Comments Received

After considering comments on the inclusion of certain digital assets transactions in the proposed definition of ''consumer payment transaction,'' the CFPB has decided, for purposes of this

merchants, that accept the apps as a payment method. For the reasons explained in the impacts analysis, the CFPB does not have information to indicate that larger participants are likely to pass through a significant portion of these costs to merchants. As the impacts analyses further explain, the costs of the Final Rule are not high and, even if they were passed through, that would be spread across the very high number of merchants that accept one or more of these apps as a method of payment.

Final Rule, to exclude such transactions from coverage under the Rule. The CFPB intends to continue to gather data and information regarding the nature of such transactions and the impact of digital assets transactions on consumers, and to take further action as appropriate. For example, the CFPB has considered comments from industry and others stating that some digital asset products and services, such as so-called unhosted or self-hosted wallets, may not currently be able to collect the data necessary to administer the larger-participant test that would be applied to establish supervisory authority. Based on the limited data and information these commenters provided in their comments, the CFPB is not prepared in this Final Rule to determine whether and how to distinguish between hosted and unhosted wallets. As further discussed below, the CFPB is implementing this change by updating the larger participant threshold to only consider U.S. dollar transactions (*see* section-by-section analysis of ''threshold'' below).

In addition, for purposes of defining what qualifies as a ''consumer payment transaction'' covered by the Final Rule, the CFPB has considered the industry association and nonprofit comments, including the survey described above, which indicate that most market participants may be more familiar with assessing where a consumer resides [222] than where the consumer is located at the time of any given consumer payment transaction (which can change from transaction to transaction, especially when consumers make payments using mobile phones). Thus, to facilitate administration of the larger-participant test, rather than adopting the proposal to base coverage of consumer payment transactions on whether the consumer is physically located in a State at the time of the transaction, the Final Rule defines ''consumer payment transactions'' as subject to the rule based on whether the consumer is a U.S. resident, as described further below.[223]

With regard to comments on the proposed exclusion in paragraph (C) of the definition of ''consumer payment transaction,'' the CFPB agrees with the consumer group comments that online marketplaces can pose risks to consumers when they sell payments data. Nonetheless, as discussed above, the market definition does not include or exclude activities based on the level of risk they pose. In addition, the law firm commenter reasonably notes that consumers seek out marketplace platforms for the goods and services they offer, including from third-party marketplace sellers.[224] In that way, consumers seek out a marketplace platform for purposes that differ from the payment-focused purposes for which they seek out a general-use digital consumer payment application. Therefore, the Final Rule treats a merchant or marketplace conducting payment transactions for sales through its own platform as distinct from the activity included in the market defined in this rule.[225] The CFPB believes that it is therefore appropriate to exclude such transactions from this Final Rule in paragraph (C). Finally, with regard to the consumer group comment that marketplace operators can grow into general-use consumer payment applications, the Rule accounts for that. If those operators do expand into general-use consumer payment applications and qualify as larger participants under this rule, they will be subject to the CFPB's supervisory authority.

Regarding the definition of ''marketplace'' in proposed paragraph (C), the CFPB agrees that in some circumstances it may be complex to evaluate the level of prominence of an entity's branding on a marketplace platform. As the proposal noted, major payment network rules include that standard to define a marketplace. However, it is unclear to the CFPB how administrable that standard is in that context. Accordingly, as discussed further below, the Final Rule does not adopt the proposed limitation on the exclusion related to the prominence of branding.

The CFPB declines the commenter's further suggestion that the rule expressly incorporate a definition of ''marketplace'' in the INFORM Act.[226] While the CFPB believes that platforms that qualify as ''online marketplaces'' under the INFORM Act generally would qualify as marketplaces for purposes of the exclusion in paragraph (C), the INFORM Act definition is limited to online marketplaces for third party sellers of a ''consumer product,'' defined by reference to certain ''tangible personal property[.]'' [227] The Proposed Rule referred more broadly to a marketplace for sale of goods or services. And, as noted above, incorporating the INFORM Act is not necessary to ensure exclusion of marketplace platform payments to third-party sellers. For these reasons, the CFPB believes the language in the Proposed Rule is more appropriate in this context and expressly incorporating the definition in the INFORM Act is unnecessary.

The CFPB agrees with the industry association commenter that stated that the rule should apply to general-use digital consumer payment applications on a consistent basis, including when consumers click on buttons on merchant or online marketplace websites to access general-use digital consumer payment applications provided by third parties. As the commenter suggested, covering these consumer financial products and services serves the CFPB's statutory objective of ensuring consistent enforcement of Federal consumer financial law to promote fair competition, as discussed further above. However, in response to comments about coverage of consumer payment transactions initiated through online merchant checkout processes that rely on payment buttons, the CFPB seeks to clarify the scope of the market definition. The market consists of providing, through a digital payment application, a general-use covered payment functionality. As discussed above, some market participants have

[222] *See* Reg. E, cmt. 3(a)–3 (stating that regulation E applies to all persons providing EFT services to U.S. residents through U.S.-located accounts). Regulation Z, which governs consumer credit card transactions, also links its scope to residency in a State. *See* Reg. Z, cmt. 1(c)–1.

[223] The CFPB declines the industry association suggestion to further narrow ''consumer payment transactions'' to those that U.S. residents make (1) from a location in a State (2) using a payment card issued by a U.S. bank or a stored value account provided by a U.S. financial institution. The CFPB believes that limiting ''consumer payment transactions'' to U.S. residents will address the commenter's concerns regarding the inadvertent coverage of foreign residents' transactions using accounts issued by foreign institutions while traveling to the United States. The additional changes the commenter suggests are not necessary or appropriate in the context of this rule. This rulemaking is not defining a market for payment cards or stored value accounts. The market activity is not providing an ''account''; rather, it is facilitating consumer payment transactions through a general-use digital consumer payment application. Such activity can facilitate payments from accounts held by third-party financial institutions. Therefore, the nationality of the provider of the underlying account is not necessarily relevant.

[224] *See also* FTC, *Buying From an Online Marketplace* (Sept. 2022) (''In general, online marketplaces connect buyers and sellers.''), *https://consumer.ftc.gov/articles/buying-online-marketplace* (last visited Nov. 7, 2024).

[225] Relatedly, the CFPB also disagrees with the law firm commenter to the extent it was suggesting that the proposed exclusion in paragraph (C) would not apply to a payment transaction conducted by an online marketplace on behalf of a third-party seller. Under the terms of the proposed exclusion, when a consumer selects goods or services from an online marketplace and the marketplace operator conducts the consumer payment transaction, that would have been excluded by paragraph (C) even if a third-party seller was involved in the sale.

[226] 15 U.S.C. 45f(f)(4).

[227] 15 U.S.C. 45f(f)(2) (incorporating definition of ''consumer product'' in 15 U.S.C. 2301(1) and associated implementing regulations).

pursued a deliberate strategy of ''embedded finance,'' through which nonbank providers of general-use digital consumer payment applications embed them into nonfinancial digital applications. Given the market reliance upon ''embedded finance'' as a way of promoting general-use digital consumer payment applications, it is reasonable for the Rule not to exclude that activity merely because it is embedded. However, that does not mean the Rule covers the merchant that embeds a payment button on its ecommerce website. When a merchant displays on its ecommerce website a payment button for an unaffiliated third-party's general-use digital consumer payment application, the merchant is not itself providing a covered payment functionality as defined in the Rule. The CFPB understands that these buttons operate as application programming interfaces (APIs) or redirects to launch the general-use digital consumer payment application provided by the third party.[228] In these circumstances, for purposes of the market definition in this Rule, the third party is providing the general-use digital consumer payment application, not the merchant. For these reasons, the CFPB disagrees with industry commenters' suggestions that the Rule needs an exclusion for ecommerce checkout processes. Further, the CFPB does not agree that, because merchants individually agree to offer payment buttons linking to digital consumer payment applications provided by unaffiliated nonbanks, this indicates that the third party's digital consumer payment application does not have general use. Under the Final Rule, as discussed further below, ''general use'' is based on whether the consumer can use the digital consumer payment application to pay more than one unaffiliated person. For example, the same payment button may appear on the websites of thousands of different merchants, each of which may have its own acceptance agreement with the provider of the associated general-use digital consumer payment application.[229] The app associated with the payment button can have general use for the consumer, who can use it to make online purchases virtually anywhere that payment button appears on an ecommerce site on the internet.[230]

The CFPB also seeks to clarify that the CFPB's statement regarding the scope of its authority under CFPA section 1002(15)(A)(vii) was not intended to narrow or otherwise alter the scope of the exclusion in paragraph (C). Paragraph (C) generally excludes transactions in which a merchant or online marketplace conducts payments to itself for sales through its platform. The Proposed Rule discussed the scope of CFPA section 1002(15)(A)(vii) to clarify that the CFPA describes a broader set of activities including in some circumstances those that may be excluded by paragraph (C). In other words, certain payment transactions may fall within the CFPA's authority under the CFPA but not qualify as ''consumer payment transactions'' for purposes of this larger participant rule. In summary, the CFPB proposed the exclusion in paragraph (C) for the purpose of defining the scope of the market and not the scope of its statutory authority under CFPA section 1002(15)(A)(vii). That said, the CFPB does not share the view expressed by some industry commenters that the proposal's discussion of the exclusion in CFPA section 1002(15)(A)(vii) was contrary to the provision's language or would lead to results that Congress did not intend. However, the validity of this Final Rule does not depend on the correctness of the proposal's interpretation of CFPA section 1002(15)(A)(vii) because, as noted above, the market definition does not encompass the full extent of the CFPB's authority under that provision. Therefore, it is not necessary for the CFPB to further address comments regarding that interpretation in this Final Rule.

With regard to the proposed coverage of consumer credit transactions in the definition of ''consumer payment transaction,'' as several commenters acknowledged, pass-through payment wallets commonly facilitate transactions using both debit cards and credit cards. Because market participants commonly provide digital applications that facilitate consumer payment transactions using both debit card and credit cards (among other payment methods), the Final Rule appropriately includes consumer payment transactions that use both types of payment cards in the market. The CFPB disagrees with the nonprofit commenter to the extent it was suggesting that paragraph (D) should have excluded all consumer credit transactions or that the definition of ''consumer payment transaction'' should only apply to payments made from a consumer's asset accounts.[231] Excluding all consumer credit transactions from the market would not be consistent with the way nonbanks often provide these consumer

[228] *See, e.g.,* Lotus Lin, *E-commerce APIs Introduction, Medium.com* (Mar. 24, 2023) (describing how some providers of general-use digital consumer payment applications provide payment gateway APIs), *https://medium.com/@lotus.lin/e-commerce-apis-introduction-29664558a3b0* (last visited Nov. 7, 2024); PYMNTS, *Buy Buttons* (''Branded buy buttons are usually placed underneath the standard 'buy' or 'pay' button on the merchant's checkout page and make it possible for consumers to pay for something without establishing an account with that merchant. Branded buy buttons use payment credentials that consumers have stored with the buy button brands. PayPal is the most widely accepted buy button, with Amazon Pay, Google Pay and Apple Pay also gaining acceptance in apps and online.''), *https://www.pymnts.com/tag/buy-buttons/* (last visited Nov. 7, 2024).

[229] Merchants often accept consumers' payments through well-known digital payment applications by agreeing to the terms and conditions imposed by the provider. One-way digital consumer payment applications gain general use is through acceptance across multiple unaffiliated merchants. *See, e.g.,* Apple, *Tap to Pay on iPhone* (''Before your app can enable Tap to Pay on iPhone and configure a merchant's device, the merchant must accept the relevant terms and conditions.''), *https://developer.apple.com/design/human-interface-guidelines/tap-to-pay-on-iphone* (last visited Nov. 7, 2024); Apple Pay Platform Web Merchant Terms at *https://developer.apple.com/apple-pay/terms/apple-pay-web/* (last visited Nov. 7, 2024); Amazon Pay, *Getting started for merchants* at *https://pay.amazon.com/business/getting-started* (last visited Nov. 7, 2024); Google Pay API Terms of Service at *https://payments.developers.google.com/terms/sellertos* (last visited Nov. 7, 2024); Meta Pay onboarding contract described at *https://developers.facebook.com/docs/meta-pay/overview#onboarding* (last visited Nov. 7, 2024); PayPal Developer Agreement (Mar. 21, 2022) (describing how holders of business accounts can use APIs and a PayPal Button) at *https://www.paypal.com/us/legalhub/xdeveloper-full?locale.x=en_US* (last visited Nov. 7, 2024); Samsung Pay, *Web Payments Integration Guide* at *https://developer.samsung.com/internet/android/web-payments-integration-guide.html* (last visited Nov. 7, 2024); Venmo Approved Business Account Addendum (effective date Jan. 24, 2019) at *https://venmo.com/legal/us-business-addendum/* (last visited Nov. 7, 2024). In addition, a payment processor that online merchants use describes examples of digital wallets that merchants can accept through its software. *See* Stripe, *Wallets: Learn about wallet payments with Stripe* (stating that the payment processor has ''created a single integration for all wallets that works across [its] products'' and identifying numerous such payment methods it enables), *https://stripe.com/docs/payments/wallets* (last visited Nov. 7, 2024).

[230] With regard to industry comments that payment buttons do not pose risks to consumers, the CFPB considers the comments about risks to consumers from various types of market activity in the response to general comments above. For the reasons discussed above, this rulemaking is not the vehicle in which the CFPB must assess such risks. Rather, the CFPB takes risk into account when prioritizing entities for examination and scoping examinations. As a result, to the extent that any given larger participant's general-use digital consumer payment application does in fact pose low risks to consumers, then the CFPB supervision program is designed to ensure they are at low risk for examination.

[231] Contrary to the commenter's suggestion, by including consumer credit transactions in the definition of ''consumer payment transactions,'' the Proposed Rule would not have expanded the scope of substantive consumer protections including Regulation E. This rulemaking does not amend or modify Regulation E. As the Proposed Rule explained, a larger participant rule merely establishes supervisory authority and does not impose any new substantive consumer protection regulation.

financial product and services in the market.[232]

In addition, the commenter did not provide support for its view that including consumer credit transactions in the definition of ''consumer payment transactions'' could create economic incentives for firms to reduce credit card lines or fraud protections. For several reasons, the CFPB disagrees with the commenter, to the extent it was suggesting that its general concerns over potential incentives warranted excluding general-use digital consumer payment applications' facilitation of consumer credit transactions. First, the commenter did not offer a persuasive rationale for the Rule to treat consumer credit transactions that nonbanks facilitate through digital payment applications differently from payments from asset accounts, when general-use digital consumer payment applications facilitate both, as noted above. Second, the commenter did not explain why it believed that the supervisory authority the rule would establish over nonbank larger participants could disincentivize allocation or usage of revolving lines of consumer credit through general-use digital consumer payment application. Such an impact is unlikely, given that the lender's own app-based lending activity can be excluded by paragraph (D) and the CFPB already supervises much of the lending activity in the credit card market.[233] Finally, with regard to market participants' investments in tokenization and anti-fraud protections, the commenter did not explain why larger participants would seek to offset the costs of CFPB examination by specifically reducing investment in anti-fraud protections or provide evidence or otherwise show that the rule would create a meaningful disincentive to engage in these activities. The CFPB believes that it is also possible that, after the Final Rule takes effect, larger participants will continue investing in such technologies as part of their efforts to avoid risks to consumers and non-compliance with Federal consumer financial law. As with the commenters' other concerns, the CFPB does not believe that this general concern regarding potential incentives warrants excluding the facilitation of consumer credit transactions from the Final Rule.

However, as the Proposed Rule explained,[234] by including consumer credit transactions in the definition of ''consumer payment transaction,'' the CFPB does not seek to define this payments market in a manner that encompasses ''consumer lending activities by lenders through their own digital applications.'' In particular, the CFPB is not seeking to define a market for extending consumer credit, such as the market it defined in the larger participant rule for automobile financing originations. The CFPB therefore proposed the exclusion in paragraph (D) to maintain a distinction between payments-focused activity (included in the market) and consumer credit originations (excluded by paragraph (D)). The CFPB declines the suggestion by the industry comment to expand the scope of this market to include what it described as the buy-now-pay-later market.[235] For the same reason, the CFPB agrees with the industry association commenter that a nonbank should be eligible for the exclusion in paragraph (D) when it provides a digital application to initiate a consumer credit transaction and also engages in a set of activities directed at originating the extension of consumer credit, regardless of who is extending the credit (and even if a third-party financial institution such as a bank or credit union is extending the credit). Accordingly, the CFPB is clarifying paragraph (D) in the Final Rule as described below to describe additional activities integral to consumer credit originations that would be part of the eligibility criteria for the exclusion, including brokering, purchasing, or acquiring the extension of credit.[236] If a nonbank provides a digital application to initiate consumer credit transactions and engages in those other activities in connection with those consumer credit transactions, then the CFPB believes it generally is engaged in consumer credit origination activity, which is not the focus of this rulemaking. By excluding extensions of consumer credit in the circumstances described in paragraph (D), the Final Rule excludes the transfer of funds resulting from that extension of credit, such as a consumer's payment to a merchant for goods and services from the funds provided by a credit card issuer. In light of the distinguishing characteristics of loan origination activities and the other reasons set forth above, the Bureau declines to include such loan origination activity in the market for which this Final Rule defines larger participants. As the Bureau has explained, this larger-participant rulemaking is only one in a series. Nothing in this Final Rule precludes the Bureau from considering in future larger-participant rulemakings other markets for consumer financial products or services that might include certain types of consumer credit origination activity.

However, as revised, paragraph (D) does not exclude pass-through payment wallet functionalities that facilitate consumer payments from accounts issued by third-party financial institutions that the pass-through payment wallet functionality provider did not originate by engaging in the activities described above (such as extending, brokering, acquiring, or purchasing the extension of credit). As a result, the definition of ''consumer payment transaction'' adopted in the Final Rule still captures the general activities of pass-through payment wallets, which often facilitate consumer payment transactions, whether through funds they hold, funds they receive, or debit cards or credit cards provided by third-party financial institutions.[237]

The CFPB also seeks to provide clarification about the scope of

[232] The Final Rule discusses other comments seeking exclusion of pass-through payment wallets in the discussion of ''covered payment functionality'' further below.

[233] Proposed paragraph (D) already clarified that the market definition is not based on the activity of extending credit. Moreover, the CFPB already supervises very large insured depository institutions and insured credit unions, which issue the bulk of consumer credit cards in the United States, as well as their service providers. CFPB, *The Consumer Credit Card Market* (Oct. 2023), sec. 2.21 (annual CARD Act report discussing concentration in the credit card issuance market, with the top 30 issuers representing 95 percent of credit card loans in 2022, and 3,800 smaller banks and credit unions accounting for five to six percent of the market). With regard to the potential for larger participants to pass through costs of the Rule to others, the Final Rule discusses this issue in part VII below.

[234] 88 FR 80197 at 80204.

[235] *See also* CFPB, Interpretive Rule, Truth in Lending (Regulation Z); Use of Digital User Accounts to Access Buy Now, Pay Later Loans, 89 FR 47068, 47071 (May 31, 2024) (BNPL Interpretive Rule) (discussing how BNPL providers facilitate extension of consumer credit marketed as BNPL loans). The CFPB also notes that the exclusion in paragraph (D) is not limited to extension of consumer credit by ''creditors'' as defined in TILA.

[236] *See, e.g.,* CFPB section 1002(15)(A)(i) (describing activities associated with consumer credit origination ''including acquiring, purchasing, selling, brokering, or other extensions of credit[]''); CFPB Automobile Financing Larger Participant Rule, 12 CFR 1090.108(a)(i)(*4*) (defining automobile financing ''originations'' as including ''[p]urchases or acquisitions'' of automobile purchase loans, their refinancings, and leases).

[237] This approach is consistent with other Federal consumer financial laws and their implementing regulations, which treat that activity as part of a consumer payments market. *See e.g.,* Regulation Z, cmt. 13(a)(3)–2 (describing a ''third-party payment intermediary, such as a person-to-person internet payment service, funded through the use of a consumer's open-end credit plan[ ]''). In light of the examples discussed in this paragraph, the CFPB does not believe changes to paragraph (D) or specification of illustrative examples in that paragraph are needed. It also is not the purpose of this Final Rule to define who is extending credit, which will depend on facts and circumstances that are beyond the scope of this rulemaking or the comments received.

''consumer payment transactions'' in light of the consumer groups' comment noting that some providers of earned wage products do not treat their transactions as extensions of consumer credit, and seeking clarification of whether they qualify as ''consumer payment transactions'' included in the market. Specifically, the CFPB seeks to clarify how the proposed definition of ''consumer payment transaction'' applied to a payment by or on behalf of a consumer to another person. As explained above, ''consumer payment transaction'' for purposes of the proposed market definition did not include ''transfers between a consumer's own deposit accounts[or] transfers between a consumer deposit account and the same consumer's stored value account held at another financial institution, such as loading or redemptions[.]'' [238] Consistent with that approach, the CFPB also did not intend and does not believe that earned wage products generally would be included in the market because they transfer wages belonging to or advanced on behalf of a consumer to that same consumer.[239] Similarly, for clarity and administrability, the CFPB does not interpret the market definition as including payments by or on behalf of a consumer to other accounts the consumer owns or controls in which another person, such as a spouse co-owner or minor child, also holds an interest.[240]

Final Rule

For the reasons described above, the CFPB adopts the proposed definition of ''consumer payment transaction'' with four changes, as described below.

First, for the reasons discussed above in the responses to comments, the Final Rule covers consumer payment transactions made by or on behalf of a consumer ''who resides in'' a State, rather than a consumer ''physically located'' in a State as stated in the Proposed Rule. As a result, when a nonbank provides a general-use digital consumer payment application to a person who does not reside in a State, the transactions it facilitates for that person would not be included in the market. The CFPB believes that this change will make the larger-participant test for this Final Rule more administrable because, unlike a consumer's physical location, a consumer's country of residence does not constantly change. Since the comments indicate that some companies may not currently collect data on consumer location at the time of making a payment, this change in the Final Rule also will avoid inadvertently creating a potential incentive for market participants to collect such data to determine larger participant status.

Second, for reasons discussed above in the responses to comments, the Final Rule clarifies the exclusion in paragraph (C) for payment transactions conducted by certain merchants and marketplace operators. Specifically, the Final Rule does not adopt the proposed requirement that the marketplace be operated ''prominently in the name of'' the excluded person or its affiliated company. This change will make the larger-participant test more administrable by avoiding the need to evaluate the form or extent of name branding when evaluating which entities qualify for the exclusion, as discussed above.

Third, the Final Rule modifies paragraph (C) to confirm that the Final Rule excludes a payment transaction conducted by a person for a donation to a fundraiser that a consumer selected from the person or its affiliated company's platform. In the Proposed Rule, the CFPB did not intend to include payment platforms provided solely to facilitate donations to fundraisers. Such donation platforms would not have had ''general use'' under the proposal and therefore transactions would not have been within the scope of the proposed market. Because the Final Rule revises the definition of ''general use'' as described below to generally apply to payment functionalities that are usable to facilitate consumer payment transactions to more than one unaffiliated person, a platform that facilitates donations to multiple unaffiliated persons could be part of the market in some circumstances in the absence of another exclusion. Thus, consistent with the scope of the Proposed Rule, the Final Rule modifies the definition of ''consumer payment transaction'' to clarify that those transactions would not be in the market.

Fourth, for the reasons discussed above in responses to comments, the Final Rule clarifies paragraph (D) to exclude extensions of consumer credit initiated through a digital application that is provided by a person who is extending, brokering, acquiring, or purchasing the credit or that person's affiliated company. As explained above, by referring to digital application-based initiations of consumer credit transactions by persons engaged in these additional activities of brokering, acquiring, or purchasing the extension of credit, the exclusion in paragraph (D) better defines a payments market in this Rule by excluding activities that are distinguishable as being part of a market for consumer credit originations.

Covered Payment Functionality

Proposed Rule

The proposed market definition would have applied to providing covered payment functionalities through a digital application for a consumer's general use in making payment transactions. Proposed § 1090.109(a)(2) would have defined two types of payment functionalities as covered payment functionalities: a funds transfer functionality and a wallet functionality. Proposed § 1090.109(a)(2) would have defined each of those two functionalities as described below. The CFPB requested common on each proposed definition, and whether it should be modified, and if so, how and why.

A nonbank covered person would have been participating in the proposed market if its market activity includes only one of the two functionalities, or both functionalities. Similarly, a particular digital application may provide one or both functionalities. A nonbank's level of participation in the proposed market would not have been based on which functionality is involved; rather, it would have been based on the annual covered payment transaction volume as defined in proposed § 1090.109(b).

The CFPB proposed to treat these two covered payment functionalities as part of a single market for general-use digital consumer payment applications. As the Proposed Rule noted, the technological and commercial processes these two payment functionalities use to facilitate consumer payments may differ in some ways. However, consumers can use both types of covered payment functionalities for the same common purposes, such as to make payments for retail spending and sending money to friends and family. For example, a funds transfer functionality may transfer a consumer's funds in a linked stored value account to a merchant to pay for goods or services, or to friends or

[238] 88 FR 80197 at 80203.

[239] *See, e.g.,* CFPB, *Data Spotlight: Developments in the Paycheck Advance Market* (July 18, 2024) (''Earned wage products provide workers access, before their payday, to a portion of their earned but unpaid wages or to funds that purport to equal or approximate a portion of their unpaid wages.''), *https://www.consumerfinance.gov/data-research/research-reports/data-spotlight-developments-in-the-paycheck-advance-market/* (last visited Nov. 7, 2024).

[240] For example, a payment functionality usable for an adult to transfer funds to K–12 school lunch accounts for the benefit of two or more minor children would not be included in the market because the adult transferor typically owns or controls the recipient account.

family. Similarly, a wallet functionality may transmit a stored payment credential to facilitate a consumer's payment to a merchant or to friends and family. Indeed, the same nonbank covered person may provide a digital application that encompasses both functionalities depending on the payment method a consumer chooses. For example, a nonbank covered person's digital application may allow the consumer to access a wallet functionality to make a payment using a credit card for which a third party extends credit, or a funds transfer functionality to make a payment from a stored value account the nonbank provides. The role these two functionalities play in a single market therefore was driven by their common uses, not their specific technological and commercial processes.

(A) Funds Transfer Functionality

The first payment functionality included in the definition in covered payment functionality in proposed § 1090.109(a)(2) was a funds transfer functionality. Paragraph (A) would have defined the term ''funds transfer functionality'' for the purpose of this rule to mean, in connection with a consumer payment transaction: (*1*) receiving funds for the purpose of transmitting them; or (*2*) accepting and transmitting payment instructions.[241] These two types of funds transfer functionalities generally described how nonbanks help to transfer a consumer's funds to other persons, sometimes referred to as P2P transfers. The nonbank either already holds or receives the consumer's funds for the purpose of transferring them, or it transmits the consumers payment instructions to another person who does so. Paragraph (*1*), for example, would have applied to a nonbank transferring funds it holds for the consumer, such as in a stored value account, to another person for personal, family, or household purposes. Even if the nonbank providing the funds transfer functionality does not hold or receive the funds to be transferred, it generally would have qualified under paragraph (*2*) by transmitting the consumer's payment instructions to the person that does hold or receive the funds for transfer. Paragraph (*2*), for example, would have applied to a nonbank that accepts a consumer's instruction to send money from the consumer's banking deposit account to another person for personal, family, or household purposes, and then transmits that instruction to other persons to accomplish the fund transfer. As the Proposed Rule noted, a common way a nonbank may engage in such activities is by acting as a third-party intermediary to initiate an electronic fund transfer through the automated clearinghouse (ACH) network. Another common way to do so noted in the Proposed Rule is to transmit the payment instructions to a partner depository institution. However, in some circumstances, a nonbank may be able to execute a consumer's payment instructions on its own, such as by debiting the consumer's account and crediting the account of the friend or family member, without transmitting the payment instructions to another person. In those circumstances, the nonbank generally would have been covered by paragraph (*1*) because, to conduct the transaction in this manner, the nonbank typically would be holding or receiving the funds being transferred.

(B) Wallet Functionality

The other payment functionality included in the definition in covered payment functionality in proposed § 1090.109(a)(1) was a wallet functionality. Paragraph (B) would have defined the term wallet functionality as a product or service that: (*1*) stores account or payment credentials, including in encrypted or tokenized form; and (*2*) transmits, routes, or otherwise processes such stored account or payment credentials to facilitate a consumer payment transaction.[242] Through this proposed definition, the proposed market would have included payment functionalities that work together first to store account or payment credentials and second, to process such data to facilitate a consumer payment transaction.

As indicated above, paragraph (B)(*1*) of the proposed definition of ''wallet functionality'' would have clarified that ''account or payment credentials'' can take the form of encrypted or tokenized data. Storage of account or payment credentials in these forms would have satisfied the first prong of the ''wallet functionality'' definition. For example, the first prong would have been satisfied by storing an encrypted version of a payment account number or a token [243] that is specifically derived from or otherwise associated with a consumer's payment account number.

Paragraph (B)(*2*) of the proposed definition of ''wallet functionality'' described the types of processing of stored account or payment credentials that would have fallen within this definition. For example, consumers commonly use wallet functionalities provided through digital applications to pay for purchases of goods or services on merchant websites. To facilitate such a consumer payment transaction, a consumer financial product or service may transmit a stored payment credential to a merchant, its payment processor, or its website designed to accept payment credentials provided by the wallet functionality. This type of product or service would have been covered by paragraph (B)(*2*).

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[241] As stated in the Proposed Rule, 88 FR 80197 at 80205 n.64, such funds transfer services are consumer financial products or services under the CFPA. *See* 12 U.S.C. 5481(5)(A) (defining ''consumer financial product or service'' to mean a financial product or service ''offered or provided for use by consumers primarily for personal, family, or household purposes[ ]''). The CFPA defines a ''financial product or service'' to include ''engaging in deposit-taking activities, transmitting or exchanging funds, or otherwise acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer[.]'' 12 U.S.C. 5481(15)(A)(iv); *see also* 12 U.S.C. 5481(29) (defining ''transmitting or exchanging funds''). The CFPA also defines a ''financial product or service'' to include generally ''providing payments or other financial data processing products or services to a consumer by any technological means, including processing or storing financial or banking data for any payment instrument,'' subject to certain exceptions. 12 U.S.C. 5481(15)(A)(vii).

[242] As stated in the Proposed Rule, 88 FR 80197 at 80205 n.65, the wallet functionality as described above is a consumer financial product or service under the CFPA. *See* 12 U.S.C. 5481(15)(A)(vii) (defining ''financial product or service'' to include ''providing payments or other financial data processing products or services to a consumer by any technological means, including processing or storing financial or banking data for any payment instrument, or through any payments systems or network used for processing payments data, including payments made through an online banking system or mobile telecommunications network,'' subject to certain exceptions); *see also* 12 U.S.C. 5481(5)(A) (defining ''consumer financial product or service'' to mean a financial product or service ''offered or provided for use by consumers primarily for personal, family, or household purposes'').

[243] As the Proposed Rule noted, tokens now are often used for wallets to store a variety of payment credentials including network-branded payment cards. *See, e.g.,* Manya Saini, *Visa tokens overtake payments giant's physical cards in circulation, Reuters.com* (Aug. 24, 2022) (describing how VISA's token service ''replaces 16-digital Visa account numbers with a token that only Visa can unlock, protecting the underlying account information.''), *https://www.reuters.com/business/finance/visa-tokens-overtake-payments-giants-physical-cards-circulation-2022-08-24/* (last visited Oct. 23, 2023); *In re Mastercard Inc.,* FTC Docket No. C–4795 (Complaint dated May 13, 2023) ¶¶ 24–32 (describing how payment cards are ''tokenized'' for use digital wallets by ''replacing the cardholder's primary account number ('PAN') [ ] with a different number to protect the PAN during certain stages of the [ ] transaction.''), *https://www.ftc.gov/system/files/ftc_gov/pdf/2010011C4795MastercardDurbinComplaint.pdf* (last visited Oct. 23, 2023); American Express, *American Express Tokenization Service, https://network.americanexpress.com/globalnetwork/products-and-services/security/tokenization-service/* (last visited Oct. 23, 2023); Discover Digital Exchange, *Powering digital payment experiences, https://www.discoverglobalnetwork.com/solutions/technology-payment-platforms/discover-digital-exchange-ddx/* (last visited Oct. 23, 2023).

Comments Received

Some commenters supported the inclusion of the range of payment functionalities described in the proposed definition of ''covered payment functionality.'' For example, one nonprofit stated that its members surveyed generally supported the proposed definitions of ''funds transfer functionality'' and ''wallet functionality'' and that the latter adequately described digital wallets in use today. A merchant trade association stated that the market should include digital wallet offerings from nonbanks, including when offered by nonbanks through joint ventures or partnerships with banks or payment networks. In their view, if a nonbank develops and determines how the service operates, then regardless of the involvement by a bank or payment network, the CFPB should supervise the nonbank to ensure fair competition. In addition, as described at the outset of the section-by-section analysis above, other commenters including consumer groups and banking industry associations generally supported the Proposed Rule without raising concerns regarding the proposed definition of ''covered payment functionality.''

On the other hand, as discussed in the section-by-section analysis of general comments on the proposed market definition in § 1090.109(a)(1) above, several industry and nonprofit commenters stated that the Proposed Rule inappropriately grouped what they described as different markets, including funds transfer functionalities and wallet functionalities, as well as a number of subtypes of each, into a single market. The Final Rule responds to those comments above. In addition, as described below, some commenters stated that the rule should exclude certain activities from the proposed definition of ''covered payment functionality.'' These comments either sought to remove entire components of the proposed definition of ''covered payment functionality,'' to limit the scope of the term in the context of nonbank/bank partnerships, or to clarify that the term did not include what they described as business-to-business services.

Some comments stated that the market definition should not include what they called payment-method or pass-through wallets captured by the proposed definition of ''wallet functionality.'' For consistency, the Final Rule refers to these products and services as pass-through payment wallets. A nonbank firm stated that the rule should exclude from the definition of ''wallet functionality'' the storage and transmission of payment credentials for accounts held at or issued by third-party financial institutions (which it called a ''payment method wallet''). In its view, payment method wallets do not provide consumers access to their funds because they do not store the funds.[244] It stated that supervising the nonbank provider of the payment method wallet would provide no benefit beyond existing supervision by CFPB and other Federal agencies of these third-party financial institutions, which includes supervision for compliance with protections under Regulation Z against billing errors in credit card transactions and Regulation E in debit card transactions. In support of that conclusion, it outlined its position that payment method wallets are not subject to EFTA or Regulation E because they do not issue an asset account used to make the payment and they do not provide an ''access device'' for an asset account because any stored debit card is the access device for purposes of Regulation E.[245] Some industry association commenters also stated that some market participants were not financial institutions under either Regulation E or under Regulation P implementing the GLBA, and that the Proposed Rule therefore did not articulate why CFPB supervision of those firms would be beneficial or overstated its benefits.[246]

A law firm commenter also stated that the term ''wallet functionality'' should be removed from the market definition. It stated that, because the proposal defined ''consumer payment transaction'' as involving a transfer of funds, all such transactions will involve a ''funds transfer functionality'' that will always be subject to supervision. It also viewed providers of a ''wallet functionality'' that does not hold and move funds as excluded from the scope of EFTA and Regulation E. As a result, in its view, supervision of persons providing a ''wallet functionality'' would be unnecessary, duplicative, and not responsive to the same level of risk to consumers.[247] Alternatively, this commenter and another industry trade association stated that the rule should address uncertainty over potential coverage of internet browsers; the Final Rule describes and responds to those comments in more detail in the section-by-section analysis of ''digital application'' further below.

An industry association stated that the rule should narrow the proposed definition of ''wallet functionality'' by dropping the reference to storage and transmission of payment credentials that are in ''tokenized form.'' It noted that consumers' personal identification information, such as a driver's license, can be tokenized to create digital ''identity credentials'' that consumers can use for what it described as non-financial purposes such as identity verification and ''commerce purposes.'' It stated that if the rule does not remove the reference to ''tokenized form'' form, then it should clarify that term only applies to tokenization of what it called ''existing'' payment credentials. It stated that the clarification was necessary to ensure that the market definition does not cover non-financial applications of tokenization that the CFPB lacks the authority to regulate.

Finally, two industry associations stated that the proposed term ''wallet functionality'' includes ''pass-through digital wallets'' that cannot legally be included in the market definition because they qualify as ''electronic conduit services'' defined in CFPA section 1002(15). They described pass-through payment wallets as holding and passing on payment information, such as card numbers, and as maintaining a record of such information. They stated that ''pass-through digital wallets'' are electronic conduit services because only data, not funds, flow through the wallet.[248]

[244] In its view, they also do not receive funds for purpose of transmitting them on behalf of the consumer because they generally agree to accept payments as an agent of the merchant.

[245] Another industry association suggested that the Final Rule clarify whether the CFPB considers a mobile phone to be an access device for purposes of Regulation E. The commenter also stated that entities may face competing obligations or burdens under this larger participant rule and a personal financial data rights rule the CFPB may adopt. It stated that both rules would apply to ''digital wallets'' but, in its view, define them differently. It called for the CFPB to establish a regulatory safe harbor under which compliance with a personal financial data rights rule does not determine application of the larger participant rule, and vice-versa.

[246] The nonbank firm mentioned above generally stated that payment method wallets generally posed low if any risk to consumers and stated that the Proposed Rule did not establish that payment method wallets pose any special or heightened risk to consumers' data related to GLBA/Regulation P compliance compared with other products and services not included within the market definition. In response to general comments further above, the Final Rule responds to comments about the consideration of risk in larger participant rules.

[247] Again, as noted above, the Final Rule summarizes and responds to comments regarding the consideration of risk to consumers at the outset of the section-by-section analysis above.

[248] One of these commenters noted that certain pass-through payment wallets may participate in the flow of funds when they act as a third-party payment processor, but even in those circumstances, pass-through payment wallets should not be covered either because they, in the commenter's view, pose low risk as evidenced by their being excluded from money transmitter laws.

Other industry comments called for removing part of the definition of ''funds transfer functionality.'' A few industry trade associations stated that the rule should remove accepting and transmitting payment instructions from the definition of ''funds transfer functionality.'' They stated that many firms transmit payment instructions, and State money transmitter laws generally exclude this type of payment processing because, in their view, that is a lower-risk activity due the payment processor not holding or receiving funds, which instead are held at Federally-regulated financial institutions.

Other industry comments called for excluding activities that do not involve the holding or receipt of funds in certain circumstances, which they generally described as posing lower risk than other market participants. An industry association and a nonbank firm stated that the rule should exclude nonbanks providing payment services in partnership with or as service providers to depository institutions. According to their description, these nonbanks typically develop, market, and provide a digital application to consumers on behalf of as and a service provider to a bank or credit union. They described the nonbank as serving solely as a service provider, regardless of whether the digital application is branded in the name of the nonbank. They stated that the nonbank provides these services solely to establish the consumer as a customer of the bank or credit union and to facilitate consumer payment transactions from accounts held by the bank or credit union either in the name of or ''for benefit of'' the consumer. They stated that the bank or credit union processes the consumer payment transactions. For example, the nonbank may receive and transmit the consumer's payment instructions to the partner bank to transmit funds. The nonbank commenter acknowledged that covering nonbank activities that facilitate payments from accounts held by nonbanks would help align supervision of nonbanks and banks. However, in the view of these commenters, facilitating payments of funds held in accounts at partner banks or credit unions is a different activity that should not be included in the market. For example, compared to what they described as ''stand-alone'' nonbank payment applications, they stated the digital applications that nonbanks provide as partners with banks and credit unions pose lower risk to consumers due to existing Federal prudential regulators' oversight of the banks and credit unions and their third-party relationships.[249] These commenters also stated that, in their view, excluding this type of activity from the market definition (or otherwise from the larger-participant test) would prevent duplicative Federal supervision between the CFPB and prudential banking regulators. One of these commenters also stated the exclusion would be consistent with the rule's goal of defining the market to exclude taking of deposits.[250] For example, this commenter stated that this type of activity is subject not only to the prohibition against unfair, deceptive, and abusive practices, but also to consumer protections governing deposit accounts. They also stated that, to meet the expectations of Federal prudential banking regulators, banks have extensive mechanisms for overseeing the third-party nonbanks that provide the consumer-facing or ''front end'' digital application, and that these mechanisms further reduce risks posed by these activities. Another industry association called for CFPB to make unspecified clarifications to the scope and requirements of the Proposed Rule to ensure close coordination between the CFPB and other regulators to prevent duplicative or diverging regulatory requirements of nonbanks that partner with depository institutions and credit unions.

In addition, a few industry associations requested that the rule clarify that the market definition does not include activities that they described in four different ways as business-to-business services that nonbanks provide in connection with consumer payment transactions for the purchase of goods and services. First, both commenters stated that the market definition should exclude any portions of the process or lifecycle associated with a consumer payment transaction that involve exclusively business-to-business transactions and do not directly involve the consumer. Second, both commenters stated that companies that provide merchant payment processing would fall within the market definition (and, as noted above, disagreed with that result). However, one of the commenters pointed to what it viewed as significant uncertainty over whether the market definition included what it described as traditional third-party payment processing by entities that enable merchants to accept payments. Third, both commenters also referred to what they called covered payment functionalities provided by a nonbank that its merchant customer offers to consumers, who use the end product. Although the consumer is an end user, they described such nonbank activities as facilitating application functionalities between businesses that should be excluded from the market definition.[251] Fourth, one of these commenters stated that, to avoid what it described as an unintended expansion of the scope of the proposal, the CFPB should clarify that the rule does not include what it described as ''back-office service providers or other vendors.''

Response to Comments Received

As discussed above in the Final Rule's response to comments on the market definition in proposed § 1090.109(a)(1), the CFPB disagrees with comments suggesting that the market should be confined to entities that receive or hold the funds being transferred in consumer payment transactions, or that the market should cover consumer payment transactions that transfer funds from nonbank accounts but not from accounts provided by banks or credit unions. As the Proposed Rule explained, the CFPB is seeking to define a market for general-use digital consumer payment applications that facilitate consumer payment transactions that transfer funds by or on behalf of the consumer,

[249] These commenters also asserted that existing oversight of the depository institutions provides sufficient oversight of this type of activity; the Final Rule addresses comments regarding existing oversight above. One commenter also suggested that establishing oversight in this rulemaking would violate a memorandum of understanding between the CFPB and prudential regulators that called for the CFPB to prevent unnecessary duplication of effort. However, the comment misconstrued that memorandum of understanding. As explained further above in the discussion of comments on existing oversight, that memorandum of understanding does not seek to prevent overlapping authority; instead, where overlapping authority exists, it provides mechanisms for coordinating across agencies to minimize the types of duplication these commenters mentioned.

[250] The nonbank firm also suggested that the Proposed Rule appeared to purport to establish supervisory authority over a nonbank that acts as a service provider to a bank with assets of $10 billion or less and not to a substantial number of such banks. In its view, such a service provider is subject to the exclusive supervision of a Federal banking agency, and assertion of CFPB supervisory authority over the service provider would conflict with CFPA section 1026(e), which only establishes authority over service providers to a substantial number of such banks. It stated that the CFPB may not take supervisory or enforcement action directly against such a service provider, and instead may only take certain actions specified in the CFPA related to the service provider, such as accessing the Federal prudential regulators' reports of examination of the service provider under CFPA section 1022(c)(6)(B).

[251] This commenter suggested this exclusion appear in the definition of ''digital application.'' However, the Final Rule considers the comment more broadly in relation to other comments seeking exclusion of what they described as business-to-business offerings.

regardless of where those funds may be held. As some industry association comments regarding bank/fintech partnerships acknowledged, the CPFB is not seeking to define a market for taking deposits in this rule. Consistent with that purpose, nothing in the proposed definition of ''covered payment functionality'' referred to engaging in the ''taking of deposits.'' Relatedly, holding or receiving funds is not a requirement for facilitating consumer payment transactions and participating in the market. Specifically, neither the form of ''funds transfer functionality'' described in paragraph (*2*) of the definition of that term nor the proposed ''wallet functionality'' definition were based on receiving or holding funds.[252] Excluding nonbanks that do not hold or receive funds (or that only facilitate payment of funds held at partner depository institutions) would result in an unduly narrow market definition that essentially is limited to money transmission, ignoring the role that other nonbank activities play in initiating other very common consumer payment transactions through general-use digital consumer payment applications. For example, consumers have significantly increased their use of digital wallets to make payments using network-branded payment cards issued by third-party financial institutions.[253] These include consumer credit card transactions in which the lender transfers funds on behalf of the consumer as part of an extension of credit. In these transactions and in debit card transactions, the nonbank may not hold or receive funds but it does initiate the consumer payment transaction at the consumer's request by receiving and transmitting payment instructions or storing and transmitting payment credentials.[254] And in this way, it also facilitates consumers' access to their funds, contrary to the suggestion by an industry commenter.

Excluding these activities from the market would result in a gap in the CFPB's supervisory oversight at the very start of the chain of activities that lead a consumer payment transaction to occur. Yet consumers naturally may look to the provider of that consumer financial product or service for help resolving problems. And a credit union trade association commenter stated that credit union customers can find it difficult to obtain prompt resolution of errors that involve a nonbank platform. A group of State attorneys general also cited a survey indicating that more 77 percent of consumers encountered difficulty obtaining resolution from the nonbank's customer service.[255]

As to industry commenter claims that nonbank market participants pose lower risk because the funds consumers use to make payments are held by other regulated and supervised financial institutions such as banks, credit unions, or money transmitters, this rulemaking does not define who is included or excluded in the market based on findings of relative risk. More specifically, the CFPB does not assess in this rulemaking the relative risk of activities to initiate payments from funds held or received by others; rather, as explained further above, the CFPB considers the risks that a market and its larger participants pose to consumers when determining how to *exercise* its authority to conduct examinations of such persons.

The CFPB also disagrees that the market should exclude nonbanks with a service-providing or partnership relationship with the depository institution that holds the funds used to make the payment. As discussed in the response to general comments above, covering these activities furthers the CFPB's statutory objective of ensuring consistent compliance with Federal consumer financial law without regard to the status of a person as a depository institution to promote fair competition. The CFPB similarly disagrees with the law firm commenter's claim that, when a consumer initiates a consumer payment transaction in reliance on a general-use wallet functionality a nonbank provides through a digital application, there is no need to include that activity in the market because another supervised institution, such as a depository institution, may be providing a funds transfer functionality. Two institutions, including a depository institution and a nonbank, may work together to provide a covered payment functionality. For example, a depository institution may accept payment instructions from a nonbank general-use digital consumer payment application provider. A supervisory review that only considers how the depository institution processes those instructions would presume that there is no significance to the role of the nonbank in relaying those instructions to the depository institution. Yet by design, the conduct of both institutions can affect the degree to which consumers' payments data is protected, legitimate transactions proceed without error or delay, and unauthorized transactions do not occur. The nonbank may even assume primary responsibility for providing the consumer interface, such

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[252] In addition, while the first prong of ''funds transfer functionality'' refers to receiving funds, that prong requires that the funds be received for the purpose of transmitting them.

[253] *See, e.g.,* Worldpay, *2024 Global Payments Report,* at 6 (describing ''key insight[ ]'' that ''[c]onsumer attraction to digital wallets isn't a turn away from cards. In card-dominated markets, card spend is simply shifting to digital wallets like Apple Pay, Google Pay and PayPal. Viewed in total, card transaction values are at an all-time high and continue to rise.''), at 148 (reporting use of payment cards through digital wallets under the heading ''digital wallets'' and separately reporting ''direct card use'' for debit cards and credit cards), *https://worldpay.globalpaymentsreport.com/* (last downloaded Aug. 22, 2024); Worldpay, Press Release, *Worldpay Global Payments Report 2024: Digital Wallet Maturity Ushers in a Golden Age of Payments* (Mar. 21, 2024) (finding that ''in the U.S., credit and debit cards fund 65 percent of digital wallets in the market.''), *https://www.businesswire.com/news/home/20240321666428/en/Worldpay-Global-Payments-Report-2024-Digital-Wallet-Maturity-Ushers-in-a-Golden-Age-of-Payments* (last visited Nov. 7, 2024); *How Are Consumers Funding Mobile Wallets?* PaymentsJournal (Apr. 1, 2024) (reporting that most consumers use a debit card or credit card to fund a mobile wallet, versus 36 percent who use the balance within the app, based on Christopher Miller, *2023 North American PaymentInsights: U.S.: Financial Services and Emerging Technologies Exhibit,* Javelin Research (July 21, 2023)), *https://javelinstrategy.com/research/2023-north-american-paymentinsights-us-financial-services-and-emerging-technologies* (last visited Nov. 7, 2024)), *https://www.paymentsjournal.com/how-are-consumers-funding-mobile-wallets/* (last visited Nov. 7, 2024); Steve Cocheo, *Consumers Have Embraced Digital Wallets. But They Also Want Them to Be Better,* The Financial Brand (Mar. 28, 2024) (discussing the ''overlap between digital wallets and cards.''), *https://thefinancialbrand.com/news/payments-trends/digital-wallets-absorb-credit-cards-as-they-boom-worldwide-176418/* (last visited Oct. 24, 2024); J.D. Power, *Debit Cards Still Lead in Customer Satisfaction and Utilization, Even as Use of Digital Wallets Grows* (May 23, 2024) (survey projecting ''slow deterioration'' in share of customers using physical version of debit cards as they opt instead to use the debit cards as a payment method stored in digital wallets), *https://www.jdpower.com/business/resources/debit-cards-still-lead-customer-satisfaction-and-utilization-even-use-digital* (last visited Nov. 7, 2024): Nicole Murgia & Lily Varon, *Digital Payments Have Surpassed Traditional Payments In The US,* Forrester Research (Feb. 29, 2024) (reporting survey data finding that ''69% of U[.]S[.] online adults said that they had used a digital payment method over the past three months to make a purchase. That's well ahead of the just over half of online adults who used a credit card or who used cash. That said, it's important to remember that cards often are the underlying payment instrument in growing digital payment scenarios.''), *https://www.forrester.com/blogs/digital-payments-have-surpassed-traditional-payments-in-the-us/* (last visited Nov. 7, 2024); Mastercard, *Mastercard reimagines online checkout; commits to reaching 100% e-commerce tokenization by 2030 in Europe* (June 11, 2024), *https://www.mastercard.com/news/press/2024/june/mastercard-reimagines-online-checkout-commits-to-reaching-100-e-commerce-tokenization-by-2030-in-europe/* (last visited Nov. 7, 2024).

[254] The Final Rule responds to general comments about the applicability of Regulation E and Regulation P in the section-by-section analysis of the market definition further above.

[255] *Consumer Reports P2P Survey* at 9 (reporting results of questions about services provided by payment apps such as PayPal, Venmo, Apple Pay, Google Pay, or Zelle). The Proposed Rule, 88 FR 80197 at 80200 n.25, also identified this survey.

as a digital application, and making representation to consumers about the speed, cost, and other aspects of payments it facilitates. As noted, it is not the purpose of this rule to enumerate, quantify, and weigh such risks because the rule does not seek to define a market that includes only high-risk activity. Rather, the purpose of this rule is to establish authority to examine larger participants in this market. Through operation of that program the CFPB can detect, assess, and as needed, address risks to consumers and markets, and otherwise conduct its risk-based supervision program for the purposes established in CFPA section 1024(b)(1).

In addition, for the reasons explained above in response to general comments about existing Federal and State oversight of some aspects of market activity, the CFPB does not define the market based on the degree to which another regulator oversees certain persons, such as a partner bank, its nonbank partner, or any other nonbank that facilitates a given consumer payment transaction. The CFPB also does not define the market based on whether market participants also may act as a service provider to another financial institution.[256]

The CFPB also disagrees with the two industry associations that argued that certain pass-through digital wallets are subject to the CFPA's exclusion for ''electronic conduit services'' because they only store and transmit card information, and not funds.[257] The commenters did not meaningfully analyze the language of the CFPA's definition of ''electronic conduit services,'' which undermines their argument in at least two ways.[258] First, the definition applies to the ''intermediate or transient storage'' of electronic data—*i.e.,* to data storage for a limited time.[259] However, as the commenters appear to acknowledge, pass-through digital wallets generally store payment credential or account information on a persistent or indefinite basis (so that it can be used to make payments as needed). Because they do so, pass-through digital wallets do not qualify for the exclusion for electronic conduit services. Second, the commenters incorrectly conclude that the electronic conduit service exclusion necessarily applies where a provider only handles data (and not funds). For example, by its terms, that exclusion does not apply to a provider who ''selects . . . the content of the electronic data'' being stored or transmitted.[260] Pass-through digital wallets generally are designed to store and transmit specific data regarding a payment card (the card number, expiration date, and CVV) provided by the consumer. Providers of such wallets thus ''select[ ] . . . the content of the electronic data'' that the wallets store and transmit, and therefore do not qualify for the electronic conduit services exclusion.[261]

With regard to the industry association commenters that sought exclusion of business-to-business services that nonbanks provide in connection with consumer payment transactions for the purchase of goods and services, the CFPB disagrees that a new exclusion is needed. With regard to ecommerce websites where the consumer can use a payment button, as explained above in the discussion of comments on the definition of ''consumer payment transaction,'' the market does not include a merchant on the basis of it placing a payment button on its website that launches a general-use digital consumer payment application provided by an unaffiliated third party (rather, the market simply includes the third-party app that the payment button launches). With regard to other examples that the industry association commenter cited—service providers or other vendors, including those that may act as traditional payment processors and participate in facilitating business-to-business transactions during the lifecycle of a consumer payment transaction—the Final Rule clarifies that the market generally does not cover that activity. For purposes of this Final Rule, the term ''covered payment functionality'' would not cover a nonbank that operates in a consumer payment transaction process solely as an intermediary between two businesses, such as where the consumer does not ''access'' a ''digital application'' to make a payment.[262] In addition, when consumers provide their payment credential through the website of a single merchant solely for use at that merchant and its affiliated companies, the merchant payment processor processing that payment credential (whether for a single transaction or by storing the card on file for repeat use) is not providing covered payment functionality that has ''general

[256] The CFPB disagrees with the nonbank firm's comment to the extent it was suggesting that in general a service provider to financial institutions cannot also be a nonbank covered person, or, more specifically that provisions in CFPA sections 1025(d) or 1026(e) describing the CFPB's supervisory authority over service providers to banks and credit unions displace the CFPB's authority under section 1024(a) over nonbank covered persons. Under the CFPA, a firm can act both as a service provider and as a provider of a consumer financial product or service. *See* 12 U.S.C. 5481(26)(C) (''A person that is a service provider shall be deemed to be a covered person to the extent that such person engages in the offering or provision of its own consumer financial product or service.''). And with respect to the CFPB's supervisory authority, no provision in CFPA sections 1024, 1025(d), or 1026(e) states that 1024(a) is displaced by 1025(d) or 1026(e). By contrast, CFPA section 1024(a)(3)(A) expressly provides that CFPA section 1024, which includes the larger participant rulemaking authority in CFPA section 1024(a)(1)(B), shall not apply to persons described in section 1025(a) and 1026(a), which refer to insured depository institutions, insured credit unions, and certain of their affiliates. It does not refer to 1025(d) or 1026(e). Accordingly, if a nonbank is a covered person because it provides a consumer financial product or service, then the CFPB may establish supervisory authority over the nonbank covered person via a larger participant rulemaking under section 1024(a)(1)(B) even if in the course of its activity the nonbank also acts as a service provider to a bank or credit union.

[257] The CFPA excludes ''electronic conduit services'' from the definition of ''financial product or service.'' 12 U.S.C. 5481(15)(C)(ii). The term ''electronic conduit services'' ''(A) means the provision, by a person, of electronic data transmission, routing, intermediate or transient storage, or connections to a telecommunications system or network; and (B) does not include a person that provides electronic conduit services if, when providing such services, the person—(i) selects or modifies the content of the electronic data; (ii) transmits, routes, stores, or provides connections for electronic data, including financial data, in a manner that such financial data is differentiated from other types of data of the same form that such person transmits, routes, or stores, or with respect to which, provides connections; or (iii) is a payee, payor, correspondent, or similar party to a payment transaction with a consumer.'' 12 U.S.C. 5481(11).

[258] Because the commenters do not provide any information regarding how the pass-through digital wallets they describe operate on a technological level, there may be additional reasons, beyond those discussed in this Final Rule, why such wallets do not qualify as electronic conduit services. For example, providers of such wallets may transmit financial data ''in a manner that such financial data is differentiated from other types of data of the same form'' that the providers transmit. 12 U.S.C. 5481(11)(B)(ii).

[259] 12 U.S.C. 5481(11)(A); *cf. Hately* v. *Watts,* 917 F.3d 770, 785 (4th Cir. 2019) (construing similar phrase ''temporary, intermediate storage'' in Stored Communications Act to refer to electronic communications ''while they are stored 'for a limited time' 'in the middle' of transmission'' (quoting *In re DoubleClick Inc. Privacy Litig.,* 154 F. Supp. 2d 497, 512 (S.D.N.Y. 2001)).

[260] *See id.* 5481(11)(B)(i). Similarly, the exception for differentiated electronic data in subsection 1002(11)(B)(ii) could apply where a provider only handles data, and not funds. *See id.* 5481(11)(B)(ii).

[261] In addition, as discussed above, some digital wallets ''tokenize'' payment information, which involves replacing the cardholder's account number with a different number at certain stages of the transaction, in order to protect the account number. That activity of creating new payment information to facilitate a payment goes beyond the role of a mere conduit, which is limited to providing ''electronic data transmission, routing, intermediate or transient storage, or connections to a telecommunications system or network[.]'' 12 U.S.C. 5481(11)(A).

[262] In any event, the Final Rule also adopts a revised definition of the term ''covered payment functionality'' that focuses on receiving funds ''from'' the consumer or storing account or payment credentials ''for'' a consumer.

use'' based on how the Final Rule defines that term as usable for making payments to multiple unaffiliated persons as discussed below.[263]

In light of these clarifications and changes adopted in the Final Rule, the CFPB disagrees that a broader, general ''business-to-business'' exclusion is warranted.[264] Such an exclusion would not be consistent with the structure of nonbank provider's market activities, which involve intermediation between consumers and payment recipients. When consumers sign up as a customer for a nonbank's general-use digital consumer payment application, they do so in order to use the app to make payments to multiple unaffiliated persons. The consumer payment transactions they make by accessing that digital application fall within the market, even though the app provider also may conduct those transactions under the umbrella of a business-to-business contract such as a merchant acceptance agreement.[265]

Final Rule

For the reasons described above, the CFPB adopts the proposed definition of ''covered payment functionality'' with certain minor clarifying changes.

First, the Final Rule changes ''wallet functionality'' to ''payment wallet functionality.'' As discussed above, some commenters raised questions about whether the Proposed Rule would have applied to digital wallets (or the part of their functionalities) that store and transmit data unrelated to consumer payments. Because the terms ''digital wallet'' and ''wallet'' have varied uses, this revision provides greater precision and prevents confusion.[266]

Second, the definition of ''funds transfer functionality'' is revised to clarify that the funds received or instructions accepted must be ''from a consumer'' to qualify as market activity. Similarly, the definition of ''payment wallet functionality'' is revised to clarify that account or payment credentials must be stored ''for a consumer'' to satisfy the first prong of that that definition. As discussed above, nonbanks are not participating in the market when providing a payment functionality that a consumer does not access through a digital application. Consistent with that approach, these clarifications to the definition of ''covered payment functionality'' similarly confirm that nonbank firms that do not engage with consumers through digital applications would not be providing a ''covered payment functionality.'' For example, for purposes of this Final Rule that term would not cover a nonbank that operates in a consumer payment transaction process solely as an intermediary between two businesses. The CFPB does not believe this is a significant change from the Proposed Rule, since the proposed market definition only would have applied to providing a payment functionality ''for consumers' general use'' in the first place. But for the avoidance of doubt, the Final Rule includes this additional clarification on this point.

Digital Application

Proposed Rule

The proposed market definition would have applied to providing covered payment functionalities through a digital application for a consumer's general use in making consumer payment transactions. Proposed § 1090.109(a)(2) would have defined the term ''digital application'' as a software program accessible to a consumer through a personal computing device, including but not limited to a mobile phone, smart watch, tablet, laptop computer, or desktop computer.[267] The proposed definition would have specified that the term includes a software program, whether downloaded to a personal computing device, accessible from a personal computing device via a website using an internet browser, or activated from a personal computing device using a consumer's biometric identifier, such as a fingerprint, palmprint, face, eyes, or voice.[268]

The Proposed Rule explained how market participants may provide covered payment functionalities through digital applications in many ways. For example, a consumer may access a nonbank covered person's covered payment functionality through a digital application provided by that nonbank covered person. Or, a consumer may access a nonbank covered person's covered payment functionality through a digital application provided by an unaffiliated third-party such as another nonbank, a bank, or a credit union.[269] In either case,

[263] Similarly, a consumer may use a general-use digital consumer payment application to make a payment in a physical store by ''tapping'' their mobile phone that contains the app on a gateway payment terminal at the checkout counter. As the proposed Rule explained, a gateway terminal, which is a computing device merchants acquire, is not a ''digital application'' as defined in the Proposed Rule because it is not a personal computing device of the consumer. 88 FR 80197 at 80206. Thus a merchant payment processor would not be engaged in market activity solely based on operating or accepting payments data through such a terminal.

[264] These clarifications relate to the scope of the market. Some entities may be acting as a service provider to a market participant. The Final Rule does not alter the scope of CFPB authority over service providers conferred by the CFPA. As the Proposed Rule explained, CFPA section 1024(e) expressly authorizes the supervision of service providers to nonbank covered persons encompassed by CFPA section 1024(a)(1), which includes larger participants. Adding an express exclusion for service providers in the Final Rule could cause confusion over the CFPB's authority to supervise such entities.

[265] As discussed above, many businesses provide general-use digital consumer payment applications to consumers and facilitate their payments through business-to-business acceptance agreements with merchants. At the same time, as also discussed above, the market definition adopted in the Final Rule does not cover the merchant, even when it provides a payment button that launches the third-party's general-use digital consumer payment application.

[266] The CFPB declines to adopt the industry commenter's suggestion that the Final Rule include a safe harbor under which compliance with the CFPB's personal financial data rights rule does not determine application of this larger participant rule, and coverage under the larger participant rule does not determine application of the personal financial data rights rule. The comment did not identify any specific differences between the two proposals' approach to covering digital wallets that it found to be significant, or explain how application of one rule could affect application of the other. In fact, application of one rule does not determine application of the other. The text of each rule governs its scope. Further, because this Final Rule does not impose substantive consumer protection obligations, it does not modify the scope of the personal financial data rights rule. In any event, as noted above, to the extent an entity is a larger participant under this rule and also is subject to the personal financial data rights rule when compliance is required in the future, CFPB examinations of that entity may review compliance with the personal financial data rights rule. Further, this treatment is consistent with CFPB examinations of depository institutions with more than $10 billion in assets; *i.e.,* the CFPB currently examines these institutions' compliance with applicable requirements of Federal consumer financial law (*e.g.,* the EFTA and its implementing Regulation E) and may examine their compliance with the personal financial data rights rule after compliance is required.

[267] The Proposed Rule noted that the definition considers whether the digital application is accessible through a personal computing device, not whether a particular payment is made using a computing device that a consumer personally owns. For example, if a consumer logs into a digital application through a website using a work or library computer and makes a consumer payment transaction, the transfer would be subject to the Proposed Rule if that digital application is one a consumer also may access through a personal computing device.

[268] The Proposed Rule noted for example that some nonbanks allow consumers to use interactive voice technology to operate the nonbank's application that resides on the phone itself. *See, e.g.,* Lory Seraydarian, *Voice Payments: The Future of Payment Technology?,* PlatAI Blog (Mar. 7, 2022) (software firm analysis reporting that major P2P participants ''allow their customers to use voice commands for peer-to-peer transfers.''), *https://plat.ai/blog/voice-payments/* (last visited Oct. 23, 2023).

[269] As the Proposed Rule noted, if a nonbank covered person provides a covered payment functionality a consumer may access through a digital application provided by a bank or credit union, the Proposed Rule would have only applied

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a consumer typically first opens the digital application on a personal computing device and follows instructions for associating their deposit account, stored value account, or other payment account information with the covered payment functionality for use in a future consumer payment transaction. Then, when the consumer is ready to initiate a payment, the consumer may access the digital application again to authorize the payment.

The Proposed Rule also explained how consumers have many ways to access covered payment functionalities through digital applications to initiate consumer payment transactions. To make a P2P payment, a consumer may use an internet browser or other app on a mobile phone or computer to access a nonbank covered person's funds transfer functionality, such as a feature to initiate a payment to friends or family or to access a general-use bill-payment function. The consumer then may direct the nonbank covered person to transmit funds to the recipient or the consumer may provide payment instructions for the nonbank covered person to relay to the person holding the funds to be transferred. Or, in an online retail purchase transaction, a consumer may access a wallet functionality by clicking on or pressing a payment button on a checkout screen on a merchant website. The consumer then may log into the digital application or display a biometric identifier to their personal computing device to authorize the use of a previously-stored payment credential. Or, in an in-person retail purchase transaction, a consumer may activate a covered payment functionality by placing their personal computing device next to a merchant's retail payment terminal. The digital application then may transmit payment instructions or payment credentials to a merchant payment processor. For example, a mobile phone may transmit such data by using near-field communication (NFC) technology built into the mobile phone,[270] by generating a payment-specific quick response (QR) code on the mobile phone screen that the consumer displays to the merchant payment terminal, or by using the internet, a text messaging system, or other communications network accessible through the mobile phone.

Through the proposed definition of digital application, the Proposed Rule would have excluded from the proposed market payment transactions that do not rely upon use of a digital applications. For example, gateway terminals merchants obtain to process the consumer's personal card information are not personal computing devices of the consumer. Merchants generally select these types of payment processing services, which are provided to consumers at the point of sale to pay for the merchant's goods or services. Their providers may be participating in a market that is distinct in certain ways from a market for general-use digital consumer payment applications. In addition, the proposed definition of ''digital application'' would not have covered the consumer's presentment of a debit card, a prepaid card, or a credit card in plastic, metallic, or similar form at the point of sale. In using physical payment cards at the point of sale, a consumer generally is not relying upon a ''digital application'' because the consumer is not engaging with software through a personal computing device to complete the transaction. However, when a consumer uses the same payment card account in a wallet functionality provided through a digital application, then those transactions would have fallen within the market definition.

The Proposed Rule requested comment on the proposed definition of ''digital application,'' and whether it should be modified, and if so, how and why. For example, the Proposed Rule requested comment regarding whether defining the term ''digital application'' by reference to software accessible through a personal computing device is appropriate, and if so, why, and if not, why not and what alternative approach should be used and why.

Comments Received

A consumer group supported the proposal's definition of a market based on use of a ''digital application.'' It cited a 2021 industry white paper observing that most financial transactions happen via mobile apps, websites, email, text messages, and other digital communications.[271] In addition, as discussed above, many commenters agreed that the market for general-use digital consumer payment applications has grown rapidly and expressed support for the proposal to supervise larger participants providing general-use digital consumer payment applications. These commenters generally did not take issue with or appeared to agree with the proposal's defining the market as a digital market.

Some consumer group commenters urged the CFPB to expand the market definition beyond payments facilitated through digital applications, to cover in-person domestic money transfers as well as payments consumers make via telephone call to transfer funds to persons while incarcerated and prepaid cards issued to such persons upon their release from incarceration. They indicated this approach would be consistent with the market definition in the international money transfer larger participant rule, which was not limited to app-based payments. They stated that some consumers that send funds to friends and family who are incarcerated have incomes that are too low to afford easy access to digital applications. They also described a risk of abusive practices with release cards due to consumers' lack of choice among card issuers. They further noted that the proposed market definition would not encompass consumers' use of release cards outside of digital applications, which they often do because they likely do not have smartphones when they are released and need to use the funds immediately.

Meanwhile, an industry association suggested that the ''digital application'' limitation invalidates the market definition because it does not satisfy principles of antitrust law due to excluding reasonably interchangeable non-products with the same use case, such as network-branded payment cards when used outside of a digital application, whether by swiping a plastic card in-person or inputting the card information manually to make a digital payment. This commenter cited data that in its view indicated that those cards are still preferred by consumers. Thus, in its view, general-use digital consumer payment applications compete with physical payment methods as part of a broader payment industry. In addition, a nonprofit commenter disagreed with the ''digital application'' limitation because, in its view, it incorrectly ascribes a special status to payments undertaken digitally.[272]

to the nonbank. Insured depository institutions, insured credit unions, and certain of their affiliates are not subject to the CFPB's larger participant rules, which rely upon authority in CFPA section 1024 that applies to nonbanks. 12 U.S.C. 5514(a)(3)(A).

[270] *See generally CFPB Contactless Payments Spotlight, supra.*

[271] *Google LLC Embedded Finance White Paper, supra,* at 3.

[272] A few industry associations also described the proposed definition of ''digital application'' as vague. Their comments appeared principally concerned not with what is a digital application, but with who is providing a covered payment functionality through a digital payment application. The Final Rule responds to their comments in the section-by-section analysis of ''covered payment functionality'' above.

Other consumer groups and a nonprofit commenter called for clarification of the definition of ''digital application'' including its reference to use of a ''personal computing device.'' For example, one consumer group suggested that the rule include additional examples of a ''personal computing device'' because computer chips are versatile and industry can use everyday items to facilitate payments and collect consumers' payments data. They stated that some automobiles already have ''smart dashboards'' that consumers may use to make purchases. They added that home appliances, such as televisions and refrigerators, also could be designed to facilitate purchases. They stated that some smart appliances already allow consumers to use a digital wallet provided by a third-party that is dominant in the market. They stated that these devices should be included as examples of personal computing devices that may facilitate market activity. On the other hand, a nonprofit commenter stated that some of its members believed the definition of ''personal computing device'' is vague and the rule needs to expressly exclude public computers from that definition. This commenter also stated some of its members believed that the definition of ''digital application'' should be clarified to provide additional examples of how a consumer ''may access'' the underlying software program. They stated that the use of PINs and passwords should be added to the examples in the definition.

Finally, two commenters raised questions about the applicability of the Proposed Rule to internet browsers and functionalities they provide. An industry association stated that the rule should clarify whether internet browsers that store credit card information would be considered to facilitate a consumer payment within the meaning of the definition of ''covered payment functionality.'' In addition, a law firm commenter stated that it did not understand the goal of the Proposed Rule to cover generic web browser activity, but a clarification would be necessary to avoid inadvertent coverage of that activity because of what it described as ''payment-autofill functions'' provided by online platforms and applications. It cited specific popular internet browsers as examples. It described payment autofill functions as prepopulating a consumer's stored payment credential information into checkout forms on a merchant website within the platform's browser.[273]

Response to Comments Received

The CFPB agrees with the consumer group commenter that it is appropriate to define the market at issue in this Final Rule as one involving ''digital applications.'' As discussed above, such digital applications have grown dramatically and become increasingly important to the everyday financial lives of consumers.

With respect to the industry associations' comments suggesting that the limitation of the market to ''digital application'' would be inappropriate from the perspective of antitrust law because it excludes consumers' use of physical network-branded payment cards, as discussed above this Final Rule does not define a market for purposes of antitrust law. As a consequence, CFPA section 1024(a)(1) does not require a larger participant rule to define a market to include all reasonably-interchangeable substitutes for a given consumer financial product or service whether provided by nonbanks or insured banks or credit unions.[274]

In addition, the CFPB disagrees with the industry association's comments because general-use digital consumer payment applications often function in ways that are distinct from network-branded payment cards, making it appropriate for the market defined in this Rule to be limited to such digital applications. For example, as the most recent Federal Reserve annual report on consumer payment preferences indicates, consumers generally cannot or do not use network-branded payment cards for making payments to friends and family outside of the nonbank general-use digital consumer payment applications.[275] Similarly, well-known general-use digital consumer payment applications often provide a functionality that physical payment cards generally do not have—the ability to load payment credentials for accounts held at multiple unaffiliated financial institutions.[276] This functionality can be a significant one. According to one recent report, the average consumer may have as many as eight network-branded payment cards.[277]

The CFPB disagrees with the consumer group and nonprofit comments to the extent they were suggesting that the ''digital application'' component of the proposed market definition would leave a significant gap in the CFPB's supervisory authority with respect to the use of network-branded payment cards including prison release cards. CFPA section 1025(a) already grants the CFPB supervisory authority over very large insured depository institutions and insured credit unions that are among the largest issuers of network-branded payment cards. While some insured depository institutions and insured credit unions with assets of $10 billion or less also issue payment cards, including prepaid cards, CFPA section 1024(a)(3)(A) specifically excludes *all* insured depository institutions and insured credit unions from the scope of a larger participant rule under CFPA section 1024(a)(1)(B). Therefore, the CFPB does not have authority to use this rule to define insured depository institutions or insured credit unions as larger participants in this market. In any event, when a nonbank prepaid card program manager facilitates consumers' use of these cards through the card's proprietary digital application, such as to make payments to friends and family, this activity may qualify as a consumer financial product or service of the nonbank that already is included in the

[273] Although it stated that it did not understand that the goal of the Proposed Rule was to cover autofill functions of generic web browsers, it stated that the autofill functionality could be viewed as transmitting or otherwise processing a stored payment credential under a broad reading of the proposed definition of ''wallet functionality'' discussed further above. However, in its view, such a broad reading would be incorrect because transmission of the payment credential for processing does not occur until the consumer clicks the merchant's payment button and because it is the merchant and their payment service providers that process the payment.

[274] In any event, the CFPB notes that loading the card into a third-party app for app-based use may be an indicator that the app is a compliment rather than a substitute for the card. *See Racing for Mobile Payments, supra,* sec. 2.1.2 (describing ''card-complementing mobile payment systems'' like those provided by Apple, Google, and Samsung in the United States).

[275] *See 2024 Diary Findings, supra* at 16 (indicating that when used by themselves and not through payment apps, ''[d]ebit and credit cards . . . typically are impractical or costly for P2P transactions''). For example, American Express National Bank has used PayPal and Venmo to facilitate credit card holders' P2P transactions, as described at *https://help.venmo.com/hc/en-us/articles/360058686993-Amex-Send-Split* (last visited Nov. 7, 2024).

[276] Some banks and credit unions offer an app-based wallet functionality that facilitates payments using cards issued by multiple unaffiliated card issuers. *See* Paze FAQs (describing how consumers can add participating cards into the wallet from the Paze website or through the bank or credit union's digital application), *https://www.paze.com/faqs* (last visited Nov. 17, 2024); *see also* VISA Blog, *One card to rule them all* (May 16, 2024) (describing VISA plans to launch a new service in the United States allowing consumers to use their card issuer's app to ''swap funding sources'' between different accounts the consumer holds with that same issuer), *https://usa.visa.com/visa-everywhere/blog/bdp/2024/05/14/one-card-to-1715696707658.html* (last visited Nov. 7, 2024).

[277] Jack Caporal, *Credit and Debit Card Market Share by Network and Issuer* (Jan. 24, 2024) (citing Nilson Report data for 2022), *https://www.fool.com/the-ascent/research/credit-debit-card-market-share-network-issuer/* (last visited Nov. 7, 2024).

market definition. And when consumers load these cards into a third-party general-use digital consumer payment applications, the use of the cards through those apps also would be included in the market definition.

The CFPB also declines the suggestion by consumer group and nonprofit commenters that the CFPB adopt in this Final Rule a market that includes all domestic money transfers including those facilitated by telephone call and through in-person transfers not mediated by a digital application. As discussed above, a trend in the consumer payments area has been the rapid growth in general-use digital consumer payment applications including their payment wallet functionalities that do not necessarily involve domestic money transmitting. The CFPB adopts this Final Rule in response to that growth in an effort to promote compliance with Federal consumer financial law and detect and assess risks to consumers and the market, including emerging risks, and to ensure consistent enforcement of Federal consumer financial law in this area. When consumers make telephone- or in-person-based domestic payments, the CFPB has other means of assessing risks they may pose to consumers. For example, if a nonbank covered person has significant involvement in that activity through the provision of a consumer financial product or service, the CFPB can evaluate whether that poses a risk to consumers sufficient to warrant a supervisory designation under CFPA section 1024(a)(1)(C).

Further, consistent with its approach in the international money transfer larger participant rule,[278] the CFPB notes that it does not seek in this rule to define a market that covers the entire universe of consumer payment transactions that fall within the scope of the CFPB's authority under the CFPA. This larger-participant rulemaking is only one in a series, and nothing in this Final Rule precludes the Bureau from considering in future larger-participant rulemakings other markets for consumer financial products or services that might include non-digital payment activities not included in the market defined by this rule.

With regard to comments on specific aspects of the ''digital application'' definition, the CFPB agrees with the members of the nonprofit commenter that PINs and passwords may be common ways that consumers use to access general-use digital consumer payment applications. Device-specific codes called passkeys also are an increasingly common way for digital applications, including general-use digital consumer payment applications, to authenticate a consumer's identity.[279] The Final Rule therefore accounts for these examples, as described below.[280] The CFPB does not agree with the consumer group commenter to the extent it was suggesting that the prospect of future participation in the market by manufacturers of automobiles and smart appliances such as televisions and refrigerators warranted adding those types of devices to the list of example of personal computing devices in the definition of ''digital application.'' Because the proposed definition did not state that the list of examples of personal computing devices was exhaustive, other devices may qualify as personal computing devices. However, the research described in the Proposed Rule indicates that general-use digital consumer payment applications are predominantly distributed via mobile phones and computers. For that reason, it is not necessary for the regulation text to identify automobiles and smart appliances such as televisions and refrigerators as additional examples of personal computing devices. The proposed definition already was flexible enough to capture this activity if it were to become common in the future. To the extent existing market participants make their general-use digital consumer applications accessible to consumers not only via mobile phones or computers, but also via automobiles or smart home appliances manufactured by others, that activity already would fall within the market definition regardless of whether automobiles or smart home appliances qualify as personal computing devices. As the Proposed Rule noted,[281] if a consumer may access a digital application through a personal computing device, then consumers' use of the application would be included in the market regardless of whether they access the application through other means, such as a work or library computer. For that reason, the CFPB also disagrees with the members of the nonprofit commenter that suggested the rule needs to further differentiate between a personal and a public computing device. They did not point to any examples that should be classified in one category or the other.[282]

Finally, with regard to comments seeking clarification or exclusion of internet browser activities including payment autofill functions, the CFPB clarifies that the Proposed Rule was not intended to treat the operation of a web browser itself as a form of market activity.[283] As noted above, the proposed definition of ''digital application'' included several examples of software programs accessed by a personal computing device, including ''a website a consumer accesses by using an internet browser on a personal computing device.'' As that example indicates, the relevant ''digital application'' that the consumer accesses using a web browser is the website, and not the web browser itself. Excluding web browsers from the definition of ''digital application'' is consistent with the CFPB's goal of covering payment applications in the rule. While some web browsers may store and automatically populate payment forms on merchant websites with consumer payment account information, that activity alone does not convert a web browser into a payments-focused digital application that is participating in this market. Nor is the CFPB aware of market research studies or surveys on consumer payment applications that identify web browsers as competing with larger participants in the market.

Final Rule

For the reasons described above, the CFPB adopts the proposed definition of ''digital application'' with certain clarifying changes described below, including changing the term to ''digital payment application.''

[278] 79 FR 56631 at 56635–56636.

[279] *See, e.g.,* PayPal, *PayPal Introduces More Secure Payments with Passkeys* (Oct. 24, 2022), *https://newsroom.paypal-corp.com/2022-10-24-PayPal-Introduces-More-Secure-Payments-with-Passkeys* (last visited Nov. 8, 2024); Apple iPhone User Guide iOS 17, *Use passkeys to sign in to apps and websites on iPhone, https://support.apple.com/guide/iphone/use-passkeys-to-sign-in-to-apps-and-websites-iphf538ea8d0/ios* (last visited Nov. 8, 2024); Google, *Passkey support on Android and Chrome, https://developers.google.com/identity/passkeys/supported-environments* (last visited Nov. 8, 2024).

[280] However, the inclusion of these examples does not necessarily mean that a nonbank is participating in the market by providing a product or service to manage a consumer's passwords. Whether or not that activity falls within the market definition will depend on whether it is conducted by a nonbank covered person as part of providing a ''covered payment functionality'' with ''general use.''

[281] 88 FR 80197 at 80206 n.67.

[282] In addition, as explained in the discussion of general comments further above, through supervisory activity at larger participants defined in this Final Rule, the CFPB can detect and assess emerging risks to consumers, including as a result of developments in the software or personal computing devices involved in the delivery of general-use digital consumer payment applications.

[283] *See, e.g., United States* v. *Microsoft Corporation,* Case No. 98cv1232, D.D.C. (Complaint filed May 18, 1998) ¶ 6 (defining an ''internet browser'' as ''specialized software programs that allow PC users to locate, access, display, and manipulate content and applications located on the internet's World Wide Web''), *https://www.justice.gov/sites/default/files/atr/legacy/2012/08/09/1763.pdf* (last visited Nov. 8, 2024).

First, consistent with the Final Rule changing ''wallet functionality'' to ''payment wallet functionality'' for the sake of precision and clarity, the Final Rule also adopts the term ''digital payment application'' instead of the more generic term ''digital application.'' Based on how the CFPB proposed the market definition for a ''general-use digital consumer payment application,'' the concept of a ''digital payment application'' already was incorporated into the market definition itself. This conforming change to the component definition of ''digital application'' therefore aligns that term more clearly with the general market definition. Relatedly, for the reasons discussed above in the CFPB's response to comments regarding web browsers, the Final Rule clarifies that operating a web browser is not an example of providing a digital payment application.

Second, in response to a nonprofit commenter, the Final Rule adds to the list of examples of how a consumer may access a personal computing device to include other common means, such as using a personal identifier, such as a passkey, password, or PIN.

General Use

Proposed Rule

The proposed market definition would have applied to providing covered payment functionalities through a digital application for a consumer's general use in making consumer payment transactions. Proposed § 1090.109(a)(2) would have defined the term ''general use'' as the absence of significant limitations on the purpose of consumer payment transactions facilitated by the covered payment functionality provided through the digital consumer payment application. The Proposed Rule explained that the CFPB sought to confine the market definition to those digital payment applications that consumers can use for a wide range of purposes. The Proposed Rule noted how digital payment applications with general use can serve broad functions for consumers, such as sending funds to friends and family, buying a wide range of goods or services at different stores, or both. As reflected in the non-exhaustive list of examples in the Proposed Rule discussed below, other consumer financial products and services provide payment functionalities for more limited purposes. While those other products and services also serve important functions for consumers, they do not have the same broad use cases for consumers. As a result, in the Proposed Rule, the CFPB viewed those products as participating in a market or markets distinguishable from a market from general-use digital consumer payment applications.

The proposed definition of general use would have clarified that a digital consumer payment application that would facilitate person-to-person, or peer-to-peer (P2P), transfers of funds would have qualified as having general use under the Proposed Rule. Even if a payment functionality provided through a digital application is limited to P2P payments, and that constitutes a limitation on the purpose of payments, that limitation would not have been a significant limitation for purposes of the proposed market definition. For example, a P2P application that permits a consumer to send funds to any family member, friend, or other person would have qualified as having general use, even if that P2P application could not be used as a payment method at checkout with merchants, retailers, or other sellers of goods or services. A P2P application also would have qualified as having general use even if it can only transfer funds to recipients who also register with the application provider, or otherwise participate in a certain network (which the Proposed Rule noted some refer to as ''closed loop'' P2P systems). As the Proposed Rule noted, although the network of potential recipients in such a system may be limited in certain respects, often any potential recipient may have the option of joining such a system (and many consumers already may have joined such systems), so the universe of potential recipients for such payments often is still broad. The Proposed Rule also stated that a digital consumer payment application still may have qualified as having general use even when the universe of potential recipients for a funds transfer is fixed, such as when a consumer can only make a transfer of funds to friends or family located in a prison, jail, or other secure facility.[284]

To provide clarity as to the proposed market definition, the proposed definition of general use would have included examples of limitations that would be significant for purposes of the proposal, such that a covered payment functionality offered through a digital consumer payment application with such limitations would not have had general use.[285] The examples would have illustrated some types of digital consumer payment applications that would not have had general use. The list of examples was not exhaustive, and other types of digital consumer payment applications would not have had general use to the extent they cannot be used for a wide range of purposes.

In addition, the Proposed Rule noted that some payment functionalities may be provided through two different digital consumer applications. For example, from a merchant's ecommerce digital application, a consumer may click on a payment button that links to a third-party general-use digital consumer payment application, where the consumer authenticates their identity and provides payment instructions or otherwise authorizes the payment. Even if the merchant's digital application itself would not have qualified as having general use, the consumer's use of the third-party general-use digital consumer payment application still would have constituted covered market activity with respect to the third-party provider.

The first example of a payment functionality with a significant limitation such that it would not have general use would have been a digital consumer payment application whose payment functionality is used solely to purchase or lease a specific type of services, goods, or property, such as transportation, lodging, food, an automobile, a dwelling or real property, or a consumer financial products and service.[286] The Proposed Rule listed this

[284] Such funds may be available to the recipient for a variety of purposes, including to purchase food, toiletries, medical supplies, or phone credits while incarcerated, and, if not used by the recipient while incarcerated, may revert upon release to an unrestricted account. *See, e.g.,* CFPB Report, *Justice-Involved Individuals and the Consumer Financial Marketplace* (Jan. 2022), sec. 3.1 (n.87 describing uses of these types of funds transfers) and sec. 4.1 (describing how, as observed in a CFPB enforcement action and an investigative report on prison release cards, ''[w]hen released, people exiting jail receive the money they had when arrested, and prisons disburse the balance of a person's commissary account, including wages from prison jobs, public benefits, and money sent by friends and family.''), *https://files.consumerfinance.gov/f/documents/cfpb_jic_report_2022-01.pdf* (last visited Oct. 23, 2023).

[285] The Proposed Rule includes these examples to illustrate the scope of the term ''general use'' in the Proposed Rule, and thus the scope of the proposed market definition. The examples are not a statement of the CFPB's views regarding the scope of its authority over consumer financial products and services under the CFPA.

[286] For example, when a consumer uses a payment functionality in a digital application for a consumer financial product or service to pay for that consumer financial product or service, such as by providing payment card information to a credit-monitoring app to pay for credit-monitoring services, this limited purpose for that payment functionality would not have had general use under the Proposed Rule. The term ''consumer financial product or service'' is defined in CFPA section 1002(5) and includes a range of consumer financial products and services including those in markets

Continued

example in paragraph (A) of the proposed definition of general use.

Second, as indicated in paragraph (B), accounts that are expressly excluded from the definition of ''prepaid account'' in paragraphs (A), (C), and (D) of § 1005.2(b)(3)(ii) of Regulation E [287] also would not have had general use for purposes of the Proposed Rule. Those provisions in Regulation E exclude certain tax-advantaged health medical spending accounts, dependent care spending accounts, transit or parking reimbursement arrangements, closed-loop accounts for spending at certain military facilities, and many types of gift certificates and gift cards. The Proposed Rule explained that, while these types of accounts may support payments through digital applications with varied purposes to different types of recipients, the accounts remain sufficiently restricted as to the purpose to warrant exclusion from the proposed market.

Third, as indicated in proposed paragraph (C), a payment functionality provided through a digital consumer payment application that solely supports payments to pay a specific debt or type of debt or repayment of an extension of consumer credit would not have qualified as having general use. For example, a consumer mortgage lender's mobile app or website may provide a functionality that allows a consumer to pay a loan. Or a debt collector's website may provide a means for a consumer to pay a debt. These digital consumer payment applications have a use that is significantly limited, to only pay a specific debt or type of debt. In general, digital applications that solely support payments to specific lenders, loan servicers, and debt collectors would not have fallen within the proposed market definition.[288] The Proposed Rule noted that the CFPB considers such digital applications generally to be more part of the markets for consumer lending, loan servicing, and debt collection. The CFPB has issued separate larger participant rules for such markets and CFPA section 1024(a) also grants the CFPB supervisory authority over participants in certain lending markets, including mortgage lending, private student lending, and payday lending. In addition, other digital applications may only help a consumer to pay certain other types of debts, such as taxes or other amounts owed to the government, including fines. Under this proposed example, those payment functionalities provided through those applications also would not have qualified as having general use.

Fourth, as indicated in proposed paragraph (D), a payment functionality provided through a digital application that solely helps consumers to divide up charges and payments for a specific type of goods or services would have been excluded. Some payment applications, for example, may be focused solely on helping consumers to split a restaurant bill. This example is a corollary of the example in paragraph (A). Since a payment functionality limited to paying for food would not have qualified as having general use under paragraph (A), paragraph (D) would have clarified that a payment functionality that enables splitting a bill for food have also would not have qualified as having general use.

The CFPB requested comment on the proposed definition of general use and examples of significant limitations that take a payment functionality provided through a digital consumer application out of the general use category. The CFPB also requested comment on whether the examples of significant limitations should be changed or clarified, and whether additional examples of significant limitations should be included, and if so, what examples and why.

Comments Received

Some commenters stated that the proposed ''general use'' limitation was excessively ambiguous or uncertain, though they did not agree on how to clarify the definition. For example, two industry associations criticized defining ''general use'' as the ''absence of significant limitations on the purpose of consumer payment transactions facilitated by the covered payment functionality'' on the ground that that standard was ambiguous and that the associated examples in the proposed definition did not provide sufficient guidance to ascertain the scope of ''general use.'' These commenters stated that additional clarification or limitations on the definition were necessary, and that if the Final Rule did not clarify this term, then firms would incur unnecessary costs and confusion as to whether they need to prepare their compliance management systems for CFPB supervision. Similarly, another industry association criticized the definition of ''general use'' as ambiguous, and suggested that such ambiguity would generate confusion for providers. The commenter suggested clarifying how the definition applies to diverse features and functionalities within payment applications. An individual commenter stated that the proposal did not clearly define ''general use'' and suggested that the rule instead adopt a bright-line test, providing that general use means use with more than 100 merchants, 10 platforms, or 5 different purposes. A nonprofit commenter stated that while a vast majority of its members approved of the proposed definition of ''general use,'' a majority also recommended adding examples to the definition. A payments industry firm stated that the rule should clarify the example described in proposed paragraph (B) related to certain gift cards and other products and services that do not have general use.[289] Finally, a comment from consumer groups stated that the Rule should clarify that online marketplace payment functions meet the definition of ''general use'' (and not exclude them from the definition of ''consumer payment transactions'' included in the market as discussed above). These commenters also stated that the Final Rule should clarify that if a payment app aimed at servicemembers is not eligible for the narrow Regulation E exclusion cited in paragraph (B) of the proposed definition of ''general use,'' then it would meet the definition of ''general use.'' [290]

In addition, commenters had differing views regarding the appropriateness of the breadth of the proposed definition of ''general use.'' Some commenters agreed with the breadth of ''general use'' or suggested it should be expanded. For example, the comment from consumer groups expressed general support for the

that the CFPB supervises, described in the Proposed Rule, as well as other consumer financial products and services outside of supervised markets over which the CFPB generally has enforcement and market-monitoring authority. *See generally* 12 U.S.C. 5481(5) (definition of ''consumer financial product or service'') and 12 U.S.C. 5481(15) (definition of ''financial product or service'').

[287] 12 CFR 1005.2(b)(3)(ii).

[288] By contrast, as noted in the section-by-section analysis of the proposed exclusion in paragraph (C) of the definition of a ''consumer payment transaction,'' if a consumer uses a general-use digital consumer payment application as a method of making a payment to such a payee, that general-use digital consumer payment application would have been participating in the market for those consumer payment transactions.

[289] Specifically, this commenter requested that the CFPB clarify that the definition of ''general use'' also excludes certain types of cards, codes, and other devices described in Regulation E section 1005.20(b). It stated that the Proposed Rule was unclear on this point because it referred only to an account described in Regulation E section 1005.2(b)(3)(ii)(D). Regulation E section 1005.20(b) describes cards, codes, and other devices that are excluded from Regulation E section 1005.20(a), which defines the accounts identified in 1005.2(b)(3)(ii)(D). As a result, in its view there is uncertainty over whether the CFPB views those cards, codes, and devices has having general use. In its view, section 1005.20(b) refers to certain types of cards, codes, and other devices with limited uses and the CFPB should confirm those types of cards, codes, and other devices to do not have general use.

[290] The comment did not provide an example or state whether such consumer financial products or services currently exist.

definition, which they characterized as appropriately broad. Several consumer group and nonprofit comments expressed support for the definition of ''general use'' based on how the proposed term reflected what they described as the broad functions of services to transfer funds to people who are incarcerated. Some of these commenters added that some large companies provide app-based money transfers both to people who are incarcerated and to people who are not.[291] In addition, without directly addressing the exclusion in paragraph (D) of the definition of ''general use'' for payment functionalities solely to split a charge for a specific type of goods or services, an industry association stated that consumers use general-use digital consumer payment applications for, among other purposes, paying expenses informally split between consumers. An industry association suggested that at least in certain ways, the proposed definition of ''general use'' unduly narrowed the market because it excluded digital applications that help consumers to make payment for the same types of purchases, such as food and automobiles, using the same underlying payment methods as applications that meet the proposed definition of ''general use.''

On the other hand, several industry commenters stated that the proposed definition of ''general use'' was too broad and that it should be narrowed in various ways. These comments generally stated that the ''general use'' limitation on the proposed market definition did not adequately limit the scope of the market definition in the context of payments for consumer purchases, in the context of peer-to-peer payments, or both.

In the context of digital payments for purchases, two industry associations stated that the rule should exclude from ''general use'' what it called ''closed-loop transactions'' which it described as transactions that can only occur at a ''finite'' group of merchants. These comments stated that the exclusion should be consistent with the CFPB's understanding of ''closed-loop transactions'' in the context of its prepaid account rule under Regulation E.[292]

In the context of digital peer-to-peer payment applications or functionalities, several industry and other commenters stated that the proposal's approach to defining ''general use'' was too broad. A nonprofit stated that the Proposed Rule incorrectly treated any peer-to-peer funds transfer functionality as having general use. Another nonprofit stated that peer-to-peer payment applications should not have general use unless also enabled for purchases. In its view, the absence of a purchase functionality constitutes a ''significant limitation'' within the meaning of the proposed definition of ''general use.'' Another industry association stated that the Proposed Rule should not have classified a peer-to-peer payment application as having general use when it restricts the universe of payment recipients to other persons who are registered users of the same application. Finally, several industry trade associations stated that the Proposed Rule was internally inconsistent by treating a payment functionality used exclusively by people who are incarcerated to make commissary purchases as having ''general use'' while simultaneously excluding payment functionalities provided solely for purchase of certain types of goods, services, or other property, such as food.[293] Two trade associations also suggested that the Proposed Rule's assessment that persons who are incarcerated may put funds received to general use in a closed environment is inconsistent with how the CFPB views closed-loop prepaid cards under, Regulation E. Another industry association stated that a payment functionality for people who are incarcerated to pay for goods and services does not have ''general use'' within its conventional meaning.[294]

Response to Comments Received

With respect to comments that the proposed definition of ''general use'' was excessively ambiguous or uncertain, the CFPB also shares the commenters' goal of reducing ambiguity and uncertainty in the definition of ''general use.'' Accordingly, the CFPB declines to adopt the proposal to define ''general use'' as the absence of significant limitations on the purposes of a consumer payment transactions facilitated by the covered payment functionality provided through the digital consumer payment application. Instead, as discussed further below, the Final Rule adopts an alternative standard for defining ''general use'' as usable to transfer funds in a consumer payment transaction to multiple unaffiliated persons, with limited exceptions.

With respect to comments on the breadth of the term ''general use,'' the CFPB believes that the definition of ''general use'' adopted in this Final Rule is appropriately broad given the characteristics of the market defined in this Final Rule. The term encompasses digital consumer payment applications capable of being used for a range of purposes such as sending funds to friends and family, buying a range of goods or services at different stores, or both. As discussed above in response to comments on the market definition in § 1090.109(a)(1), treating those functions as part of a single market is consistent with the CFPB's experience and expertise, the views of certain other market observers, and with common consumer user experience.

In response to the commenter that raised concerns about the rule including a ''general use'' limitation at all, the CFPB notes that the ''general use'' limitation reduces the breadth of the market, which the commenter stated already was overly broad. The CFPB also declines to drop the ''general use'' limitation based on that industry association's comments suggesting that this limitation impermissibly excludes economic substitutes. The commenter cited examples of food delivery applications and automobile purchase

[291] In addition, they stated that the ''general use'' of these payment systems is reflected in the significant number of people who are incarcerated (nearly two million at any one time with one estimate that people were incarcerated nearly seven million times in 2021), broad available uses those people have for transferring the funds while they are incarcerated, and the universal acceptance of release cards loaded with funds remaining at the time of release. As discussed in the section-by-section analysis of the comments on the proposed definition of ''digital application,'' these commenters also called for expansion of the market to include the full range of payment services that support payments to people while incarcerated, payments by people while incarcerated, and payments by people who are recently released from incarceration using payment cards issued upon release. They added that these products and services pose large risks to consumers, due to, among other features, high fees and the lack of competition for such products and services.

[292] While these commenters quoted a description of ''closed-loop prepaid cards'' they stated came from the CFPB's rules concerning prepaid accounts, the citation they identified is to a CFPB website that contains consumer education materials regarding general-use prepaid cards, prepaid gift cards, and other prepaid cards at *https://www.consumerfinance.gov/consumer-tools/prepaid-cards/answers/key-terms* (last visited Nov. 17, 2024).

[293] In addition, they stated that the proposal's different treatment of these examples created confusion about the identity of the estimated 17 larger participants. The CFPB discusses comments on that issue in the section-by-section analysis of the larger-participant test below.

[294] Some of these commenters further claimed the cost-benefit analysis did not consider potential impacts on money transfer services for incarcerated people, which they considered to be a distinct product market. In the response to general comments above, the CFPB responds to comments calling for the CFPB to divide the proposed market into separate markets for purposes of this rulemaking. The impacts analysis in part VII further explains how it analyzes the impacts in the market adopted in the Final Rule.

applications that facilitating payments that consumers also can make through payment functionalities that have general use.[295]

The CFPB similarly declines the consumer group comments suggesting that the Final Rule clarify that marketplaces meet the definition of ''general use.'' Regardless of whether they meet that definition, for the reasons discussed in the section-by-section analysis of ''consumer payment transaction'' above, the Final Rule adopts the proposed exclusion in paragraph (C) of the definition of that term for marketplace payment functionalities.

The CFPB disagrees with the industry and nonprofit comments stating that the CFPB should adopt a narrower definition of ''general use'' that would exclude some or all peer-to-peer payment applications. Like a payment functionality that can be used to pay two or more unaffiliated merchants, a peer-to-peer payment functionality enables transfers for consumer payment transactions to multiple, unaffiliated individuals. Thus, it is appropriate to for payment functionalities that solely support payments to friends and family to fall within the definition of ''general use'' in the Final Rule. In addition, the market increasingly bundles both types of payments and many peer-to-peer payment functionalities can be used formally or informally to make payments for purchases. Defining the market based on the status of the recipient as a consumer or a business, as the commenter suggests, would be inconsistent with how the market has evolved, as further discussed above in the response to comments on the market definition in § 1090.109(a)(1).

In addition, peer-to-peer digital consumer payment applications often support payments to millions if not tens of millions of other users including in some circumstances that industry describes as a ''closed loop'' system. For example, even in such a system, often any adult consumer who can pass identity verification can enroll to receive funds.[296] The Final Rule therefore does not treat the need for a recipient to sign up for an account to receive funds as a basis for excluding the corresponding covered payment functionality from the definition of ''general use.'' This approach also promotes consistent oversight of consumer financial products and services that allow consumers to send funds to other consumers, without regard to whether they operate through depository institutions.[297]

The CFPB declines to adopt the suggestion by some industry commenters that the Final Rule exclude payment functionalities based on whether they are limited to use at what the industry association commenters described as a ''finite'' number of merchants. The term ''finite'' is not a workable standard for this Rule, and the CFPB disagrees with the industry commenters' further suggestion that if it does not adopt that exclusion (or an exclusion for some other definite number), the rule would have the paradoxical effect of treating the universe of potential recipients in closed-loop payment systems for retail spending as infinite. These comments did not recognize that paragraph (B) of the proposed definition of ''general use'' already excluded closed-loop gift cards.[298] And the comment did not provide a justification for this Rule to adopt a broader exclusion, such as for payment functionalities usable at multiple unaffiliated merchants. The CFPB also disagrees with the individual commenter that the Rule should define ''general use'' based on the reaching a specific quantity of merchants, platforms, and purposes. The commenter did not provide any justification for the specific numbers of merchants, platforms, and purposes they proposed. In addition, the range of goods and services offered by an individual merchant can vary widely across merchants. As a result, the number of merchants where a consumer can make purchases is not necessarily an indicator of ''general use.'' However, the CFPB agrees that additional clarification may be helpful as to whether the type of payment account excluded from Regulation E (by virtue of only being usable at a single merchant or its affiliates) also would be excluded from the market definition here based on lacking ''general use.'' The CFPB provides those clarifications below in the discussion of the revised definition of ''general use'' adopted in Final Rule.[299]

Finally, the CFPB does not agree with the industry firm commenter that the Proposed Rule created significant uncertainty as to whether certain cards, codes, or other devices described in Regulation E section 1005.20(b) would have general use for purposes of this rule. No other commenter raised this issue, and the commenter that raised the issue did not explain why it believed that the CFPB would view all of the cards, codes, or other devices described in Regulation E section 1005.20(b) as

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[295] For the reasons described at the outset of the section-by-section analysis above, the CFPB disagrees with the industry association comment that concluded that antitrust law governs how the CFPB must define larger participants in a market for consumer financial products or services pursuant to CFPB section 1024(a)(1)(B). In addition, as discussed further above, the CFPB disagrees that it would be appropriate for the market to include merchant and marketplace payment functionalities described by the exclusion in paragraph (C) of the definition of ''consumer payment transaction.''

[296] *CFPB Deposit Insurance Spotlight, supra* (''In closed loop systems, transactions are enabled through a single provider. Under this model, both payer and receiver must have an account with the same provider to complete the payment.'').

[297] *See also* Julian Morris, *Peer-to-Peer and Real Time Payments: A Primer,* Int'l Ctr. For Law & Econ. (Aug. 21, 2023) (generally describing how ''closed loop'' is more of an indicator that the platform may operate outside of the banking system), *https://laweconcenter.org/resources/peer-to-peer-and-real-time-payments-a-primer/* (last visited Oct. 24, 2024). The Final Rule also does not define ''general use'' by reference to peer-to-peer payment systems that may be described as ''closed loop'' because usage of the term ''closed loop'' in that context varies and the market is rapidly evolving. *See, e.g., CFPB Deposit Insurance Spotlight, supra* (describing how ''[c]losed loop payment systems are often connected to traditional open loop systems, so funds can be deposited or withdrawn out of the closed loop system.''); *Getting the U.S. Banking Market Ready for Instant Payments,* PaymentsJournal (May 21, 2024) (''In other parts of the world, fintechs have taken the lead by converting their closed-loop stored value wallet propositions and making them interoperable on the back of real-time payment systems. U.S. fintechs have the same opportunity.''), *https://www.paymentsjournal.com/getting-the-u-s-banking-market-ready-for-instant-payments/* (last visited Nov. 8, 2024); VISA, *In 2024, payments to get global, open, tailored and interoperable* (Dec. 15, 2023) (describing how ''money-moving apps and wallets'' operating within their own ''siloed ecosystem . . . is beginning to change. With payments players prioritizing interoperability, we will soon see a more seamless future-state of global money movement—one where paying across services is as seamless as using any one service''), *https://usa.visa.com/visa-everywhere/blog/bdp/2023/12/14/in-2024-payments-1702577675756.html* (last visited Nov. 8, 2024); VISA, *Introducing Visa+* (describing new Visa+ product launched in the United States where ''users set up one payname in their preferred wallet, and pay or get paid regardless of the participating app their peers use.''), *https://usa.visa.com/products/visa-plus.html.* (last visited Nov. 8, 2024).

[298] In describing the exclusion they were seeking, these commenters referred to a description of ''closed-loop prepaid cards'' without acknowledging that term included gift cards, which the Proposed Rule already proposed to exclude in paragraph (B) of the definition of ''general use.'' *See also* CFPB, Final Prepaid Account Rule, 81 FR 83934, 83936 (Nov. 22, 2016) (explaining how ''consumers can only use funds stored on closed-loop prepaid products at designated locations (*e.g.,* at a specific merchant *or group of merchants in the case of certain gift cards;* within a specific transportation system in the case of transit cards)'') (emphasis added).

[299] The Final Rule does not adopt the consumer group suggestion of clarifying that online marketplace payment functionalities have ''general use'' because, for the reasons discussed in the section-by-section analysis of ''consumer payment transaction'' above, the Final Rule does not drop the exclusion in paragraph (C) of the definition of that term. The requested clarification would create confusion, suggesting online marketplace payment functionalities excluded by paragraph (C) are covered by the definition of ''general use.''

having general use, especially in light of the other examples of accounts that would not have general use described in proposed paragraph (B). In any event, the CFPB disagrees that Regulation E section 1005.20(b)(2) describes accounts that would not have general use for purposes of this rule. Section 1005.20(b)(2) describes general-purpose reloadable cards that are not marketed as gift cards or gift certificates. But the absence of gift marketing does not render these cards lacking in general use, and if they are loaded into a general-use digital consumer payment application, then they may fall within the market definition.

Final Rule

In response to the comments analyzed above, the CFPB includes the proposed term ''general use'' in the Final Rule but defines it differently than the proposal did. Rather than adopting the proposal to define ''general use'' using the ''absence of significant limitations on the purpose'' standard and providing illustrative examples of activities that would or would not meet the standard, the Final Rule adopts an alternative standard that is clearer and more administrable, along with specific, enumerated exceptions. This approach addresses comments as discussed above and described below.

For purposes of the Final Rule, ''general use'' is defined as usable for a consumer to transfer funds in a consumer payment transaction to multiple, unaffiliated persons. The CFPB is adopting this new standard because it is clearer and more administrable, and more closely aligns with the similar concept in Regulation E.[300] The definition is subject to specific exceptions as described below.

This approach is based upon similar concepts in Regulation E, and therefore improves clarity and reduces uncertainty. For example, Regulation E defines a prepaid card that has ''general use'' for purchases based on being ''[r]edeemable upon presentation at multiple, unaffiliated merchants for goods and services[.]'' [301] Similarly, under the Final Rule, a payment functionality that facilitates payments to multiple, unaffiliated merchants for goods and services also would have ''general use,'' unless an exception applies. Also similar to Regulation E, a payment functionality would not meet the definition of ''general use'' in the Final Rule if the consumer payment transactions it facilitates are solely for a single merchant and its affiliated companies.

In addition, consumers use digital consumer payment applications to transfer funds from additional types of payment methods beyond prepaid cards (*e.g.,* other prepaid accounts, bank accounts, and credit cards) and to make payments to additional types of entities beyond merchants. Therefore, the CFPB does not view Regulation E as encompassing the full scope of activity that market participants include within their general-use digital consumer payment applications. For that reason, the Final Rule does not adopt the precise phrase used to define ''general use'' in the Regulation E definition of prepaid cards, which generally facilitate purchase transactions from merchants. The Final Rule instead adopts the phrase ''multiple, unaffiliated persons'' to define the universe of potential recipients of transfers of funds that determine whether a payment functionality has ''general use.'' [302] If a covered payment functionality facilitates consumer payment transactions to multiple unaffiliated entities that are not merchants, it would qualify as having ''general use,'' unless an exception applies. Further, if a covered payment functionality facilitates consumer payment transactions to multiple individuals such as family or friends not acting as merchants, that covered payment functionality still would qualify as ''general use'' for purposes of the Final Rule, unless an exception applies.[303] Although this approach includes many common peer-to-peer transfer systems in the definition of ''general use,'' the CFPB disagrees with the industry commenters that this indicates the definition is too broad.[304] As discussed above, given their mixed use, these covered payment functionalities often facilitate consumer payment transactions to sole proprietors and other small businesses anyway.

With regard to the list of examples in proposed paragraphs (A)–(D) that would not have met the proposed definition of ''general use,'' as described below, some are not adopted in the Final Rule because it already excludes them in other ways, others are maintained with modifications, and two are not adopted because the Final Rule includes the corresponding examples in the market.

First, the Final Rule need not adopt proposed paragraph (A) because the CFPB understands that other revisions the Final Rule would make the exclusion in proposed paragraph (A) unnecessary.[305] First, the Final Rule need not adopt proposed paragraph (A) because the CFPB understands that other revisions the Final Rule would make the exclusion in proposed paragraph (A) unnecessary. Specifically, if a merchant or marketplace sells or leases only specific types of goods, services, or other property, then a payment functionality that is limited to facilitating payments to that merchant or marketplace already would be excluded from the Final Rule for other reasons. For example, the definition of ''general use'' in the Final Rule already does not cover a payment functionality that facilities consumer payment transactions solely by facilitating a purchase from a single merchant or its affiliated companies, including a merchant providing any of the types of goods, services, or other property listed in proposed paragraph (A).[306] Such activities do not facilitate payments to ''multiple, unaffiliated persons'' in the definition of ''general use.'' In addition, to the extent an online marketplace

[300] The term ''general use'' in the Final Rule has certain similarities to terms in Regulation E, 12 CFR part 1005, but differs in some substantive respects as specified below. Usage, or omission, of specific language from EFTA or Regulation E in the Final Rule is not an endorsement by the CFPB of any specific interpretation of EFTA or Regulation E.

[301] 12 CFR 1005.20(a)(3)(ii).

[302] *See also* Regulation E, 12 CFR 1005.2(b)(3)(i)(D)(*2*) (defining ''prepaid account'' to include accounts with the ''primary function [ ] to conduct person-to-person transfers'').

[303] The CFPA defines ''affiliate'' in section 1002(1) on the basis of a control relationship between two persons. Two consumers generally would not qualify as ''affiliates'' because they generally do not ''control'' one another for purposes of the CFPA.

[304] A number of industry commenters suggested the proposed definition was too broad because the Proposed Rule stated that a covered payment functionality dedicated to transferring funds to incarcerated people may have ''general use'' based on recipients' ability to use transferred funds for purchase of a variety of types of goods, even when those uses might not be subject to Regulation E. The Final Rule does not adopt that approach because the definition of ''general use'' in the Final Rule does not depend on the uses of funds by payment recipients.

[305] This approach also makes the definition of ''general use'' more consistent with similar concepts in Regulation E. Under paragraph (A) in the proposed definition of ''general use,'' a payment functionality that solely supports the purchase or lease of a specific type of services, goods, or other property from multiple, unaffiliated merchants would not have had ''general use.'' However, the relevant provisions of the definitions of ''prepaid account'' and ''general-use prepaid card'' in Regulation E apply to accounts redeemable at multiple unaffiliated merchants, regardless of whether they sell the same specific type of services, goods, or other property. 12 CFR 1005.2(b)(3)(i)(D)(*2*) & 1005.20(a)(3)(ii). By not including that exception, the definition of ''general use'' in the Final Rule is more consistent with Regulation E, which contains no such exclusion from the definition of ''general-use prepaid card'' or ''prepaid account'' discussed above.

[306] The definition of ''general use'' in the Final Rule also does not include a payment functionality that facilitates consumer payment transactions solely to purchase consumer financial products or services from a single provider and their affiliated companies.

operator's payment functionality facilitates payments to multiple, unaffiliated persons for the purchase of goods or services a consumer selects from the online marketplace (including a marketplace offering only specific types of goods or services), the online marketplace operator's conduct of those payment transactions already would be excluded from the definition of ''consumer payment transaction'' as described above.

Second, the Final Rule adopts other examples described in proposed paragraphs (B) and (C) with certain modifications described below for clarity. In paragraph (B) of the proposed definition of ''general use,'' the CFPB proposed to exclude using certain accounts described in Regulation E section 1005.2(b)(3)(ii)(A), (C), and (D), which Regulation E excludes from the definition of ''prepaid account.'' The CFPB did not receive any comments agreeing or disagreeing with the exclusions described in proposed paragraph (B).[307] Notwithstanding the adoption of a more specific definition of ''general use'' described above, the CFPB does not view these types of highly-specialized payment functionalities as having ''general use'' for purposes of this rule. For the reasons explained in the Proposed Rule as described above, the Final Rule therefore maintains these exclusions by listing them as exceptions.

In addition, the Final Rule adopts the exception in proposed paragraph (C) to pay a specific debt or type of debt. The Final Rule also clarifies that this exception excludes additional examples beyond loan servicing functionalities that facilitate repayment of extensions of consumer credit. The Final Rule states that this exception excludes payment functionalities provided solely for paying the following two types of debts: (*1*) Debts owed in connection with origination or repayment of an extension of consumer credit; or (*2*) Debts in default. Through these exceptions, the Final Rule separates the market it defines from other distinct markets as described below. It therefore does not include those payment functionalities in the definition of this market. With respect to the type of debts described in paragraph (*1*), just as the Proposed Rule did not seek to cover loan servicing such as the servicing of mortgage loans (which is part of the mortgage market), it also did not seek to cover payment functionalities that facilitate payments made in connection with origination of a mortgage loan (such as payments through closing or escrow accounts maintained by providers of real estate settlement services described in CFPA section 1002(15)(A)(viii)).[308] The revised exception clarifies this. In addition, in paragraph (*1*), the Final Rule specifies the payment of debts in default as a second type of debt payment functionality that is excluded by paragraph (B). Specifically, consumers may pay debts in default through a debt collector as defined in 15 U.S.C. 1692a(6).[309] As noted in part III above, the CFPB already has issued a rule defining larger participants in a market for consumer debt collection, and may supervise service providers to such persons under CFPA section 1024(e). And consumers may repay extensions of credit or debts in default through a debt settlement firm as described in CFPA section 1002(15)(A)(viii)(II).[310] The CFPB also views the market for debt relief services as separate from the market for general-use digital consumer payment applications.[311]

Third, for the reasons described below, the Final Rule does not exclude the example described in proposed paragraph (D) for splitting charges for specific types of goods or services. As the industry association comment described above noted, consumers can use general-use consumer payment applications to make payments for split expenses. For example, a consumer may transfer funds to a friend or family member as reimbursement for food or other expenses. Whether the provider markets its digital application primarily for that use, or for other uses, it can meet the definition of ''general use'' adopted in this Final Rule. The CFPB does not believe this change significantly affects the market-related estimates discussed in the section-by-section analysis of the larger-participant test below or the impacts analyses in part VII below. For example, online marketplaces may help consumers to split bills and make associated payments in circumstances that already are excluded from the definition of ''consumer payment transaction.'' [312] In addition, other products and services marketed as ''bill splitting apps'' may help consumers to calculate the amount each consumer will pay, but either do not help consumers to make the associated payments or refer consumers to a third-party's general-use digital consumer payment application to make the associated payments.

Finally, the CFPB reiterates that each of the exceptions from the definition of ''general use'' in paragraphs (A) through (C) of the Final Rule is for a payment functionality provided through a digital application solely to support payments of the type listed in the exception. If a nonbank provides a payment functionality through a digital application to support one of the types of payments in paragraphs (A) through (C), but also to support peer-to-peer transfers to other accountholders generally, then it would still have general use, as described above.

State

Proposed § 1090.109(a) would have defined the term ''State'' to mean any State, territory, or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico; or any political subdivision thereof. For consistency, the CFPB proposed to use the same definition of ''State'' as used in the international money transfer larger participant rule, § 1090.107(a), which drew its definition from Regulation E subpart A.[313] The CFPB requested comment on the proposed definition of State. No commenters addressed this aspect of the Proposed Rule, which the Final Rule adopts as proposed.

109(b) Test To Define Larger Participants

Proposed § 1090.109(b) would have set forth a test to determine which

[307] As noted above, two industry associations expressed general support for excluding closed-loop transactions in a manner consistent with Regulation E. In addition, while acknowledging the exclusion for using accounts described in 12 CFR 1005.2(b)(3)(ii)(C), some consumer groups suggested that the Final Rule should clarify that other payment apps directed at servicemembers can have ''general use.'' Subject to the exceptions discussed here, the definition of ''general use'' in the Final Rule applies when to a covered payment functionality that facilitates payments to multiple, unaffiliated persons, regardless of whether the functionality is directed at servicemembers. In addition, as discussed above, one commenter sought clarification regarding how the CFPB reads the exclusion for using accounts described in 12 CFR 1005.2(b)(3)(ii)(D), which the CFPB discusses above.

[308] 12 U.S.C. 5481(15)(A)(iii). Real estate settlement services generally are part of a distinct market for mortgage lending that is subject to additional applicable Federal consumer financial laws such as the Real Estate Settlement Procedures Act, 12 U.S.C. 2601 *et seq.*

[309] Fair Debt Collection Practices Act, 15 U.S.C. 1692a(6).

[310] 12 U.S.C. 5481(15)(A)(viii)(II) (one type of ''financial product or service'').

[311] Debt settlement is part of a distinct market that is subject to additional applicable Federal consumer financial laws such as the Telemarketing Sales Rule. 16 CFR part 310.

[312] For example, if a consumer selects food for purchase by placing a restaurant order through an online marketplace platform operator that also conducts transactions to split the bill for that purchase, such activity may qualify for the exclusion in paragraph (C) of the definition of ''consumer payment transaction.''

[313] *See* International Money Transfer Larger Participant Final Rule, 79 FR 56631 at 56641.

nonbank covered persons are larger participants in a market for general-use digital consumer payment applications as described in proposed § 1090.109(a). Under the proposed test, a nonbank covered person would have been a larger participant if it meets each of two criteria set forth in paragraphs (1) and (2) of proposed § 1090.109(b) respectively. First, paragraph (1) specified that the nonbank covered person must provide annual covered consumer payment transaction volume as defined in paragraph (3) of proposed § 1090.109(b) of at least five million transactions. Second, paragraph (2) specified that the nonbank covered person must not be a small business concern based on the applicable SBA size standard listed in 13 CFR part 121 for its primary industry as described in 13 CFR 121.107. The Final Rule summarizes and responds to comments about the test in the section-by-section analysis of this proposed definition below.[314]

Comments Received

Comments from two industry providers, two trade associations, and some Members of Congress commenters stated that the description in the Proposed Rule of the confidential data it relied upon was insufficient to allow for meaningful comment. As described below, these comments generally focused on two types of data the Proposed Rule did not release: confidential data about market participants' activities that the CFPB used to estimate their larger participant status, and, relatedly, the identities of the individual entities included in the Proposed Rule's estimate of the number of market participants that would qualify as larger participants.

With regard to the proposal's estimate of 17 larger participants, several Members of Congress criticized the Proposed Rule for not identifying the individual firms included in the estimate. They stated that the Proposed Rule was not specific enough to allow the public to identify larger participants, which they stated was necessary for the public to understand the implications of the proposal and to provide comprehensive feedback on its impact. A group of industry associations also stated that uncertainty in the proposed definition of ''general use'' left uncertainty about the identities of firms included in the estimate. Meanwhile, a banking industry association suggested that, separate from the rulemaking, the CFPB should publish a list of larger participants that are subject to supervision to help consumers and industry to better evaluate their relationships with these nonbanks.

Some of these industry commenters also stated that the CFPB should release information about the confidential transaction data for individual firms that it used to make its estimates concerning the number of larger participants and their share of market participant that the Proposed Rule used in support of the proposed threshold. Two of these comments stated that the CFPB must release the data it relied upon, while the other comment called for releasing what it called a sanitized version of the NMLS data it used. One indicated that it needed such additional information to comment on the Proposed Rule's estimate of the percentage of the market that larger participants comprised. This commenter also noted the acknowledgment in the Proposed Rule that the NMLS data may be overinclusive or underinclusive, and its acknowledgment about the lack of sufficient data to estimate larger participant status for certain market participants. Some of these commenters added that, in their view, more than 17 companies would qualify as larger participants, due in significant part to the inclusion of pass-through payment wallet functionalities within the market definition.

Another industry association stated more generally that the Proposed Rule was not sufficiently transparent and that the rulemaking needs to provide more comprehensive information and justification for the threshold, which it stated should be sector-specific.[315]

Response to Comments Received

The CFPB disagrees with commenters that the Proposed Rule did not provide sufficient information for commenters to offer meaningful comment. As discussed in the proposal and further below, the CFPB provided commenters with extensive information about the data and other evidence supporting the rule to enable informed comment, including the sources of data, the CFPB's methodology for analyzing the data, descriptions of market concentration, and the limitations of the data. While the Proposed Rule did not disclose entity-level transaction volume and revenue data, entities in this market generally keep this information confidential and do not disclose it to the public.[316] The Bureau has routinely gathered this information in carrying out its statutory functions with the understanding that such information will be kept confidential consistent with the CFPA and its implementing rules.

Congress anticipated that the CFPB would collect and rely on confidential data from a variety of sources to support its rulemaking and other statutory functions, and that it would use that information in a way designed to protect its confidentiality.[317] The confidential transaction and revenue data that the CFPB relied on in the Proposed Rule came from two sources that the Bureau had access to: confidential supervisory information regularly shared by the States through NMLS and data obtained via the CFPB's market monitoring functions.[318]

As the Proposed Rule indicated, the States collect nonpublic NMLS money services business call report data under explicit assurances of confidentiality.[319] The NMLS collects all of this commercial or financial information from the States as part of State supervisory functions, also under assurances of confidentiality. On behalf of the States, the State financial regulator association that operates NMLS authorized the CFPB to use this robust dataset if it complied with the NMLS confidentiality conditions. When this information is shared with the CFPB, the CFPB also treats it as confidential supervisory information, which is generally protected from

[314] As the Proposed Rule noted, prior to issuing the Proposed Rule, the CFPB conducted analysis of data sources as described in parts IV, V and VI of the Proposed Rule to identify likely market participants, and, to the extent of available data: (1) to inform its general understanding of the market; and, relatedly, (2) to estimate the level of market activity by market participants, the degree to which market participants would be small entities, and the level of market activity by larger participants. These estimates therefore relied to some degree on preliminary entity-level analysis that is not dispositive of whether the CFPB would ever seek to initiate supervisory activity at a given entity or whether, in the event of a person's assertion that it is not a larger participant, the person would be found to be a larger participant.

[315] An industry commenter also noted in a footnote that they believed the CFPB could not rely upon data collected through its 2021 section 1022(c)(4) orders because, in their view, the CFPB did not comply with the Paperwork Reduction Act (PRA).

[316] As noted below, the only exception is well-known entities in the market that are public companies, which disclose revenue information in public securities filings.

[317] *See* 12 U.S.C. 5512(c)(1), (c)(3)(B), (c)(4), (c)(6), (c)(8); *see also* 12 CFR part 1070.

[318] *See* 12 U.S.C. 5512(c)(8); 12 CFR part 1070.

[319] The Proposed Rule (88 FR 80107 at 80209–10 n.83 & n.90) identified the public NMLS website with detailed information about the type of data collected in NMLS money services business call reports. In those materials, NMLS emphasizes to money services business that ''[a]ll data submitted in the [MSB call] report is confidential[.]'' *NMLS MSB Call Report Overview and Definitions* at 6 (''Information Sharing''), *https://mortgage.nationwidelicensingsystem.org/licensees/resources/LicenseeResources/MSBCR%20Overview%20-%20(FINAL).pdf* (last visited Nov. 8, 2024).

disclosure by statute and CFPB implementing regulations.[320]

The Proposed Rule explained that the CFPB also collected certain information pursuant to orders issued pursuant to section 1022(c)(4) of the CFPA. Those orders provided that the CFPB will treat the information received in response to the order in accordance with its confidentiality regulations at 12 CFR 1070.40 through 1070.48.[321] Confidential commercial or financial information about specific transaction volume collected through those orders also generally would be protected by FOIA exemption 4,[322] and therefore would qualify as confidential information under 12 CFR 1070.2(f).[323]

In the CFPB's experience, virtually no market participants publicly disclose their volume of consumer payment transactions as defined in the Proposed Rule, and unless a firm is a public company, it does not disclose its revenues. No commenters suggested that the individual firm-level transaction volume data or the revenue data of companies that are not public companies was *not* confidential information or generally available to anyone but the individual company itself. As discussed in the impacts analyses, in response to the proposal's request for data, no commenters provided or pointed to sources of additional relevant data.[324]

The CFPB reasonably relied on this confidential transaction data and revenue data in the Proposed Rule to provide estimates of the number of firms that would qualify as larger participants compared to the overall number of estimated market participants and estimates of larger participants' market participation share of market activity. To conduct a preliminary entity-level analysis of which market participants may qualify as a larger participant under the Proposed Rule, the CFPB generally needed to use available data about the two criteria for the proposed larger-participant test—an entity's consumer payment transaction volume and its revenues (which generally governs small business concern status under applicable size standards).

The absence of such information provided by commenters supports the conclusion that the money services business call reports when combined with the CFPB's section 1022(b) order responses are the most comprehensive sources available for estimating transaction volume at the firm level for purposes of this rule. Both sources collect information about consumer payments facilitated in the United States by market participants. In addition, no commenter indicated that an individual firm itself did not have access to its own transaction volume data or its revenue data with which to assess its own larger participant status under the Proposed Rule. Comments describing potential difficulty individual firms could face in relying on available data to assess larger participant status referred to difficulties in counting of digital assets transactions, which the Final Rule does not include in the larger-participant test, as described below.

Courts have held that an agency can rely on confidential information in its rulemaking so long as the agency discloses ''sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.'' [325] Here, the Proposed Rule disclosed, among other information: (1) the sources of the data; (2) meaningful sources of additional public information about the data; [326] (3) the methodologies used to analyze the data; (4) the results of deploying those methodologies; (5) that the data indicated that the market was highly concentrated, with a few entities facilitating hundreds of millions or billions of consumer payment transactions annually; [327] (6) that only about one percent of market activity was conducted by an estimated three entities with transaction volume between the five and 10 million transaction thresholds considered in the Proposed Rule; [328] (7) aggregate transaction estimates for the proposal's estimated 17 larger participants; (8) the extent to which the data sources did not include relevant data; and (9) the potential for uncertainty in its estimates based on the nature of the data. This detailed information enabled commenters to provide meaningful comment on, and criticize, the basis for the proposed test to define ''larger participants'' in the proposed market, and meaningful comment on whether the Final Rule should adopt a higher, lower, or different threshold for the larger-participant test. As described further below, the CFPB received extensive, meaningful comment on these very questions (as well as numerous other aspects of the rule). The industry commenters described above also did not explain what additional information could be provided that would address their comments.

The CFPB disagrees with the industry comments stating that it was necessary for the Proposed Rule to unmask confidential data, or otherwise provide additional information regarding confidential data, in order to allow for meaningful comment. As discussed above, the CFPB is obligated to maintain the confidentiality of the confidential transaction volume and revenue data described above. The CFPB could not provide a de-identified list of entities linked to their transaction and revenue data without significant risk of unmasking confidential data, nor did commenters provide any suggestions as to how the CFPB could disclose the data in a way that would both preserve confidentiality and improve commenters' ability to provide

[320] CFPA sec. 1022(c)(6), 12 U.S.C. 5512(c)(6); 12 CFR 1070.40–48. The CFPB similarly would be obligated to keep such information confidential had it collected the information directly from the entities, *see* 12 CFR 1070.40–1070.48, in addition to increasing the burden on industry with duplicative requests, *cf.* 12 U.S.C. 5514(b)(3).

[321] *See https://files.consumerfinance.gov/f/documents/cfpb_section-1022_generic-order_2021-10.pdf* (last visited Nov. 7, 2024) (sample 1022 order on website cited in proposal, 88 FR 80197 at 80210 n.90, where the CFPB explained that ''it obtained transaction and revenue data from six technology platforms offering payment services through a CFPB request pursuant to CFPA section 1022(c)(4)''). *See CFPB Orders Tech Giants to Turn Over Information on their Payment System Plans* (Oct. 21, 2021) (CFPB 1022 Orders Press Release), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-tech-giants-to-turn-over-information-on-their-payment-system-plans/*.

[322] *See Food Mktg. Inst.* v. *Argus Leader Media,* 588 U.S. 427 (2019).

[323] The CFPB also disagrees with the comment suggesting that the CFPB's section 1022(c)(4) orders did not comply with the PRA. These orders, which the CFPB addressed to six entities, were not subject to the PRA requirements. *See* 5 CFR 1320.3(c)(4) (defining ''collection of information'' from ''ten or more persons'' as subject to PRA).

[324] 88 FR 80197 at 80211. As discussed in the section-by-section analysis above, some commenters stated that the CFPB should use additional data sources to estimate the volume of consumer payment transactions that transfer digital assets such as crypto-assets and stablecoins. However, as discussed below, the Final Rule does not cover those transactions. Therefore, those data sources are not pertinent to the Final Rule.

[325] *See Fla. Power & Light Co.* v. *United States,* 846 F.2d 765, 771 (D.C. Cir. 1988); *see also Riverkeeper Inc.* v. *EPA,* 475 F.3d 83, 112 (2d Cir. 2007); *rev'd on other grounds,* 556 U.S. 208 (2009).

[326] 88 FR 80197 at 80210 n.90 (providing links to NMLS and CFPB public websites where commenters could review descriptions of the type of data identified in the proposed rule and how the data was collected, including sample 1022 order and *NMLS Money Services Business Call Report Overview* described above).

[327] 88 FR 80197 at 80210. *See also, e.g., FIS 2023 Global Payments Report* at 16 (''North America's credit and debit card markets are increasingly intermediated by a handful of major digital wallet brands. These initially consisted of PayPal, Google Pay and Apple Pay, but challengers such as Shop Pay (Shopify's checkout solution) and Cash App Pay (recently becoming an open loop wallet) have joined the playing field.''); *2022 Survey and Diary of Consumer Payment Choice: Summary Results, supra,* at 1 (noting that two-thirds of consumers reported that they had adopted an online payment account such as PayPal, Venmo, or Zelle). The Proposed Rule cited both of these sources at 88 FR 80197 at 80200 n.25.

[328] 88 FR 80197 at 80210.

meaningful comment on the Proposed Rule.

The CFPB also declines the request by certain industry commenters to publicly disclose the identities of individual firms that comprised the rule's estimate of the number of larger participants. That CFPB notes that, in their comments, several commenters specifically identified firms they believed would be larger participants, indicating that many commenters believed that they did not need the CFPB to identify those larger participants in order to provide meaningful comment on the rule. In any event, the CFPB disagrees that the identities of the estimated larger participants were critical facts that commenters needed in order to provide meaningful comment. As disclosed in the proposal, the CFPB relied on a number of considerations to define the market (discussed above) and the larger participant test (discussed below), none of which were the identities of potential larger participants. Based on those considerations, the information in the proposal described above, and the rest of the proposal, many commenters made specific comments on the proposed market definition and proposed threshold, which the CFPB has fully considered and responded to above (on the market definition) and below (on the larger participant test).[329] The industry commenters seeking release of the list of 17 firms did not explain how public disclosure of their identities would allow for more meaningful comment. Further, these industry comments did not explain how the CFPB could make the disclosures they requested without disclosing confidential information, such as implications from such disclosure that could reveal confidential entity-level transaction information that the States obtained through their supervisory functions and made available to the CFPB through NMLS or information that an entity may customarily and actually treat as private.[330]

Finally, even if the CFPB's estimates had relied entirely on public data (which they could not), public disclosure of the identities of estimated larger participants also may be misleading and incompatible with the administrative process that CFPB has established to determine which entities are larger participants.[331] As the Proposed Rule noted, the market-wide estimates of the rule's scope and impact are based only on ''preliminary entity-level analysis that is not dispositive'' of larger participant status or whether the CFPB would conduct supervisory activity of the entity.[332] As a result, publishing the CFPB's preliminary entity-level analysis could misleadingly suggest that the CFPB already has determined these entities' larger participant status. However, that is not the purpose of the CFPB's preliminary entity-level analysis, which instead informs market-wide estimates of the aggregate scope and impact of the rule. By contrast, for markets in which the CFPB has finalized larger participant rules, the CFPB administers a separate process for such evaluation under section 103 of its larger participant regulation at part 1090. Based on notice-and-comment rulemaking, it designed that process to assess which entities qualify as larger participants. As described in the Proposed Rule, to determine if an individual entity qualifies as a larger participant, the CFPB can use that same section 103 process to request confidential supervisory information from the entity and the entity may voluntarily submit such information including to dispute it qualifies as a larger participant.[333] The confidential supervisory process established in section 103 of part 1090 is an appropriate means for the CFPB to determine which entities are a larger participants.[334]

Final Rule

In consideration of the comments described above on data used in the Proposed Rule and comments on the criteria and threshold for the proposed larger-participant test described below, the Final Rule adopts the two proposed criteria—annual covered consumer payment transaction volume and small business concern status. As described below, the Final Rule makes certain adjustments to the calculation of annual covered consumer payment transaction volume (by counting only those transactions denominated in U.S. dollars) and the threshold volume that determines when entities that are not small business concerns qualify as larger participants (adopting a significantly higher volume, of 50 million).

Criteria

Proposed Rule

The Proposed Rule reiterated that the CFPB has discretion in choosing criteria for assessing whether a nonbank covered person is a larger participant of a market.[335] It explained how the CFPB selects criteria that provide ''a reasonable indication of a person's level of market participation and impact on consumers.'' [336] It noted how previous larger participant rulemakings acknowledged that, for any given market, there may be ''several criteria, used alone or in combination, that could be viewed as reasonable alternatives.'' [337]

Here, the CFPB proposed to combine the two criteria described above: the annual covered consumer payment transaction volume and the size of the entity by reference to SBA size standards. The Proposed Rule's larger-participant test would have combined these criteria as follows: a nonbank covered person would have been a larger participant if its annual covered consumer payment transaction volume exceeded the proposed threshold, discussed in the section-by-section

[329] For example, many industry and some nonprofit commenters explained in detail why they believed the proposed market definition was too broad and why the proposed larger participant test would cover more larger participants than the CFPB estimated. However, none of those commenters stated how the methodology and data sources the proposal used and disclosed would have led the CFPB to fail to estimate any particular entity as a larger participant. And, as noted above, no firms provided additional data in response to the CFPB request.

[330] For example, disclosing the identities of the 17 estimated larger participants in the Proposed Rule would have revealed that the entities had greater than 5 million consumer payment transactions based on the data available to the CFPB. And disclosing the names of all seven entities estimated to be larger participants in this Final Rule would then reveal that the 10 entities who are no longer estimated to be larger participants have between 5 and 50 million consumer payment transactions per year.

[331] *See* 12 CFR 1090.103(d) & (a). *See also* 88 FR 80197 at 80198.

[332] 88 FR 80197 at 80208 n.77. Even when publishing the highlights of supervisory findings of violations of Federal consumer financial law, the CFPB does not identify individual entities. *See CFPB Supervisory Highlights Issue 35, Fall 2024* at 3 (''To maintain the anonymity of the supervised institutions discussed in *Supervisory Highlights,* references to institutions generally are in the plural and the related findings may pertain to one or more institutions.''), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights-special-ed-auto-finance_2024-10.pdf* (last visited Nov. 6, 2024).

[333] *See* 12 CFR 1090.103(d) and (a). *See also* 88 FR 80197 at 80198.

[334] With regard to the banking industry association's comment seeking publication, outside of the rulemaking process, of the names of larger participants, the CFPB declines to address that comment because it is beyond the scope of the rulemaking itself.

[335] *See, e.g.,* 77 FR 42874 at 42887 (consumer reporting larger participant rule describing such discretion); 77 FR 65775 at 65785 (same, in consumer debt collection larger participant rule).

[336] 77 FR 42874 at 42887 (consumer reporting larger participant rule); *see also* 80 FR 34796 at 37513 (automobile financing larger participant rule describing how aggregate annual originations are a ''meaningful measure'' of such participation and impact); 78 FR 73383 at 73393–94 (same, for account volume criterion in student loan servicing larger participant rule).

[337] 77 FR 65775 at 65785 (consumer debt collection larger participant rule).

analysis further below, and, during the same time period (*i.e.,* the preceding calendar year), it was not a small business concern.

The first criterion would have been based on the number of consumer payment transactions. Specifically, proposed § 1090.109(b)(3) would have defined the term ''annual covered consumer payment transaction volume'' as the sum of the number of the consumer payment transactions that the nonbank covered person and its affiliated companies facilitated by providing general-use digital consumer payment applications in the preceding calendar year.[338] The Proposed Rule explained how the CFPB viewed this to be an appropriate criterion for defining larger participants in a market defined by reference to products that facilitate certain consumer payments. Each transaction counted under this criterion also generally is a payment. In that way, a transaction is essentially a well-understood unit of market activity.

The Proposed Rule further noted that, as in the CFPB's international money transfer larger participant rule, here the number of transactions also reflects the extent of interactions between the nonbank covered person providing the in-market consumer financial product or service. Each one-time consumer payment transaction typically results from a single interaction with at least one consumer.[339] And, in the case of recurring consumer payment transactions, consumers also have at least one interaction with the covered persons in the market. The number of transactions also is a common indicator of market participation.[340]

The Proposed Rule stated that the CFPB considered proposing different criteria, such as the dollar value of transactions or the annual receipts from market activity, and explained why it did not propose either of those alternatives. First, digital wallets often are used for consumer retail spending, which can grow in amount through inflation. For the proposed market that included digital wallets, a dollar value criterion may become affected by inflation or other factors.[341] At the same time, as the Proposed Rule noted, in general, a higher number of transactions also may often comprise a higher dollar value of transactions.

With respect to annual receipts, the Proposed Rule explained that data was less available, especially for market participants that are not publicly traded or that do not file call reports on money transmission at the State level. In addition, in the context of the market at issue, the Proposed Rule noted that an annual receipts criterion could miss significant market participation and consumer impacts, such as where a provider is subsidizing a product or otherwise not earning significant per-transaction revenues.

As noted above, the CFPB proposed a second criterion that also must be satisfied for a nonbank covered person to be a larger participant, in addition to the annual covered payment volume criterion. Under the second criterion, in the previous calendar year, the nonbank must not have been a ''small business concern'' as that term is defined by section 3(a) of the Small Business Act, 15 U.S.C. 632(a), and implemented by the SBA under 13 CFR part 121, or any successor provisions. Thus, under the Proposed Rule, an entity would have been a small business concern if its size were at or below the SBA standard listed in 13 CFR part 121 for its primary industry as described in 13 CFR 121.107.[342]

The CFPB proposed this second criterion because it was not seeking to use this rulemaking as a means of expending its limited supervisory resources to examine small business concerns. The consumer digital payments applications market is potentially broad and dynamic, with rapid technological developments and new entrants. But many well-known market participants have large business operations that have an impact on millions of consumers. As explained in the Proposed Rule, in light of its resources, the CFPB believes that it would be preferable to focus on larger entities, instead of requiring all entities with an annual covered consumer payment transaction volume over five million to be subject to supervisory review under the Proposed Rule. If a particular nonbank covered person were a small business concern participating in this market in a manner that posed risks to consumers, the CFPB has authority to pursue risk-based supervision of such an entity pursuant to CFPA section 1024(a)(1)(C).[343]

The CFPB requested comment on its proposed criteria, including whether, instead of basing the annual volume criterion described above on number of consumer payment transactions, it should be based on a different metric, such as the dollar value of consumer payment transactions, and, if so, why.

Comments Received

A few industry commenters addressed the proposed criteria of volume of consumer payment transactions. Two industry associations and a law firm commenter stated that the amount (value) of a consumer payment transaction more directly correlates with risks to consumers than their frequency (volume).[344] In their view, if two entities have the same transaction volume, then the one facilitating the higher dollar amount typically poses greater risk to consumers.[345] Thus, in the view of one of these commenters, a test based on transaction value would better facilitate the CFPB's operation of a risk-based nonbank supervision program as required by CFPA section 1024(b)(2). The second commenter stated that the CFPB should consider either a transaction value threshold alone or in conjunction with transaction volume. In its view, the proposal field to articulate a connection between transaction volume and risks to consumers across the various different types of activity in the market. The third commenter stated that either approach could be done, but recommended the combined approach in order to ensure the rule captures only larger participants. Finally, another industry association stated that to profitably

[338] Under the CFPA, the activities of affiliated companies are to be aggregated for purposes of computing activity levels in larger participant rules. *See* 12 U.S.C. 5514(a)(1)(B), (3)(B).

[339] *See, e.g.,* 79 FR 56631 at 56641 (international money transfer larger participant rule noting that the absolute number of transactions ''reflects the extent of interactions'' between the provider and the consumer because ''each transfer represents a single interaction with at least one consumer'').

[340] State regulators, for example, require money transmitters to report this metric. *See generally* NMLS, *Money Services Business Call Report, https://mortgage.nationwidelicensingsystem.org/slr/common/Pages/MoneyServicesBusinessesCallReport.aspx* (last visited Oct. 23, 2023).

[341] In addition, as discussed in the impacts analyses in parts V and VI of the Proposed Rule, some of the data sources the CFPB relied upon in formulating the Proposed Rule may be overinclusive by including certain payments that are not within the market defined in the Proposed Rule, such as certain business-to-business payments. Those payments may have higher dollar values. The Proposed Rule noted how it would have been less affected by those data distortions by proposing number of transactions as a criterion.

[342] In addition, under the SBA's regulations, a concern's size is measured by aggregating the relevant size metric across affiliates. *See* 13 CFR 121.103(a)(6) (''In determining the concern's size, SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit.'').

[343] 12 U.S.C. 5514(a)(1)(C). *See generally* 12 CFR part 1091 (regulations implementing CFPA section 1024(a)(1)(C)).

[344] The industry association commenters also stated that the risks are different for firms that hold or transmit funds compared to those that transmit payment instructions or act as merchant payment processors.

[345] At the same time, the law firm commenter indicated that, in its view, entities with lower consumer payment transaction volumes also generally pose less risk to consumers.

serve lower-income consumers who conduct transactions with lower values, companies needed to engage in higher volumes of activity; but rather than describing this as a reason to use a different criteria, it described this as a reason to increase the transaction volume threshold, as discussed below.

Some comments also addressed the proposed second criteria, an exclusion for entities that qualified as a small business concern in the previous year. Several commenters supported an exclusion for small businesses in general,[346] though some stated that the exclusion did not change their views, discussed further below, that the proposed consumer payment transaction volume threshold was much too low. No commenter disagreed with excluding small business concerns from larger participant status with respect to transactions covered by the Final Rule.[347] For example, two banking industry associations supported the proposed exclusion for a small business concern. Another industry association stated that it supported the proposed exclusion because it believed small business concerns should be provided more flexibility than its competitors to innovate and grow. This commenter also stated that the rulemaking should provide a fuller explanation of its impact, including whether the CFPB had identified any companies that exceed an annual consumer payment transaction volume threshold but would have qualified as small business concerns. It suggested that to the extent that small business concerns have a volume that exceeds the proposed threshold, this would support their view that the proposed transaction threshold was too low. It stated that consideration would be relevant not only with regard to the proposed threshold of five million annual consumer payment transactions, but also to potential thresholds of 50 million and 500 million annual consumer payment transactions. It also stated that the rule should consider what advantages a small business concern would have as a result of such an exclusion. Another industry association stated that the proposed small business exclusion was inadequate for identifying larger participants in this market for several reasons, including that the small business size standard updates every five years are not frequent enough for this market in light of its ongoing growth, the variety of product offerings market participants have means they can exceed the small business threshold even with small volumes of market activity, and, by their estimate, even based only on the market activity alone a small or medium-sized market participant serving approximately 220,000 consumers could exceed the highest potentially-applicable small business concern cutoff by charging a one percent fee on the value of the average consumer activity levels. Finally, another industry association agreed that many small businesses and startups have annual receipts that exceed small business concern size standards, in light of users' average annual digital payment transaction values (which it stated were $7,610 in 2023).

Response to Comments Received

With regard to comments calling for the Final Rule to use a criteria other than the volume of consumer payment transactions, none of these commenters addressed the Proposed Rule's rationale for proposing a volume rather than value-based criterion: the potential for inflation to shrink the coverage of the rule under a value-based criterion, and the potential for greater distortion to the extent data relied upon included business-to-business transactions that would not be in the market.[348] For those reasons, the CFPB continues to favor use of a transaction volume criterion. In addition, the CFPB agrees with the industry comment noting that lower-income consumers have significant adoption levels for general-use digital consumer payment applications. Compared with consumers that have higher incomes, smaller-dollar transactions by lower-income consumers generally would comprise a larger share of their disposable income. Their payment activity therefore may be better captured by a transaction volume criterion. Finally, the CFPB disagrees with the suggestion by a few commenters that the rule adopt an additional criteria, such as combining transaction volume and value. That approach would increase complexity in the administration of the rule and, given the significantly higher consumer payment transaction volume threshold adopted in the Final Rule discussed below, would not be necessary to ensure the rule only identifies *bona fide* larger participants. In any event, when the CFPB prioritizes entities for examination based on indicators of risk, the CFPA provides a basis for the CFPB to consider, among other factors, not just the number but also the value of consumer payment transactions facilitated.[349]

The CFPB agrees with the commenters that a small business concern exclusion is appropriate for this larger participant rule. This exclusion will ensure that the CPFB's exercise of its larger participant supervisory authority under this rule does not extend to small business concerns. The CFPB disagrees with the industry association commenter to the extent it was suggesting this exclusion is likely to confer undue advantages on small business concerns. As discussed in the below section-by-section analysis of the threshold for the larger-participant test, which the Final Rule sets at 50 million consumer payment transactions annually, available data does not establish that any nonbank market participant that exceeds that threshold would qualify as a small business concern. And even if a small business concern were to exceed the threshold, it would not necessarily avoid CFPB supervision simply due to not qualifying as a larger participant under this rule. For example, if its risk profile warranted prioritization for an exam, then the CFPB also may consider it for supervisory designation under CFPA section 1024(a)(1)(C). Finally, with regard to comments that the exclusion is inadequate to define larger participants (including comments stating that companies with volumes at or slightly above the proposed threshold of five million annual consumer payment transactions are unlikely to qualify as small business concerns under SBA size standards), the CFPB understands those comments to be primarily focused on the threshold for the other proposed criteria for the larger-participant test (the annual covered consumer payment transaction volume threshold). The CFPB further discusses comments on that threshold below.

Final Rule

As explained further above, the Final Rule adopts the two proposed criteria, and makes certain changes to the threshold and its calculation, as described below.

[346] An individual commenter that expressed general support for the Proposed Rule also stated that the CFPB should clarify the methods and data sources the CFPB would use to determine small business concern status.

[347] Some commenters focused on the digital asset industry stated that the exclusion would be unfair to entities not eligible for small business status such as foreign businesses or nonprofits or entities that may be small but ineligible for small business concern status because they are dominant in their field.

[348] 88 FR 80197 at 80209.

[349] *See* CFPA section 1024(b)(2)(B), (E). 12 U.S.C. 5514(b)(2)(B), (E).

Threshold

Proposed Rule

Under the Proposed Rule, a nonbank covered person would have been a larger participant in a market for general-use digital consumer payment applications if the nonbank covered person satisfies two criteria. First, it must facilitate an ''annual covered consumer payment transaction volume,'' as defined in proposed § 1090.109(b)(3), of at least five million transactions. As explained in proposed § 1090.109(b)(3)(i), the volume is aggregated across affiliated companies, as required by CFPA section 1024(a)(3)(B).[350] Thus, the proposed threshold included the aggregate annual volume of consumer payment transactions facilitated by all general-use digital consumer payment applications provided by the nonbank covered person and its affiliated companies in the preceding year.[351] Second, under proposed § 1090.109(b)(2) as explained above, the CFPB also proposed to exclude from larger-participant status any entity in the proposed market that was a small business concern in the previous calendar year based on applicable SBA size standards.[352] The Proposed Rule stated that the CFPB viewed this proposed threshold and the proposed small entity exclusion, discussed above, to be a reasonable means of defining larger participants in this market.[353]

The CFPB estimated in the Proposed Rule that the proposed threshold would have brought within the CFPB's supervisory authority approximately 17 entities,[354] about 9 percent of all known nonbank covered persons in the market for general-use digital consumer payment applications.[355] The Proposed Rule noted that this was a rough estimate because the available data on entities operating in the proposed market for general-use digital consumer payment applications was incomplete.[356]

In the Proposed Rule, the CFPB anticipated that the proposed annual covered consumer payment transaction volume threshold of five million would have allowed the CFPB to supervise market participants that represent a substantial portion of the market for general-use digital consumer payment applications and have a significant impact on consumers. Available data indicated that the market for general-use digital consumer payment applications is highly concentrated, with a few entities that facilitate hundreds of millions or billions of consumer payment transactions annually, and a much larger number of firms facilitating fewer transactions. The Proposed Rule stated that the CFPB believed that a threshold of five million was reasonable, in part, because it would have enabled the CFPB to cover in its nonbank supervision program both the very largest providers of general-use digital consumer payment applications as well as a range of other providers of general-use digital consumer payment applications that play an important role in the marketplace. Further, certain populations of consumers, including more vulnerable consumers, may not transact with the very largest providers and instead may transact with the range of other providers that exceed the five million transaction threshold.

According to the CFPB's estimates in the Proposed Rule, the approximately 17 providers of general-use digital consumer payment applications that meet the proposed threshold collectively facilitated about 12.8 billion transactions in 2021, with a total dollar value of about $1.7 trillion. The CFPB estimated that these nonbanks were responsible for approximately 88 percent of known transactions in the nonbank market for general-use digital

[350] 12 U.S.C. 5514(a)(3)(B) (providing that, ''[f]or purposes of computing activity levels under [CFPA section 1024(a)(1)] or rules issued thereunder [including larger participant rules issued under CFPA section 1024(a)(1)(B)], activities of affiliated companies (other than insured depository institutions and insured credit unions) shall be aggregated'').

[351] The Proposed Rule noted that the available data do not always conform to the precise market scope of covered consumer payment transactions. For example, the data do not always distinguish between transactions in which a business sent funds, which would not be covered consumer payment transactions, from transactions in which a consumer sent funds. In addition, in some cases the data may include funds a consumer transfers between one deposit or stored value account and another, both of which belong to the consumer. As the Proposed Rule further noted, the analysis in the Proposed Rule included transaction volume broadly defined, and the CFPB cannot distinguish between this overall activity and covered market activity (to the extent they differ). Therefore, the analysis in the Proposed Rule may be an overestimate of covered market activity and larger-participant status of providers of general-use digital consumer payment applications subject to the larger-participant threshold.

[352] As discussed above and below, the proposed exclusion would have applied to any nonbank that, together with its affiliated companies, in the previous calendar year was a small business concern based on the applicable SBA size standard listed in 13 CFR part 121 for its primary industry as described in 13 CFR 121.107. The SBA defines size standards using North American Industry Classification System (NAICS) codes. The Proposed Rule noted that the CFPB believed that many—but not all—entities in the proposed market for general-use digital consumer payment applications are likely classified in NAICS code 522320, ''Financial Transactions Processing, Reserve, and Clearinghouse Activities,'' or NAICS code 522390, ''Other Activities Related to Credit Intermediation.'' Entities associated with NAICS code 522320 that have $47 million or less in annual receipts are currently defined by the SBA as small business concerns; for NAICS code 522390, the size standard is $28.5 million. However, the Proposed Rule noted that other entities that the CFPB believes to be operating in the proposed market may be classified in other NAICS codes industries that use different standards, including non-revenue-based SBA size standards, such as the number of employees. While the CFPB had data to estimate the SBA size status of some market participants in the Proposed Rule, such as publicly-traded companies, the CFPB lacked data sufficient to estimate the SBA size status of some market participants. *See* SBA, Table of Small Business Size Standards Matched to North American Industry Classification System Codes, effective March 17, 2023, Sector 52 (Finance and Insurance), *https://www.sba.gov/document/support--table-size-standards* (last visited Oct. 26, 2023).

[353] The Proposed Rule stated that the CFPB identified approximately 190 entities from available data that provide general-use digital consumer payment applications and may be subject to the Proposed Rule. Of those entities, the CFPB had data on about half sufficient to estimate larger-participant status, including whether those entities would be subject to the small business exclusion built into the larger-participant test. The estimate that approximately 17 entities would have been larger participants was based on the set of entities for which the CFPB had sufficient information to estimate larger participant status.

[354] The Proposed Rule noted that the estimate of 17 entities excluded entities where either (1) available information indicated that the small entity exclusion would have applied or (2) the CFPB lacked sufficient information regarding the entity's size to assess whether the small entity exclusion would have applied.

[355] The Proposed Rule described in detail how the CFPB based its market estimates on data from several sources. The CFPB obtained transaction and revenue data from six technology platforms offering payment services through a CFPB request pursuant to CFPA section 1022(c)(4). *See CFPB 1022 Orders Press Release, supra.* The CFPB was also able to access nonpublic transaction and revenue data for potential larger participants from the Nationwide Mortgage Licensing System & Registry (NMLS), a centralized licensing database used by many States to manage their license authorities with respect to various consumer financial industries, including money transmitters. Specifically, the CFPB accessed quarterly 2022 and 2023 filings from nonbank money transmitters in the Money Services Businesses (MSB) Call Reports data (for a description of the types of data reported in MSB call reports, see NMLS, *Money Services Business Call Report*). Additionally, the CFPB compiled a list of likely market participants, as well as transaction and revenue data where available, from several industry sources (including Elliptic Enterprises Limited) and various public sources including the CFPB's Prepaid Card Agreement Database, *https://www.consumerfinance.gov/data-research/prepaid-accounts/search-agreements* (last visited Oct. 23, 2023), company websites, press releases, and annual report filings with the U.S. Securities and Exchange Commission.

[356] The Proposed Rule noted that its estimate that approximately 190 entities are participating in the market may have been an underestimate because, for certain entities, the CFPB lacked sufficient information to assess whether they provide a general-use digital consumer payment application. In addition, it noted that for some entities that are among the approximately 190 participants in the market, the CFPB lacked sufficient information to assess whether certain products they offer constitute a general-use digital consumer payment application.

consumer payment applications.[357] At the same time, this threshold likely would have subjected to the CFPB's supervisory authority only entities that can reasonably be considered larger participants of the market defined in the Proposed Rule.

Proposed § 1090.109(b)(3)(i) also would have clarified how the activities of affiliated companies of the nonbank covered person are included in the test when the affiliated companies also participate in the proposed market. It provided that, in aggregating transactions across affiliated companies, an individual consumer payment transaction would only have been counted once even if more than one affiliated company facilitated the transaction. It also provided that the annual covered consumer payment transaction volumes of the nonbank covered person and its affiliated companies would have been aggregated for the entire preceding calendar year, even if the affiliation did not exist for the entire calendar year.

The Proposed Rule noted that because the general-use digital consumer payment applications market has evolved rapidly and market participants can grow quickly, the CFPB also was not proposing a test that is based on averaging multiple years of market activity. As a result, if an entity has less than the threshold amount for one or more calendar years but exceeds the threshold amount in the most recent calendar year, it would have been a larger participant. The Proposed Rule stated that this would have ensured that the CFPB can supervise nonbanks that quickly become larger participants, without waiting several years.

The Proposed Rule further stated that the CFPB was considering a lower or higher threshold.[358] Lowering the threshold therefore would not have substantially increased the number of entities subject to supervision, in part because many entities that exceed a lower threshold would have been excluded as small entities. Thus the Proposed Rule noted that lowering the threshold would have resulted in only a marginal increase in market coverage. The Proposed Rule provided an example of a higher threshold. The Proposed Rule estimated that an annual covered consumer payment transaction volume threshold of 10 million would have allowed the CFPB to supervise approximately 14 entities, representing approximately 87 percent of activity in this market.[359] However, at this higher threshold the CFPB would not have been able to supervise as varied a mix of nonbank larger participants that, as discussed above, have a substantial impact on the full spectrum of consumers in the market.

The CFPB sought comment, including suggestions of alternatives on the proposed threshold for defining larger participants of the market for general-use digital consumer payment applications as defined in the Proposed Rule.

Comments Received

Many of the industry association commenters, a law firm, and some nonprofits stated that the proposed five million consumer payment transaction volume threshold was too low and did not identify *bona fide* larger participants. A nonprofit stated the threshold appeared designed to maximize oversight rather than define true larger participants. Some of these commenters stated that the proposed threshold was so low that it would treat virtually all market participants as larger participants, including those with very small market shares, exposing small/mid-size companies to supervision when they cannot support the cost of exams, and more generally stifling market entry, innovation, and competition. These commenters generally stated that the proposal did not adequately explain the reasoning and evidence in support of such a threshold.[360]

One industry association commenter encouraged the CFPB to set the threshold here cautiously, in consideration of the stage of this market's development. It stated that, unlike in prior larger participant rules, this market is in the growth stage not the maturity stage, where data and settled expectations can be more helpful in the development of larger-participant tests. It viewed the proposed threshold as too low given the market's current stage and stated that a higher threshold as necessary for properly determining the true larger participants in the market as it matures and to allow for proper scalability within the market without impeding competition.[361]

Another industry association stated that the proposal of a small business exclusion for the first time in a larger participant rule appeared to support its concern that the proposed threshold was too low, and still would discourage firms that are not small businesses from entering the market. It suggested that the rulemaking should specifically consider a volume of 50 million or 500 million annual consumer payment transactions. It also criticized the Proposed Rule for not making clear whether entities who were small business concerns would have otherwise met the transaction volume threshold. It also stated that the rule should consider a threshold more in line with the debt collection larger participant rule, under which larger participants comprised an estimated 63 percent of market activity.

Several industry associations offered rough estimates to illustrate how the proposed threshold would treat firms with very small market shares (ranging from, in their estimates, as low as 0.005 percent of overall consumer payment transactions to no more than two percent of app-based transactions) as larger participants, which in their view would not make them ''larger'' participants under the statute.

Several of these commenters added that the proposed threshold would discourage entry into the market and innovation and competition. A nonprofit commenter suggested that the threshold would deter small and mid-sized businesses from expanding. One of the industry associations stated these effects could limit access to payment products for low-/moderate-income consumers, and urged the CPFB to set the threshold dynamically, at a level that represents a significant share of market activity.

The law firm commenter added that the proposal would subject firms with barely five million consumer payment transactions annually to the same supervision as firms with hundreds of millions or billions of such transactions, when the smaller larger participants cannot sustain the costs of exams.

[357] *See* 88 FR 80197 at 80209–10 nn.86–91. The Proposed Rule noted that the 88 percent estimate was calculated among all of the entities for which the CFPB has transaction information. *Id.* n.92.

[358] The Proposed Rule discussed an example of a lower threshold. An annual covered consumer payment transaction volume threshold of one million might have allowed the CFPB to supervise approximately 19 entities, still representing approximately 88 percent of activity in this market. *See id.* at 80210.

[359] *See id.*

[360] One nonprofit commenter also encouraged the CFPB to consider setting different thresholds in the Final Rule for what it referred to as different sectors within the proposed market. However, it did not state which parts of the market should be differentiated. The CFPB generally considers comments further above on whether to define a single market in this Final Rule. Because it has determined to do so, it is not finalizing a larger-participant test that works differently for different parts of the market.

[361] This commenter also encouraged the CFPB to conduct periodic reviews of the threshold as the market grows to ensure it continues to capture larger participants. The CFPB notes that it already monitors this market, among others, as part of its statutory functions. *See* 12 U.S.C. 5512(c). The CFPB will continue to monitor this market and may consider adjustments to the threshold, to the extent necessary or appropriate through future rulemakings.

On the other hand, banking and credit union industry trade associations supported the proposed five million consumer payment transaction volume threshold to define nonbanks that are larger participants. One of them called for periodic CFPB evaluation of this threshold including to see whether entities may be structuring their activities to evade it and publication of the results, while another called for adding criteria to capture large, well-resources, fast-growing organizations with fewer transactions.[362] A nonprofit stated that two thirds of its members surveyed supported the proposed threshold, and that some of its members supported lowering the threshold to one million annual consumer payment transactions. Some consumer groups and part of the membership of a nonprofit also stated that the proposed threshold was too high because, among other reasons, some money transfer services for incarcerated people have a dominant position within that area despite facilitating less than five million consumer payment transactions. Other consumer groups estimated that large firms that contract with incarceration facilities to provide money transfer services would qualify as larger participants under the proposed larger-participant test. They added that the CFPB should ensure that they are subject to the CFPB's supervisory authority under a Final Rule.[363]

An industry association stated that the test should be applied over a longer period (at least two years) than the proposal (one year). They stated that short-term fluctuations could create an inaccurate determination of market share. They also noted that, given how the market has been growing, the CFPB should consider a threshold that is dynamic and grows as the market grows, so that if the market grows for example more than ten-fold in the future, the test still would reasonably identify larger participants. In addition, in their view, a one-year period would not provide sufficient time for entities to undertake the compliance improvements the proposal stated larger participants would undertake to prepare for supervision. Another commenter, a nonprofit, stated that an unspecified minority of its membership suggested applying the test over multiple years.[364]

Several consumer groups supported aggregating activities of affiliates for purposes of the transaction threshold in the proposed larger-participant test. In their view, without aggregation, market participants could avoid larger participant status by structuring different types of consumer payment transactions, such as consumer payment transactions using different types of stored value, through different entities within a corporate family. However, two industry commenters stated that the larger-participant test should not consider activities of affiliates. An industry association stated that aggregation would allow the CFPB to supervise activities of individual entities whose activity levels alone do not qualify them as larger participants, resulting in an internally contradictory result. Another industry association stated that, to avoid covering entities with low market shares, the rule should not count receipts of affiliates not engaged in market activity toward the small business concern test.

Response to Comments Received [365]

In consideration of comments on the Proposed Rule stating that the proposed threshold of five million annual consumer payment transactions was too low and could capture certain entities with very small market shares, as well as the comment suggesting that the CFPB consider thresholds of 50 million or 500 million annual consumer payment transactions, the Final Rule adopts the significantly higher threshold of 50 million annual consumer payment transactions. As discussed below, this higher threshold encompasses the group of firms that have considerably higher transaction volumes and are in the concentrated part of the market. The CFPB finds the higher threshold to be appropriate, considering the concentrated market structure and how a significant number of market participants that would not qualify as larger participants as discussed below. To the extent any firm has activity levels at or slightly above the threshold, it may have an individual market share of less than one percent. But such a firm still has larger participation than the vast majority of participants.[366] The CFPB also declines to adopt the industry association suggestion to make the threshold dynamic because that approach would be unnecessary and difficult to administer.[367]

For the reasons described above, the CFPB disagrees with the comments that supported the proposed threshold of five million annual consumer payment transactions. Based on available data, the CFPB estimates in the Final Rule suggest that all of those nonbanks with annual covered consumer payment transaction volume between 5 million and 50 million combined facilitate at most a few percent of the market activity. While some consumer groups estimated that a much higher threshold than the CFPB proposed may not capture some firms providing what they described as high-risk money transfer services to people who are incarcerated, those comments also stated that other large corporations provide a broad suite of money transfer services to people who are and are not incarcerated alike. In any event, as discussed above, the CFPB declines to define larger participants based on the goal of targeting activities that may pose specific types of levels of risk to consumers. As discussed in the section-by-section analysis of the market definition further above, the CFPB accounts for risk when operating its nonbank supervision program. Any nonbank covered person, including firms providing digital services for consumers to transfer funds to incarcerated people, can qualify as a larger participant if it meets or exceeds the threshold in the Final Rule. And through operation of its risk-based larger participant supervision program, the CFPB may determine how to exercise its supervisory authority with respect to such a larger participant. Given the number of consumers those types of firms serve, even the higher threshold

[362] This commenter did not offer a specific criteria for achieving its goal, which may better be achieved through the more flexible supervisory designation process than through a regulatory test.

[363] These commenters also stated that the threshold test should include all consumer payment transactions a market participant facilitates, even when they are not facilitated through the digital application that made the entity a market participant. These commenters called for counting in-person, kiosk-based, and telephonic transfers, which they stated would qualify more correctional money-transfer companies as larger participants, and the test may be more efficient to administer because it would not require breaking out which transactions occur through the digital app channel.

[364] This commenter noted, without further elaboration, a suggestion of at least one member to set a first-year threshold of 10 million and a second-year threshold at 5 million.

[365] As noted in the section-by-section analysis further above, the CFPB is not including transfers of digital assets in the Final Rule. The CFPB considers the above comments on the proposed threshold in light of this update, which the Final Rule implements through a limitation in the threshold described further below.

[366] *See, e.g.,* Automobile Finance Larger Participant Rule, 80 FR 37496, 37515 (June 30, 2015) (''Each of the [larger participants] provides or engages in hundreds of automobile originations each week and falls in the top 10 percent of nonbank entities in the market according to the Bureau's estimates. They can reasonably be considered larger participants of the market. Some entities that meet this threshold will have considerably less than 1 percent market share, but that is due in large part to the fragmentation of the market and does not change the fact [that] they are 'larger' than the vast majority of participants.'').

[367] As noted above, to the extent necessary or appropriate, the CFPB may adjust the threshold through future rulemakings that may reflect shifts in the market and other data that may be available to the CFPB.

that the Final Rule adopts is reasonably likely to allow it to conduct some supervisory activities in this area.

In addition, given that the Final Rule adopts a higher threshold of 50 million annual consumer payment transactions as discussed below, the CFPB is not persuaded by claims by some commenters that nonbank firms would be discouraged from entry, innovation, or growth due to the potential exposure to CFPB examinations resulting from this rule. The CFPB notes its existing enforcement authority over market participants generally regardless of size, their existing obligations to comply with Federal consumer financial law regardless of size, how this rule imposes no substantive consumer protection obligations, how the CFPB uses a prioritization process to allocate limited supervisory resources toward those nonbanks that pose relatively higher risks to consumers, and that no firm that is a small business concern would incur the cost of examination under this rule. Considering all of these factors, the CFPB does not believe that this rule is likely to shape market participation patterns in the way those commenters describe.

With regard to the industry association commenter asking whether any firms would have exceeded the proposed threshold but qualified for the small business concern exclusions, the CFPB notes that it did not include any such firms in its estimate of 17 larger participants because such firms would not have qualified as larger participants under the Proposed Rule. The Final Rule discusses this question further in the explanation below of the threshold adopted in the Final Rule.

With regard to comments on the look-back period for applying the proposed larger-participant test, the CFPB disagrees that the rule should apply a longer period such as two years. Fluctuations in market participants' transaction volumes may occur over time, but if their volumes exceed the threshold in a calendar year, then they would be sufficient, over a long enough time period (12 months), to conclude that the entity's market activity has been having a significant impact on consumers. As the international money transfer larger participant rule noted in adopting a one-year lookback period, ''[b]ecause the criterion directly measures the number of transfers in the market, it should not be subject to temporary fluctuations that are unrelated to an entity's market participation.'' [368] In addition, for this rule, as with the international money transfer larger participant rule, the CFPB ''believes that the single-year approach will make the Final Rule's definitions easier to apply . . . and alleviate the concern expressed by some commenters about the overall complexity of'' certain provisions. For example, this is the first larger participant rule that adopts a larger-participant test with two criteria, and the first larger participant rule that adopts an exclusion for small business concerns as one of the criteria. It would significantly increase complexity in the administration of the test to judge two different criteria, which generally are measured over a calendar year (such as small business concern criteria measured by annual receipts) over multiple years.[369] Further, to the extent commenters assumed that all entities that exceed the proposed threshold in the prior year for the first time would face immediate examination the following year, that assumption is an incorrect reading of the Proposed Rule. First, if the entity were a small business concern in the previous calendar year, under the proposed larger-participant test, it would not have qualified as a larger participant, even if its volume of consumer payment transactions did exceed the threshold for the first time in that same calendar year. Second, as the Proposed Rule explained, consistent with the CFPA, the CFPB conducts a risk-based supervision program for nonbanks subject to supervisory authority under CFPA section 1024(a). This includes a process for prioritizing entities for examination as described in its public Supervision and Examination Manual cited in the Proposed Rule and discussed in part I above. As part of that process, where appropriate, the CFPB can consider the entity's volume of consumer payment transactions, including the degree to which it exceeds the transaction threshold and for how long it has exceeded that threshold.

With regard to comments on the proposal to aggregate activities of affiliated companies, CFPA section 1024(a)(3)(B) requires aggregation of activity across affiliated companies for purposes of determining activity levels in larger participant rules. To clarify that the purpose of paragraph (b)(3) is to implement that requirement, the Final Rule adds language to the header for paragraph (b)(3) that describes the provision as outlining the ''method'' for computing aggregate activity levels. With regard to the industry association comment calling for the rule to assess small business concern status without counting receipts of affiliated companies, the CFPB disagrees. The overall size of the business organization, including affiliates, is a relevant reference point as the CFPB considers which types of entities may incur the estimated cost of examination pursuant to this rule.

Final Rule

The Final Rule adopts in paragraph (b)(3) a threshold annual covered consumer payment transaction volume of 50 million consumer payment transactions denominated in U.S. dollars as described further below.[370]

The CFPB estimates that seven nonbanks that are not small business concerns have annual consumer payment transaction volumes that exceed this threshold, that these seven nonbank firms account for approximately eight percent of the 85 market participants for which the CFPB has sufficient data to estimate larger participant status (and an even lower share of the approximately 130 known market participants),[371] and that these

[368] 79 FR 56631 at 56637.

[369] Although the CFPB's first larger participant rules averaged annual receipts over time, those rules only adopted that single criterion (annual receipts).

[370] The Final Rule also makes non-substantive clarifying revisions to paragraph (b), including identifying in paragraph (b) that both criteria in paragraphs (b)(1) and (2) are based on the preceding calendar year and associated revisions.

[371] Due to the Final Rule's adoption of a threshold limited to transfers of funds denominated in U.S. dollars discussed further below, the Final Rule does not include in its estimate of nonbank market participants firms that appear to provide consumer payment transactions solely in the form of digital assets. The Final Rule also does not include in this estimate two firms that public information indicates are not nonbank market participants, as described in n.373 below.

In addition, the estimated 130 nonbank market participants includes four additional nonbank financial firms, as follows: (1) Based on its review of the clarified definition of ''general use'' described above, the Final Rule has identified two nonbank financial firms that provide payment functionalities for family and friends to transfer funds to postsecondary students; (2) The removal of the proposed exclusion for bill splitting in the definition of ''general use'' described above also results in one estimated additional nonbank market participant; and (3) Through its general activities, the CFPB became aware of one additional nonbank providing a peer-to-peer app-based payment functionality for a deposit account. Nonbank financial institutions providing these services generally do not appear to be licensed as money transmitters and the account agreements do not appear to be filed in the CFPB's prepaid account agreement database.

Further, as noted above and in the Proposed Rule, an entity is included in the estimated number of nonbank market participants if public information indicates it currently offers at least one consumer financial product or service within the market definition; however, for some of these 130 estimated nonbank market participants, the CFPB lacks sufficient information to assess whether certain other products they offer or are developing constitute a general-use digital consumer payment application. As also noted in the Proposed Rule, the CFPB's estimate of the number of nonbank market

Continued

seven nonbank firms facilitated approximately 13.3 billion consumer payment transactions, accounting for approximately 98 percent of the over 13.5 billion consumer payment transactions market participants provide.[372] Despite the increase in the threshold, larger participants' share of market activity also increased largely because the nonbank market size estimate in the Final Rule does not include an entity that the Final Rule estimates, based on further research in response to a comment described above, may not be a nonbank covered person.[373]

As some commenters noted, the market continues to grow and evolve rapidly and that some new entrants may quickly exceed the proposed threshold of five million transactions. For the reasons explained above, the CFPB does not believe the threshold used to define a larger participant in this Final Rule is likely to significantly affect market activity such as new entry, innovation, and growth. But the significantly higher threshold the Final Rule adopts nonetheless would provide new entrants and others with smaller volumes more room to grow before coming under the CFPB umbrella of larger participant supervision in this rulemaking. For example, based on the estimates in the Final Rule at this threshold, eight fewer entities would qualify as larger participants because their volume of consumer payment transactions falls between 5 and 50 million annual consumer payment transactions (and another two are no longer estimated to be nonbank market participants, as noted above). Yet, the remaining entities that the CFPB estimates qualify as larger participants under the higher threshold adopted in the Final Rule still account for approximately 98 percent of the market activity as noted above. In addition, this higher threshold would allow CFPB supervision to focus more consistently on nonbank firms that account for almost all market activity including the part of the market that the Proposed Rule described as ''highly concentrated, with a few entities that facilitate hundreds of millions or billions of consumer payments annually[.]'' [374] At the same time, based on its estimates, the CPFB finds that the higher threshold still would serve the goal described in the Proposed Rule of covering larger participants that serve a mix of consumer populations including more vulnerable consumers such as justice-involved individuals as well as lower-income consumers and the unbanked or underbanked populations more generally. In any event, because the seven nonbank firms that the CFPB estimates would be larger participants at the threshold of 50 million account for approximately 98 percent of market activity, the CFPB does not believe that adopting a lower threshold that would cover additional market activity would be warranted. The CFPB also does not believe that it would be appropriate to adopt a threshold that would result in substantially less market activity being covered, such as the estimated 63 percent in the consumer debt collection rulemaking that one industry association commenter suggested the CPFB consider here. As that rulemaking noted, the data used to estimate overall market activity included receipts from the collection of medical debt, which were not included in the larger-participant test.[375] As a result, the circumstances surrounding that estimate in that rule were unique to that rule and that test. In addition, due to the highly-concentrated nature of the market described above, adopting any higher threshold (even 500 million transactions, as one commenter suggested the CFPB consider) would not significantly reduce larger participants' share of market activity. A threshold of 500 million transactions would result in an estimated four larger participants with an estimated 96 percent share of market activity. The CFPB also does not seek to adopt a threshold at a level that is so high that it only captures the few largest participants, which would have the incongruous effect of treating only the largest participants as ''larger'' participants, and in any event would not achieve the CFPB's stated goal of covering a mix of activities described above.

In addition to increasing the threshold as described above, the Final Rule limits the definition of ''annual covered consumer payment transaction volume'' to transactions denominated in U.S. dollars. With this clarification (and a corresponding edit to paragraph (b)(3)(i)), the larger-participant test in this Final Rule excludes transfers of digital assets, including crypto-assets such as Bitcoin and stablecoins. For the reasons discussed in the section-by-section analysis of ''consumer payment transaction'' above, the Final Rule excludes these transactions from the threshold to ensure the administrability of the larger-participant test while the CPFB continues to monitor developments in the market for consumer payments involving digital assets.

VI. Effective Date of Final Rule

The Administrative Procedure Act generally requires that rules be published not less than 30 days before their effective dates.[376] In the Proposed Rule, the CFPB proposed that, once issued, the Final Rule for this proposal would be effective 30 days after the Final Rule is published in the **Federal Register**. For the reasons discussed below, in consideration of the comments, the Final Rule adopts that effective date.

Comments Received

An industry trade association stated that nonbanks would need at least 90

participants may be an underestimate because, for certain entities, the CFPB lacks sufficient information to assess whether they provide a general-use digital consumer payment application.

[372] Due to the threshold's limitation to transfers of funds denominated in U.S. dollars discussed further below, the Final Rule does not include in the market transactions that the data sources specifically identify as digital assets transactions. In addition, as a result of that limitation on the threshold in the Final Rule, the Final Rule does not use the transaction volume data from the CFPB's section 1022 order responses for one of the estimated larger participants and instead uses money service business call report data in NMLS.

[373] To respond to the industry association comment (described above) asking whether any of the rulemaking's estimated nonbank market participants would have exceeded the consumer payment transactions volume threshold and also qualified as a small business concern, the CFPB has reviewed public information and makes two updates to the estimates in the Final Rule. First, the CFPB identified one entity that would have exceeded the proposed transaction volume threshold that the proposal did not estimate to be a larger participant because the data sources described in the proposal did not indicate whether the entity was a small business concern. To respond to the comment, the CFPB reviewed public information, which suggested the entity may not be a nonbank covered person, and the Final Rule does not include that entity among the estimated nonbank market participants or its transaction volume in the market size estimate. Second, for another entity that had that level of transaction volume and which the proposal estimated was not a small business concern, the CFPB reviewed public information and found that the firm had previously sold its general-use digital consumer financial application to an unaffiliated entity, for which the CFPB lacks data to estimate its transaction volume data or whether it is a small business concern. Therefore, the Final Rule does not include the selling entity among the estimated market participants or its transaction volume in the market size estimate. As a result of these two updates, the CFPB estimates that all nonbank entities with data indicating over 50 million consumer payment transactions are not small business concerns. As noted, the CFPB still does not have transaction volume data for some market participants; to the extent any of them have over 50 million consumer payment transactions, it is possible they could be a small business concern. But given that the CFPB estimates that none of the seven nonbank firms that available transaction volume data indicates have over 50 million consumer payment transactions are small business concerns, it may be unlikely that if any other firms did have a volume that exceeds the threshold, they would be a small business concern.

[374] 88 FR 80197 at 80210.

[375] 77 FR 65775, 65788 n.98.

[376] 5 U.S.C. 553(d).

days from publication in the **Federal Register** to prepare for CFPB supervision. This commenter stated that some companies may not have reasonable notice from the Proposed Rule that they are participating in the proposed market. The commenter also pointed to effective date periods of 60 or more days in previous larger participant rules as a precedent. A law firm made similar points in support of its view that a 60-day pre-effective date period is needed. It also noted that the rationale the CFPB adopted in the consumer reporting larger participant rule for a 60-day period—including recognizing the need for entities that have never been examined to conduct training to prepare for the CFPB examination process [377]—also applies here.[378] Finally, although two trade associations representing depository institutions and a trade association representing credit unions called for the CFPB to use or develop examination procedures for larger participants in a manner consistent with its procedures for examining banks and credit unions, they did not call for extending the effective date period.

Response to Comments Received

The CFPB disagrees that additional time, beyond the minimum 30-day period prescribed by the APA noted above, is necessary before this Final Rule can take effect. Larger participant rules do not impose substantive consumer protection obligations. Although larger participants might choose to increase their compliance with Federal consumer financial law in response to the possibility of supervision, market participants are already obligated to comply, and should already comply with, applicable Federal consumer financial law, regardless of whether they are subject to supervision. Thus, entities that qualify as larger participants under the Final Rule should not require additional time to come into compliance with Federal consumer financial law. Moreover, the CFPB designs its examination procedures and process to allow companies a reasonable amount of time to provide responses to information requests before examiners begin the examination. This is in addition to a 45-day period in which the entity may challenge the assertion that it is a larger participant under 12 CFR 1090.103(a). In addition, the CFPB believes that many larger participants have examination experience at the State level, and in some cases with the CFPB.[379] As noted in the Proposed Rule, some larger participants may already be subject to CFPB examination authority, including but not limited to as larger participants pursuant to the international money transfer larger participant rule. For all of these reasons, the CFPB disagrees that a later effective date is necessary to allow companies more time to prepare for CFPB supervision.[380]

VII. Dodd-Frank Act Section 1022(b) Analysis

A. Overview

In developing this Final Rule, the CFPB has considered the potential benefits, costs, and impacts of the Rule as required by section 1022(b)(2) of the CFPA.[381] The Proposed Rule set forth a preliminary analysis of these effects, and the Bureau requested and received comments on the topic.

The CFPB is issuing this Rule to establish supervisory authority over larger participants in the defined market for general-use digital consumer payment applications. Participation in this market will be measured on the basis of the aggregate number of annual consumer payment transactions denominated in U.S. dollars that a nonbank facilitates through general-use digital consumer payment applications, defined in the Final Rule as ''annual covered consumer payment transaction volume.'' If a nonbank covered person, together with its affiliated companies, has an annual covered consumer payment transaction volume (measured for the preceding calendar year) of at least 50 million and is not a small business concern, it will be a larger participant in the market for general-use digital consumer payment applications. As prescribed by existing § 1090.102, any nonbank covered person that qualifies as a larger participant will retain larger participant status until two years from the first day of the tax year in which the person last met the larger-participant test.[382]

B. Baseline for Analysis and Data Limitations

The discussion below relies on information that the CFPB has obtained from industry, other regulatory agencies, and publicly-available sources, as well as on CFPB expertise. These sources form the basis for the CFPB's consideration of the likely impacts of the Final Rule. The CFPB provides estimates, to the extent possible, of the potential benefits and costs to consumers and covered persons of this Final Rule, against a baseline in which the CFPB takes no action. This baseline includes the current state of the market and existing regulation, including the CFPB's existing rules defining larger participants in certain markets.[383] Many States have supervisory programs relating to money transfers, which may consider aspects of Federal consumer financial law.[384] Federal prudential regulators' supervisory programs for banks also may extend to certain nonbank service providers, and may consider aspects of Federal consumer financial law related to the banking institutions subject to the jurisdiction of

[377] *See* 77 FR 65775 at 65778–79 & n.30 (consumer debt collection larger participant rule adopting rationale for a 60-day effective date period in the consumer reporting larger participant rule, recognizing that ''companies affected by the Consumer Reporting Rule might not previously have been supervised at the Federal or State level'').

[378] A digital assets payment provider stated that a two-year implementation period would be needed to allow these types of firms and the CFPB time to prepare for supervision. A digital assets industry trade association stated that firms in this area would need more time to assess whether they are larger participants. The Final Rule does not include digital assets in the larger-participant test and therefore those issues are not relevant to setting the effective date.

[379] The law firm commenter's claim that many larger participants have not previously been examined was not supported by examples or specifics. It was unclear whether the commenter was considering examination at the State level, which was part of the rationale for the 60-day effective date in the consumer reporting larger participant rule as noted above. As noted above, many industry commenters stated that many market participants are money transmitters subject to examination at the State level.

[380] With regard to an individual commenter's suggestion of a two-phased adoption process, prior rules have not taken that approach and the CFPB believes it is not warranted here since, as noted above, larger participant rules do not impose substantive consumer protection obligations, and the Final Rule does not include digital assets transactions.

[381] Specifically, CFPA section 1022(b)(2)(A) calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on insured depository institutions and insured credit unions with $10 billion or less in total assets as described in CFPA section 1026; and the impact on consumers in rural areas. The manner and extent to which the provisions of 12 U.S.C. 5512(b)(2) apply to a rulemaking of this kind that does not establish standards of conduct are unclear. Nevertheless, to inform this rulemaking more fully, the CFPB performed the analysis described in those provisions of the CFPA.

[382] 12 CFR 1090.102.

[383] *See, e.g.,* 12 CFR 1090.107 (defining larger participants of a market for international money transfers subject to the CFPB's supervisory authority under 12 U.S.C. 5514(a)(1)(B)). The CFPB has discretion in any rulemaking to choose an appropriate scope of analysis with respect to potential benefits and costs and an appropriate baseline. The CFPB, as a matter of discretion, has chosen to describe a broader range of potential effects to inform the rulemaking more fully.

[384] The Financial Crimes Enforcement Network's (FinCEN) Federal regulation of money transmitters generally does not apply Federal consumer financial law.

those regulators. However, the activities of larger participants in this market extend beyond State-regulated money transmitting and acting as service providers to banks. In addition, at present and other than the CFPB's activities, no program for supervision of nonbanks that participate in the general-use digital consumer payment applications market is dedicated exclusively to promoting compliance with Federal consumer financial law.

To the extent that this rule establishes supervisory authority over entities or their activities that already are subject to State or Federal supervisory oversight, as discussed in parts I and V above, the CFPB coordinates with the applicable State and Federal regulators in the operation of its risk-based nonbank supervision program to prevent unnecessary duplication and burden. To the extent that entities already are subject to the CFPB's supervisory authority (such as entities subject to supervision as service providers under section 1025(d) or 1026(e) of the CFPA or larger participants under a prior larger participant rulemaking), this rule will establish an additional basis for the CFPB to supervise those entities.

The CFPB notes at the outset that limited data are available with which to quantify the potential benefits, costs, and impacts of the Final Rule. As described above, the CFPB has utilized various sources for quantitative information on the number of market participants, their annual revenue, and their number and dollar volume of transactions.[385] However, the CFPB lacks detailed information about their rate of compliance with Federal consumer financial law and about the range of, and costs of, compliance mechanisms used by market participants. Further, as noted above in the section-by-section analysis of the threshold for the larger participant test, the CFPB lacks sufficient information on approximately one-third of known market participants necessary to estimate their larger-participant status.[386] Compared to the lower threshold test of five million annual transactions that the CFPB proposed in the Proposed Rule, it is less likely that those entities would be larger participants at the higher threshold test of 50 million annual transactions in the Final Rule.

In light of these data limitations, this analysis generally provides a qualitative discussion of the benefits, costs, and impacts of the Final Rule. General economic principles, together with the limited data that are available and the CFPB's experience operating its supervision program, provided insight into these benefits, costs, and impacts. Where possible, the CFPB has made quantitative estimates based on these principles and data as well as on its experience of undertaking supervision in other markets.

C. General Comments Received on the 1022(b) Analysis

Several industry commenters and some Members of Congress generally asserted that the cost-benefit analysis for the proposal was inadequate. For example, three industry associations stated that the proposal overlooked various direct and indirect costs associated with supervision and that it underestimated the costs, or that it opportunistically framed the costs and benefits, or that it overstated benefits of supervision with respect to larger participants that are not ''financial institutions'' under Regulation E implementing the EFTA and Regulation P implementing the GLBA. One industry association commenter referenced the cost to what it referred to as custodial and non-custodial cryptocurrency-asset wallet developers to change their business model in order to collect and verify identity and transaction information. Another industry association commenter stated that the cost of any new regulation, including this Rule, would be incorporated into production costs and passed on to the consumer. Similarly, another industry association commenter claimed the CFPB failed to explain how expanding its supervisory authority would bring about consumer benefits from increased compliance. In addition, a company commenter claimed that the proposal failed to account for all costs, to accurately quantify the benefits and costs, and to find that the benefits would outweigh the costs of the Rule. A law firm commenter stated that the costs of CFPB examinations would outweigh benefits to consumers for firms at or near the proposed threshold of five million transactions.[387]

The CFPB disagrees with the general assertion that its consideration of benefits and costs under section 1022(b) of the CFPA in the proposal was inadequate. The CFPB conducted a thorough analysis of the reasonably-available data to estimate and quantify benefits and costs to the extent possible. As noted in the proposal as well as above, where data do not support reliable quantitative estimates, the CFPB has qualitatively discussed potential benefits and costs based on general economic principles and its experience engaging in supervisory activities in other markets. The CFPB has provided additional responses to particular comments below, and where appropriate has updated its consideration of the Rule's benefits and costs in response to comments. For example, some industry commenters provided additional information on wages and salaries as well as predictions of larger participants' likely future staffing levels for CFPB supervisory examinations in this market and the CFPB has incorporated this information into cost calculations below. The CFPB notes that the general criticism of a lack of quantification generally was not accompanied by submissions of data that would aid in further quantifying potential costs or benefits that were not quantified in the proposal.[388]

Above and further below, the Rule discusses how expanding the supervisory authority of the CFPB to cover this market will help increase compliance.

D. Potential Benefits and Costs to Consumers and Covered Persons

The discussion below describes three categories of potential benefits and costs. First, the Final Rule authorizes the CFPB's supervision of larger participants of a market for general-use digital consumer payment applications. Larger participants of the market may respond to the possibility of CFPB supervision by changing their compliance systems and conduct, and those changes may result in costs, benefits, or other impacts. Second, if the CFPB undertakes supervisory activity of specific larger participant providers of general-use digital consumer payment applications, those entities may incur costs from responding to supervisory activity, and the results of these

[385] *See* section-by-section analysis of § 1090.109(b).

[386] As stated above, the CFPB estimates that approximately 130 entities operate in the market for providing general-use digital consumer payment applications as defined in the Final Rule. Of those entities, the CFPB has data on roughly two-thirds sufficient to estimate larger-participant status, including whether those entities would be subject to the exclusion for small business concerns. The CFPB estimates that approximately seven of those would be larger participants under the larger-participant test defined in the Final Rule.

[387] Some commenters stated that the CFPB should conduct separate cost-benefit analyses for what they characterized as disparate markets. The CFPB responds to comments on the market definition above, in § 1090.109(a)(1). This section analyzes the costs and benefits of the Rule for the market defined in the Final Rule.

[388] The Proposed Rule sought ''submissions of additional data that could inform the CFPB's analysis of the costs, benefits, and impacts of the Proposed Rule.'' 88 FR 80197, 80211.

individual supervisory activities also may produce benefits and costs. Third, the CFPB analyzes the costs that might be associated with entities' efforts to assess whether they would qualify as larger participants under the Rule.

1. Benefits and Costs of Responses to the Possibility of CFPB Supervision Conducting an Examination or Other Supervisory Activities

The Final Rule subjects larger participants of a market for general-use digital consumer payment applications to CFPB supervision. As described in the Proposed Rule, that the CFPB will be authorized to undertake supervisory activities with respect to a nonbank covered person who qualifies as a larger participant would not necessarily mean that the CFPB would in fact undertake such activities regarding that covered person in the near future. Rather, the CFPB generally would examine certain larger participants on a periodic or occasional basis. The CFPB's decisions about supervision are informed, as applicable, by the factors set forth in CFPA section 1024(b)(2) [389] relating to the size and transaction volume of larger participants, the risks to consumers created by their provision of consumer financial products and services, the extent of State consumer protection oversight, and other factors the CFPB may determine are relevant. Part I of the Final Rule provides additional background on the CFPB's risk-based prioritization process (including how it considers field market intelligence), which is not the subject of this rulemaking. Each entity that believes it qualifies as a larger participant will know that it is subject to CFPB supervision and might gauge, given its circumstances, the likelihood that the CFPB would initiate an examination or other supervisory activity.

The prospect of potential CFPB supervisory activity could create an incentive for larger participants to allocate additional resources and attention to compliance with Federal consumer financial law, potentially leading to an increase in the level of compliance. They might anticipate that by doing so (and thereby decreasing risk to consumers), they could decrease the likelihood of their actually being subject to supervisory activities as the CFPB evaluated the factors outlined above. In addition, an actual examination would be likely to reveal past or present noncompliance, which the CFPB could seek to correct through supervisory activity or, in some cases, enforcement actions. Larger participants therefore might judge that the prospect of CFPB supervision increases the potential consequences of noncompliance with Federal consumer financial law, and they might seek to decrease that risk by taking steps to identify and cure or mitigate any noncompliance before the CFPB conducts an examination.

The CFPB believes it is likely that many larger participants would increase compliance in response to the CFPB's supervisory activity authorized by the Final Rule. However, because the Final Rule itself would not require any provider of general-use digital consumer payment applications to take such action, any estimate of the amount of increased compliance would require both an estimate of current compliance levels and a prediction of market participants' behavior in response to a Final Rule. The data that the CFPB currently has do not support a specific quantitative estimate or prediction. But, to the extent that nonbank entities allocate resources to increasing their compliance in response to the Final Rule, that response would result in both benefits and costs.[390]

Benefits From Increased Compliance Based on Possibility of CFPB Examination

Increased compliance with Federal consumer financial laws by larger participants in the market for general-use digital consumer payment applications would be beneficial to consumers who use general-use digital payment applications. Increasing the rate of compliance with Federal consumer financial laws would benefit consumers and this market by providing more of the protections mandated by those laws.

Entities are aware that the CFPB would be examining for compliance with applicable provisions of Federal consumer financial laws, including the EFTA and its implementing Regulation E, as well as the privacy provisions of the GLBA and their implementing Regulation P.[391] In addition, the CFPB would be examining for whether larger participants of the market for general-use digital consumer payment applications engage in unfair, deceptive, or abusive acts or practices.[392] Conduct that does not violate an express requirement of another Federal consumer financial law may nonetheless constitute an unfair, deceptive, or abusive act or practice. To the extent that any provider of general-use digital consumer payment applications is currently engaged in any unfair, deceptive, or abusive acts or practices, the cessation of the unlawful act or practice would benefit consumers. Providers of general-use digital consumer payment applications might improve compliance policies and procedures in response to possible supervision in order to avoid engaging in unfair, deceptive, or abusive acts or practices.

The possibility of CFPB supervision also may help to make incentives to comply with Federal consumer financial laws more consistent between the likely larger participants and insured banks and insured credit unions, which are subject to Federal supervision with respect to Federal consumer financial laws. Although some nonbank market participants already are subject to State supervision and also may be supervised by Federal prudential regulators in certain capacities, introducing the possibility of Federal supervision that applies to market activities regardless of the degree to which they are subject to State or Federal prudential regulatory oversight could encourage nonbanks that likely are larger participants to devote additional resources to compliance. It also could help to ensure that the benefits of Federal oversight reach consumers who do not have ready access to bank-provided general-use digital consumer payment applications.

Comments Concerning Benefits of Increased Compliance Based on Possibility of CFPB Examination

Two industry association commenters expressed doubt about whether there would be benefits to consumers from larger participants increasing compliance with Federal consumer financial laws in anticipation of a possible CFPB supervisory examination due to the data gaps described in the proposal and the lack of an estimate regarding the number of supervisory examinations the CFPB plans to undertake in any given year. These commenters moreover suggested that companies that believe they are larger participants will have to assume they

[389] 12 U.S.C. 5514(b)(2).

[390] Another approach to considering the benefits, costs, and impacts of the Proposed Rule would be to focus almost entirely on the supervision-related costs for larger participants and related benefits of any increased compliance resulting from examination activity and omit a broader consideration of the benefits and costs of increased compliance by entities in anticipation of such examination activity. As noted above, the CFPB has, as a matter of discretion, chosen to describe a broader range of potential effects to inform the rulemaking more fully.

[391] The CFPB also can supervise larger participants for other Federal consumer financial laws that apply, including rules that have recently taken effect, such as the CFPB's nonbank registration regulation at 12 CFR part 1092, or for which compliance is mandatory in the future, such as its Personal Financial Data Rights Rule.

[392] 12 U.S.C. 5531.

will be examined such that all potential larger participants would experience the increased anticipation cost associated with being subject to the rule.

Response to Comments

With respect to data gaps in the analysis of larger participant status, the CFPB notes that larger participants likely possess more information than the CFPB regarding their own transaction volume, revenue and/or employee counts necessary to determine their larger participant status. The CFPB expects the higher threshold of 50 million annual transactions to reduce uncertainty among potential larger participants as to their larger participant status. While the CFPA and CFPB regulations thereunder do not require larger participants to prepare for the examination process before they receive notice of an actual examination, the CFPB believes it is plausible that many larger participants would respond to the incentives described above as part of their risk-management strategy, especially if they expect there to be a reasonable chance of examination in the near future. Commenters did not offer evidence to the contrary. Part V of the Final Rule above provides additional discussion of general comments concerning the Final Rule's promotion of compliance with Federal consumer financial law.

Costs of Increased Compliance Based on Possibility of CFPB Examination

To the extent that nonbank larger participants would decide to increase resources dedicated to compliance in response to the possibility of increased supervision, the entities would bear any cost of any changes to their systems, protocols, or personnel. Whether and to what extent entities would increase resources dedicated to compliance and/or pass those costs on to consumers would depend not only on the entities' current practices and the changes they decide to make, but also on market conditions. The CFPB lacks detailed information with which to predict the extent to which increased costs would be borne by providers or passed on to consumers, to predict how providers might respond to higher costs, or to predict how consumers might respond to increased prices, and commenters did not provide such detailed information in their comments. The CFPB further considers and responds to related comments about the cost of compliance enhancements below.

2. Benefits and Costs of Individual Supervisory Activities

In addition to the responses of larger participants anticipating supervision, the possible consequences of the Final Rule would include the responses to and effects of individual examinations or other supervisory activity that the CFPB might conduct with respect to larger participants in the market for general-use digital consumer payment applications.

Benefits of Supervisory Activities

In the CFPB's experience, supervisory activity generally provides several types of benefits. As discussed above, the CFPB operates a risk-based nonbank supervision program, and prioritizes markets and individual entities for supervisory activity on the basis of a risk assessment that considers the factors listed in CFPA section 1024(b)(2). Due to this risk-based approach, in the CFPB's experience, the CFPB's nonbank supervisory activities often uncover compliance deficiencies indicating harm or risks of harm to consumers.[393] In its supervision and examination program, the CFPB generally prepares a supervisory letter or report of each examination. The CFPB shares examination findings with the supervised entity because one purpose of supervision is to inform the entity of problems detected by examiners. Thus, for example, an examination may find evidence of widespread noncompliance with Federal consumer financial law, or it may identify specific areas where an entity has inadvertently failed to comply, or it may identify weaknesses in compliance management systems including policies and procedures. These examples are only illustrative of the kinds of information an individual examination may identify.

Detecting and informing supervised entities about such problems is generally beneficial to consumers including by identifying issues before they become systemic or cause significant harm. When the CFPB notifies entities about risks or noncompliance associated with aspects of their activities, the entities are expected to adjust their practices to reduce those risks. In the CFPB's experience, those responses frequently result in increased compliance with Federal consumer financial law, with benefits like those described above in connection with the possibility of CFPB examination. However, the benefits in connection with individual supervisory activities may be greater because the CFPB often will identify specific acts or practices that violate Federal consumer financial law and direct specific corrective actions including compliance improvements as well as restitution and remediation. For more than a decade, the CFPB has regularly described these corrective actions, including by larger participants, in its *Supervisory Highlights* publication.[394] Such responses can also avert violations that would have occurred if CFPB supervision did not detect the risk or noncompliance promptly. In some circumstances, the CFPB also informs entities about acts or practices that risk violating Federal consumer financial law. Action to reduce those risks is also a benefit to consumers.

Given the obligations providers of general-use digital consumer payment applications have under Federal consumer financial law and the existence of efforts to enforce such laws, including by the CFPB and States,[395] and based on the CFPB's supervisory experience in other markets, the CFPB also expects that the results of CFPB supervision will benefit larger participants under supervision by detecting compliance problems early. When an entity's noncompliance results in litigation or an enforcement action, the entity must face both the costs of defending its action and the penalties for noncompliance, including potential liability to private plaintiffs. The entity must also adjust its systems to ensure future compliance. Changing practices that have been in place for long periods of time can be expected to be relatively difficult because they may be severe enough to represent a serious failing of an entity's systems. Supervision may detect flaws at a point when correcting them would be relatively inexpensive. Catching problems early, in some situations, can forestall costly litigation. To the extent early correction limits the amount of consumer harm caused by a violation, it can help limit the cost of redress. In short, supervision is likely to benefit providers of general-use digital consumer payment applications under

[393] *See, e.g.,* response to general comments in part V above citing examples of *Supervisory Highlights* issues that identified compliance deficiencies, violations of Federal consumer financial law, and risks of violations of Federal consumer financial law by nonbank covered persons, including larger participants in other markets.

[394] *See, e.g., id.; see also Supervisory Highlights* (website compendium of all of these publications), *supra,* at *https://www.consumerfinance.gov/compliance/supervisory-highlights/* (last visited Oct. 17, 2024).

[395] *See, e.g.,* CFPB, Interpretive Rule, Authority of States to Enforce the Consumer Financial Protection Act of 2020, 87 FR 31940 (May 26, 2022) (interpreting CFPA section 1042 and related provisions).

supervision by, in the aggregate, reducing the need for other more expensive activities to achieve compliance.[396]

Comments Regarding Benefits to Compliance

The CFPB received differing comments regarding the potential compliance benefits of the Rule. Three nonprofits and one company commented that the proposal lacked support for the claimed benefit to consumers from increased compliance because the CFPB failed to demonstrate a baseline lack of compliance with Federal consumer financial laws. For example, one commenter stated that the proposal did not provide data to show that supervision and compliance positively correlate with consumer welfare. The company commenter criticized that the Bureau did not explain how much compliance there currently is and how much incremental compliance would be achieved by supervision. None of these commenters provided additional information that would aid in quantifying current compliance levels. In contrast, other commenters, including consumer groups, an industry commenter, and a group of State attorneys general, discussed related and additional potential benefits of the Rule without quantifying these specifically, including: ensuring compliance of payment applications and digital wallet providers with EFTA and the error resolution responsibilities of Regulation E; the improved ability of the CFPB to coordinate with State regulators to prevent or address violations of the prohibition against unfair, deceptive, and abusive acts and practices; effective oversight of compliance with the privacy provisions of the GLBA in order to address data privacy issues imposed by digital payment applications; and an improved ability of the CFPB to monitor payment fraud, which one consumer advocate commenter described as extremely common.

Three industry association commenters claimed that the proposal overstated the benefits of supervision under the Federal consumer financial laws it referenced because, commenters asserted, many market participants are not financial institutions under the EFTA and GLBA and their respective implementing regulations, and the Rule would therefore not have the stated compliance benefits for consumers of the products of those firms. Similarly, another industry association and one company asserted that pass-through wallets or payment method wallets are not subject to Regulation E.

Two of the above-mentioned commenters from industry associations further stated that the proposal overstated benefits to consumers of supervision due to already-existing State and Federal oversight that they argued would be duplicative of the additional oversight established by this Rule. In contrast, several State attorneys general submitted a comment letter stating that the Rule would help existing regulatory oversight efforts in the market and would allow Federal and State authorities to coordinate to prevent unlawful conduct.

Response to Comments

The CFPB agrees with several commenters that this Rule provides potential benefits to consumers that may arise through increased supervision for compliance with Federal consumer financial laws including the CFPA's prohibition against unfair, deceptive, and abusive acts and practices, EFTA and Regulation E, and Regulation P and the privacy protections of the GLBA.

The CFPB disagrees with comments suggesting that the CFPB must estimate or quantify the baseline level of non-compliance in the market in order to conclude that the Rule is likely to increase compliance. Such comments are inconsistent with the CFPB's supervisory experience. As discussed above, the CFPB's risk-based supervision program is designed to prioritize supervisory activity among nonbank covered persons on the basis of risk, and thus to focus on those activities where consumers have the greatest potential to be harmed. Further, following the issuance of its five prior larger participant rules, the CFPB has successfully used its supervisory authority to detect violations and promote compliance in each of the markets covered by those rules, as reflected in its *Supervisory Highlights* publication.[397] Above, the CFPB provides additional discussion of comments concerning the Final Rule's promotion of compliance with Federal consumer financial law, including comments stating that the CFPB should measure the baseline level of non-compliance before issuing this Rule.

With respect to comments that some market participants are not financial institutions subject to EFTA and GLBA, as discussed in the section-by-section analysis above, this rulemaking does not prescribe substantive consumer protections or otherwise determine the scope of those laws. Regardless, supervision of those entities that are financial institutions for their compliance with those laws will still benefit consumers. More broadly, the Bureau will examine whether larger participants in the market for general use digital payment applications engage in unfair, deceptive, or abusive acts or practices.[398] As covered persons, larger participants are subject to the CFPA's prohibition against such acts and practices. To the extent that any larger participant or its service provider currently is engaged in any such act or practice, the cessation of the unlawful act or practice will benefit consumers.[399]

With respect to comments regarding existing oversight, as discussed further above, the CFPB agrees with the group of State attorneys general who stated that the rule would help existing regulatory oversight efforts in the market and would allow Federal and State authorities to coordinate to prevent unlawful conduct. The CFPB disagrees with comments suggesting that the CFPB's supervision will be duplicative of existing State and other Federal regulatory oversight. As discussed further above, in the response to general comments on this topic in the section-by-section analysis of the Final Rule, and in the background section of the rule in part II, the CFPB coordinates its supervisory activities with Federal prudential regulators, the FTC, and States in order to avoid duplication. Furthermore, there is currently no Federal program for supervision of nonbank covered persons in the market for general-use digital consumer

[396] Further potential benefits to consumers, covered persons, or both might arise from the CFPB's gathering of information during supervisory activities. The goals of supervision include informing the CFPB about activities of market participants and assessing risks to consumers and to markets for consumer financial products and services. The CFPB may use this information to improve regulation of consumer financial products and services and to improve enforcement of Federal consumer financial law, in order to better serve its mission of ensuring consumers' access to fair, transparent, and competitive markets for such products and services. Benefits of this type would depend on what the CFPB learns during supervision and how it uses that knowledge. For example, because the CFPB might examine a number of larger participants in the market for general-use digital consumer payment applications, the CFPB would build an understanding of how effective compliance systems and processes function in that market.

[397] *See* CFPB, *Supervisory Highlights* (website compendium of all of these publications), *at https://www.consumerfinance.gov/compliance/supervisory-highlights/* (last visited Oct. 17, 2024).

[398] 12 U.S.C. 5531.

[399] The CFPB Supervision and Examination Manual provides further guidance to CFPB examiners on how the prohibition against unfair, deceptive, and abusive acts and practices applies to supervised entities. *See CFPB Supervision and Examination Manual,* part II.C (UDAAP statutory-based procedures).

payment applications with respect to Federal consumer financial law compliance, and this Rule will fill that gap.

Costs of Supervisory Activities

The potential costs of actual supervisory activities would arise in two categories. The first category would be the cost to individual larger participants of supporting supervisory activity itself. The second category would involve any costs to individual larger participants of increasing compliance in response to the CFPB's findings during supervisory activity and to supervisory actions. These costs in the second category, discussed further below, would be similar in nature to the possible compliance costs based on the possibility of CFPB examination, described above, that larger participants in general may incur in anticipation of possible supervisory actions. This analysis will not repeat that discussion. As the CFPB Supervision and Examination Manual notes, the reason entities need a sound compliance management system is ''[t]o maintain legal compliance'' with Federal consumer financial law.[400] That is the case regardless of whether the entity is examined by the CFPB. For that reason, if a company already has established a sound compliance management system or improves that system in anticipation of possible CFPB supervisory actions as discussed above, then it is less likely to incur the costs in this second category described further below in response to actual CFPB supervisory activities.[401]

With respect to the first category of cost of supervisory activities, those activities may involve requests for information or records, on-site or off-site examinations, or some combination of these activities. For example, in an on-site examination, CFPB examiners generally contact the entity for an initial conference with management. That initial contact often is accompanied by a request for information or records. Based on the discussion with management and an initial review of the information received, examiners determine the scope of the on-site exam. While on-site, examiners spend some time in further conversation with management about the entity's policies, procedures, and processes. The examiners also review documents, records, and accounts to assess the entity's compliance and evaluate the entity's compliance management system. As with the CFPB's other examinations, examinations of nonbank larger participants in the market for general-use digital consumer payment applications may involve issuing confidential supervisory letters or examination reports and compliance ratings. The CFPB Supervision and Examination Manual describes the supervision process and indicates what materials and information an entity could expect examiners to request and review, both before they arrive and during their time on-site.

The primary costs an entity would face in connection with supporting an examination would be the cost of employees' time to collect and provide the necessary information. The frequency, duration, and scope of examinations of any particular entity would depend on a number of factors, including the size and transaction volume of the entity, the compliance or other risks identified, the extent of State consumer protection oversight, and other relevant factors, such as whether the entity has been examined previously, and the demands on the CFPB's supervisory resources imposed by other entities and markets. Nevertheless, some rough estimates may provide a sense of the magnitude of potential staff costs that larger participants may incur in supporting the examination of their consumer financial products and services.[402]

The cost of supporting supervisory activity may be calibrated using prior CFPB experience in supervision. In the proposal, the CFPB outlined that examinations of larger participants in the market for general-use digital consumer payment applications would be anticipated to be approximately eight weeks on average,[403] with an additional two weeks of preparation. This estimate assumed that each examination would require two weeks of preparation time by staff of larger participant providers of general-use digital consumer payment applications prior to the examination as well as on-site assistance by staff throughout the duration of the examination. The CFPB has not suggested that counsel or any particular staffing level is required during an examination. However, based on prior estimates, the CFPB assumed in the Proposed Rule that an entity might dedicate the equivalent of one full-time compliance officer and one-tenth of the time of a full-time attorney to assist with an exam. The national average hourly wage of a compliance officer is $39; the national average hourly wage for an attorney is $85.[404] These averages accounted for the likelihood that some compliance officers and attorneys will earn below or above the national average. Assuming that wages and salaries account for 70.3 percent of total compensation for private industry workers, the CFPB estimated in the proposal that the total employer cost of labor to comply with an examination would amount to approximately $25,000.[405]

[400] *See CFPB Supervision and Examination Manual,* part II.A (compliance management review examination procedures).

[401] A comment by an industry association stated that the proposal's estimate of the cost of supporting an examination ''seem[ed] to ignore'' costs related to establishing compliance programs and systems. However, that comment appears to have misunderstood the scope of that estimate. The CFPB does not consider the costs of establishing a compliance management system to be part of the cost of supporting the supervisory activity itself. Rather, the CFPB considers the costs of establishing or improving a compliance management system, if they are incurred, as either borne in anticipation of its supervisory activity (discussed above) or in response to findings of its supervisory activity (the second category of costs, discussed below). In any event, the Final Rule itself does not impose any requirements related to the establishment of a compliance management system. Firms are expected to have the systems and policies necessary to ensure they comply with existing, applicable substantive legal requirements, such as EFTA, its implementing Regulation E, the privacy provisions of the GLBA, their implementing Regulation P, and the CFPA's prohibition against unfair, deceptive, or abusive acts or practices. The CFPB's Supervision and Examination Manual describes aspects of compliance management that examiners review, but does not impose requirements; firms have flexibility in designing those systems and policies.

[402] In addressing comments in part V above, the Final Rule notes that the market definition, market-related definitions, and larger participant test do not depend or rely on the CFPB's position that the CFPA authorizes supervision and examination of all of the consumer financial products and services provided by nonbank covered persons subject to CFPA section 1024(a). This rule does not determine the extent to which the CFPB would examine other consumer financial products and services provided by larger participants besides general-use digital consumer payment applications. Nonetheless, the CFPB considers that the cost to a larger participant of supporting a typical eight-week on-site examination should not vary significantly depending on which consumer financial products or services are scoped into the examination.

[403] For an estimate of the length of examination, see Board of Gov. of Fed. Res. System Office of Inspector General, *The Bureau Can Improve Its Risk Assessment Framework for Prioritizing and Scheduling Examination Activities* (Mar. 25, 2019) at 13, *at https://oig.federalreserve.gov/reports/bureau-risk-assessment-framework-mar2019.pdf.* (last visited Oct. 31, 2023).

[404] For current U.S. Bureau of Labor Statistics (BLS) estimates of mean hourly wages of these occupations, see BLS, *Occupational Employment and Wages, May 2023, 13–1041 Compliance Officers, at https://www.bls.gov/oes/current/oes131041.htm#(1)* (last visited Aug. 15, 2024); BLS, *Occupational employment and Wages, May 2023, 23–1011 Lawyers, at https://www.bls.gov/oes/current/oes231011.htm* (last visited Aug. 15, 2024).

[405] *See* BLS, *Employer Costs for Employee Compensation—March 2024* (table 1 for 2024 Q1 estimates of the share of wages and salaries in total compensation of private sector workers), *at https://www.bls.gov/news.release/pdf/ecec.pdf.* (last visited Aug. 15, 2024). This cost is calculated as follows: ((((0.1 × $84.84) + $38.55)/0.703)) × 40 hours × 10 weeks.

Comments Received

The CFPB received comments on the Proposed Rule advocating for higher estimates of the entity's cost of supporting supervisory activity, including on the wage and or salary level used in the analysis and on the number of employees typically called upon to support a supervisory exam. For example, two industry associations and one commenter stated that the types of staff tasked with supervisory examinations at large technology firms are highly specialized and compensated at rates that are higher than the national average. Two of these commenters provided alternative estimates for wages and salaries based on industry publications or U.S. Bureau of Labor Statistics (BLS) compensation estimates for firms with 500 workers or more. A commenter from a non-profit associated with the cryptocurrency industry stated that companies would devote ''hundreds of thousands of dollars on support services'' but did not describe the components of these costs or provide evidence to substantiate this claim. A law firm representing an interested party likewise criticized the examination cost estimate of approximately $25,000 as an underestimate and cited a former CFPB Deputy Director stating that the costs would amount to ''at least ten times that'' estimate, but did not provide a detailed explanation of the estimated cost components.

Relatedly, two industry associations stated that companies may hire consultants and outside counsel to support an examination, in addition to attorneys, compliance officers and other staff. Another industry commenter provided a link to an industry study finding that the top 100 U.S. law firms charge clients on average $917 per hour for outside counsel. Neither commenter elaborated on the frequency or magnitude of this practice, including the share of firms that would hire outside counsel or the number of hours they would contract to support company responses to requests for information from CFPB examiners.

Several industry commenters suggested larger participants would be likely to dedicate multiple compliance officers and attorneys to the preparation and support of a supervisory examination. For example, one company commenter asserted that both the preparation and the support for an actual examination would require multiple full-time compliance personnel and attorneys. Two other industry association commenters asserted that supporting an examination and meeting the CFPB's expectations for entities' compliance management systems would require ''dozens of employees'' who collaborate across multiple departments in order to respond to information requests. One industry association stated that firms not previously supervised may increase staffing due to the lack of previous experience with CFPB examinations, and also due to what the commenter stated was antagonistic rhetoric by the CFPB toward this industry.

The CFPB also received comments regarding the estimated length of a typical supervisory examination that asserted that the true length would be longer than two weeks of preparation and eight weeks of examination engagement. For example, one company stated that it takes a year to prepare for examinations and two industry association commenters stated that the full examination process including responding to follow-up requests spans multiple months and oftentimes over a year. However, none of these commenters provided a detailed accounting of specific duties, time estimates, or other evidence to substantiate these statements. Two further industry association commenters likewise questioned the two- plus eight-week examination timeline, indicating they thought a longer period to be more accurate, although neither provided an alternative length estimate.

One industry association criticized that the CFPB declined to state the expected frequency of examinations. Several commenters stated that the cost of supervision could stifle new entry, innovation, competition and consumer access to the covered products, and that the proposal did not adequately account for these costs. For example, one commenter from a non-profit stated that the proposal's coverage of pass-through wallets could disincentivize offerings such as the tokenization of payments and credit products offered through wallets. Three additional commenters from industry associations asserted that the proposed transaction test of five million covered transactions was so low that it could lead to barriers to market entry, innovation, competition, and consumer access to these products. None of the commenters offered specific estimates or research to help quantify such potential costs, nor did they make suggestions of how to more adequately evaluate them qualitatively.

Related to the impact of costs on consumers' access to covered products, some commenters claimed the proposal inadequately considered potential pass-through costs to consumers and merchants. For example, some Members of Congress expressed concern that supervisory costs could have a negative impact on merchants that use covered products. They cited an industry study that finds that, of the small and medium-sized businesses throughout nine global markets, including the United States, that responded to their survey, 73 percent reported digital payments to be ''fundamental to their growth.'' [406] A non-profit and an industry association representative called for the CFPB to provide evidence that the Rule will not significantly impact small businesses or consumers.

Some of these same commenters as well as a company commenter claimed the proposal did not adequately consider the potential for supervisory costs to be passed through to consumers. For example, the nonprofit commenter noted that supervisory costs could create barriers to entry into the market and increase prices to consumers. The company stated that payment method wallets are free to consumers and that the Rule's costs could lead to firms charging consumers for the product. An individual consumer questioned whether the Rule would lead firms to charge fees for covered products. One industry association suggested the use of the average dollar amount of transactions to estimate potential pass-through costs to consumers.

Finally, an industry association commenter suggested that the Rule could increase the risk of privacy breaches and data leaks by increasing the number of individuals with access to sensitive, private information about customers of larger participants.

Response to Comments

The CFPB acknowledges the concerns raised by industry comments that, in the context of this market, the cost of supervisory activities may generally be higher than suggested in the Proposed Rule, and the CFPB is revising certain estimates in the discussion that follows in response to those comments. As noted above and discussed further below, the cost of supervisory activities can vary based on a number of factors, and thus the costs of examination activities may differ among larger participants within the market defined in this Rule. Those costs are partly

[406] *See* VISA, *Back to Business Global Study: 2022 Small Business Outlook, at https://usa.visa.com/dam/VCOM/blogs/visa-back-to-business-study-2022-outlook-jan22.pdf* (last visited Aug. 26, 2024). The nine markets include Brazil, Canada, Germany, Hong Kong, Ireland, Russia, Singapore, UAE and the United States. Percentages in the study are not necessarily representative of small and medium-sized businesses in the United States.

within the control of larger participants, some of whom may choose to devote more resources to responding to supervisory activities than others (*e.g.,* more staff time or support from outside counsel and consultants). In addition, as a general matter, the costs of supervisory activities are likely to be greater where examiners identify compliance violations or other risks to consumers, which are more likely to generate follow-up information requests and more extensive engagement with an entity as the CFPB attempts to correct the identified violations and address other risks.[407] These variations mean that the cost figures provided in this section are necessarily rough estimates, and that individual larger participants' costs may diverge from these estimates.

While none of the commenters provided alternative estimates of examination costs that included specific salaries combined with staffing levels and alternative proposals of the average examination length, the following paragraphs describe how estimates would change under different salary, staffing and length assumptions. For these scenarios, the CFPB draws on comments provided on the proposal. In a first scenario, the alternative estimates below incorporate higher salary levels that some commenters suggested would be more accurate in this market. In a second scenario, the CFPB uses these higher salary estimates in conjunction with higher staffing levels than those discussed in the proposal. A third scenario introduces an example of when the combined preparation and examination time would be longer than the proposed ten weeks. Under this scenario, the CFPB provides alternative estimates for an examination lasting 12 weeks, under the assumption of the higher salaries from scenario one as well as under both the higher salary and higher staffing levels from scenario two.

The CFPB does not have complete information pertaining to wages and salaries paid by all entities that may be subject to the Rule, and does not advocate for any particular wage or salary level for staff that support supervisory activities. However, the CFPB acknowledges that the cost to larger participants in this market of complying with a supervisory examination are likely to be higher than that of the average firm, in part because of where larger participants are located. For example, the top-paying metropolitan area for both compliance officers and lawyers is San Jose-Sunnyvale-Santa Clara, California, where the mean hourly wage for compliance officers is $56 and for lawyers is $129. Using these wage levels and the staffing assumptions set forth in the Proposed Rule,[408] the estimated total employer cost of labor to comply with an examination would increase to approximately $39,000.[409] This estimate is roughly $8,000 higher than the equivalent employer cost of labor suggested by one industry commenter on the Proposed Rule.[410]

Based on its review of comments, and in light of the higher transaction threshold in this Final Rule, the CFPB is providing additional estimates with respect to staffing the preparation and support of a supervisory examination in order to account for the fact that many entities are likely to choose higher staffing levels than those set forth in the proposal. The estimate of one full-time compliance officer and one tenth of one attorney took into account that there could be multiple individuals engaged part-time in an examination and part-time in other non-examination obligations. Although commenters did not provide precise or entirely consistent estimates regarding how larger participants are likely to staff examinations, the CFPB acknowledges that many larger participants in this market may choose to staff examinations with more full-time equivalent attorneys, compliance officers and other staff than is typically the case in previously supervised larger participant markets. The larger participants in this market are larger in terms of revenue compared to larger participants in other established larger participant markets.[411] For illustrative purposes, the CFPB has estimated that an entity that pays salaries at the level of the highest-paying metropolitan area and staffs an examination with three full-time compliance officers, two full-time attorneys and one outside counsel that spends 30 hours throughout the duration of the two-week preparation and eight-week examination period, would incur costs close to $270,000 per examination.[412] Alternatively, at this cost, the entity could staff the examination with more than five in-house staff if some of them work part-time on the examination and part-time on other duties. For example, some additional personnel may spend some number of hours on data analysis or coding or otherwise preparing materials for presentations to the CFPB, or may attend and provide information at the standard opening and closing meetings

[407] For the same reason, as a general matter, examinations with more extensive follow-up activities are more likely to provide benefits to consumers.

[408] 88 FR 80197, 80213 (describing assumption of one full-time compliance officer and one-tenth of the time of a full-time attorney to assist with the examination for 10 weeks).

[409] This cost is calculated as follows: ((((0.1 × $129.12) + $55.83)/0.703)) × 40 hours × 10 weeks. An alternative way to calculate the costs imposed on entities that pay some of the highest national wages for compliance officers and attorneys would be to use, for example, the 90th percentile of wages rather than the mean. However, the BLS top codes (suppresses) wages above $115/hour for lawyers such that the official wage estimates above that threshold would be imprecise. The 90th percentile of national hourly wages for compliance officers was $59/hour. Using these wage estimates would yield a total employer cost of labor of approximately $40,000 to comply with a supervisory exam.

[410] One industry commenter, citing three industry publications, asserted that the median rate for a compliance officer with four-six years of experience is $91,500 and the annual base pay for the majority of in-house counsel in large cities is ''at least $200,000.'' Using these numbers, the total employer cost of an examination would be approximately $31,000 ((0.1 × (($200000 × 10)/52)) + (91500 × 10/52))/0.703.

[411] For example, the 2012 debt collection rule estimated that 168 of the 175 larger participants had annual receipts between $10 million and $250 million, *see* 77 FR 65775, 65789. Among larger participants in the market covered by this Rule, average annual revenue was $208 billion in 2023. Higher revenue may indicate more complexity, or firms with higher revenue may decide to devote more resources to a supervisory examination because those costs comprise a small fraction of their operating budget. While it is reasonable to expect that larger participants in this market generally would devote more resources to a supervisory examination compared to many previous larger participants, the CFPB does not have information indicating that would necessarily always be the case.

[412] Without stating a specific number, one individual firm commented on the Proposed Rule that firms likely would staff supervisory examinations with multiple full-time compliance officers and multiple full-time attorneys and another industry association commenter asserted that firms would hire outside counsel to support an examination. Two industry trade associations stated that they expect larger participants to devote ''dozens'' of staff to a supervisory examination, but did not elaborate on the number of hours they would work or otherwise provide more specific numbers or information to substantiate that claim. Based on supervisory experience in other markets, the CFPB assumes in-house compliance officers spend more time on examinations than in-house attorneys. Therefore, in line with the general views of these commenters, the Bureau has assumed for purposes of its estimate that an entity would devote three full-time compliance officers, two full-time attorneys, and one outside counsel. Because outside counsel does not typically engage directly with examiners during the 10-week examination process described above, based on supervisory experience in other markets, the CFPB does not have data on how outside counsel is typically involved during a standard examination, but acknowledges that the larger participants in this specific market may seek outside advice on how to respond to and participate in an examination. The CFPB assumes the number of hours of outside counsel support in this scenario could be approximately 20 hours of preparation and 10 hours of support during the examination and assumes for illustrative purposes an hourly fee of $917 for outside counsel, as provided by one commenter. The cost of $270,000 is calculated as follows: ((((2 × $129.12) + (3 × $55.83))/0.703)) × 40 hours × 10 weeks + (917 × 30).

for the examination, or other initial meetings where they provide a brief overview of discrete issues. These meetings typically last only a few hours. The CFPB does not have detailed information to reliably quantify the exact amount of time these additional employees would devote to such supporting activities, but does not expect these limited engagements to materially affect this estimate.

With regard to the company comment that claimed that preparation for supervisory examinations of nonbanks is generally ''a year-round affair,'' this commenter did not explain or support this claim. Nor does it fit with the CFPB's experience since entities generally do not receive notice a year in advance of a scheduled examination. This assumption also is not in line with the experience of the CFPB from the supervision of other larger-participant markets. Supervision typically involves requiring documents from time to time and conducting occasional in-depth examinations of a company typically over the 10-week engagement period described above. For example, the CFPB may conduct supervisory monitoring activities throughout the year, including ''contacting the appropriate officer of the institution to discuss new products or services, events that may impact compliance management, and any questions raised by information reviewed by the [CFPB's central point of contact for supervision].'' [413] However, these engagements generally are brief and often occur in the form of one phone call or videoconference. In contrast, during an in-depth examination of a company, CFPB examiners may ask to see a company's existing compliance policies and procedures, otherwise review a company's records and operations including for selected customer accounts, conduct interviews with personnel, and assess how the company complies with applicable Federal consumer financial laws. The scope of an examination will depend on, among other factors, the size and complexity of the firm.

With respect to comments regarding post-examination costs, the CFPB acknowledges that entities may face such costs. While the estimated cost for a larger participant in this market to support a supervisory examination described above assumes two weeks of preparation and eight weeks of engagement with the CFPB, some examinations may result in a Potential Action and Request for Response (PARR) letter, which provides a supervised entity with notice of preliminary findings of conduct that may violate Federal consumer financial laws and advises the entity that the Bureau is considering taking supervisory action against the entity.[414] In such an event, the CFPB estimates an additional two weeks of staff time necessary to respond to the PARR. In this third scenario of potentially higher examination costs, an additional two weeks would result in the cost of an examination increasing by approximately $8,000, to approximately $47,000, using the average wages of the top-paying metropolitan area, assuming staffing at the level set forth in the Proposed Rule. Under the higher salary and staffing assumptions described above, including three full-time compliance officers, two full-time attorneys and one outside counsel contracted for 80 additional hours of work on a PARR, an additional two weeks would increase the examination cost by approximately $122,000, to approximately $392,000.[415]

As stated in the proposal, the overall costs of supervision in the market for general-use digital consumer payment applications would depend on the frequency and extent of CFPB examinations and other supervisory activity. Neither the CFPA nor the Final Rule specifies a particular level or frequency of examinations.[416] The frequency of examinations would depend on a number of factors, including the larger participants' size and volume of transactions; the CFPB's understanding of the conduct of market participants and the specific risks they pose to consumers; the extent of existing State consumer protection oversight; and other relevant factors, including the responses of larger participants to prior examinations and the demands that other markets make on the CFPB's supervisory resources. These factors can be expected to change over time, and the CFPB's understanding of these factors may change as it gathers more information about the market through its supervision and by other means. The CFPB therefore declines to predict, at this point, precisely how many examinations in the market for general-use digital consumer payment applications it would undertake in a given year.

However, the CFPB notes that it is unlikely that all seven potential larger participants would undergo supervisory examinations in the same year. The frequency with which entities undergo supervision will determine the industry-wide costs. If each of the seven larger participants underwent examination every other year, the estimated annual direct cost of supervision would be around $137,000 industry-wide using average wages of the top-paying metropolitan area and the examination length and staffing levels set forth in the proposal. Even at the highest range of estimates, where each entity devoted three full-time compliance officers, two full-time attorneys, and contracted 110 hours of outside counsel with one of the largest 100 U.S. law firms, and all received a PARR, and half of the larger participants undergo supervision in any given year, the industry-wide estimated cost using the highest-paying metropolitan area wages would be approximately $1.4 million, or $392,000 $\times$ 3.5.

With respect to the consideration of pass-through costs to consumers and merchants, the CFPB disagrees that it did not consider such potential impacts. The CFPB recognizes that many merchants provide website pay buttons that link to general-use digital consumer payment applications provided by unaffiliated third parties and that small businesses in particular may rely on those consumer financial products and services for growth. However, the CFPB expects the costs of supervisory examinations to not exceed $1.4 million industry-wide annually even if half of the larger participants were to undergo an extended supervisory examination every year, which is unlikely.[417] As

[413] *See CFPB Supervision and Examination Manual,* part I.A (page 13 of Overview section).

[414] *See* CFPB, Request for Information Regarding the Bureau's Supervision Program, 83 FR 7166, 7168 (Feb. 20, 2018).

[415] This scenario assumes that outside counsel become more intensively involved in the event of a PARR and devoted 80 hours to support the larger participant in responding to the PARR, in the event that the larger participant chose to engage outside counsel for $917 hourly. Examination costs of approximately $47,000 and $392,000 in scenarios with a PARR are calculated as $(((0.1 \times \$129.12) + \$55.83)/0.703) \times 40$ hours $\times$ 12 weeks and as $(((2 \times 129.12) + (3 \times 55.83))/0.703) \times 40$ hours $\times$ 12 weeks + (917×110), respectively.

[416] The CFPB declines to predict at this time precisely how many examinations it will undertake at each larger participant of general-use digital consumer payment applications. Based on its experience in examining larger participants in other markets, it does not expect to conduct an examination of each larger participant in this market each year. If the CFPB were to examine each entity estimated to be a larger participant of the market for general-use consumer digital payment applications once every two years, the expected annual labor cost of supervision per larger participant under the higher salary, staffing and examination length assumptions would be approximately $196,000 (the cost of one examination, divided by two), depending on the staffing and remuneration decisions of the larger participant as well as on whether the examination is followed up with a PARR.

[417] As discussed in the section-by-section analysis in part V, the estimates in this Rule do not reflect

Continued

stated in the proposal, the CFPB cannot foresee how larger participants may respond to the cost of supervision. One possibility is that larger participants absorb the entire cost of supervision. Another possibility is that they pass through the entire cost of supervision, or some fraction of the cost of supervision, to merchants and consumers. The extent to which larger participants would pass through their costs of supervision to merchants (for products that support payments for purchases) or consumers (for products that support purchases and/or payments to other consumers) will be limited by competitive forces in the market. For example, if one larger participant increases its fees for services, merchants or consumers may switch providers. This potential response to increased prices and competition for merchants' and consumers' business could prevent a full pass-through of costs. Moreover, the highest estimate of examination costs described in the scenarios above amounts to approximately $392,000 per larger participant, or 0.0002 percent of the average revenue (approx. $208 billion) of the estimated seven larger participants.[418] Because the examination support costs are a small fraction of the total revenue of larger participants, the CFPB believes it is less likely that these costs would cause firms to substantially change their business models.

Even in the event that larger participants pass through the entire cost of the higher end of the CFPB examination support cost estimates to merchants that use these products, the cost per merchant likely would be very small. One industry study estimates that there were 13.7 million online stores in 2024.[419] If 59 percent of merchants use buy buttons, as indicated by one industry report,[420] then roughly 8.1 million online merchants use these products. The CFPB estimates that seven larger participants are responsible for approximately 98 percent of transactions in the market. Therefore, even if larger participants that underwent an examination were to pass through 100 percent of $1.4 million in estimated annual examination costs (under the higher estimate) to approximately eight million merchants, the amount per merchant would likely be low. Measured against the $1.1 trillion in online retail sales in 2023, the Bureau views this cost to be negligible and not large enough to discourage entry, innovation or growth among merchants that use or would like to use these products.[421] Likewise, the CFPB views the cost relative to the gains from doing business in this market as too low to disincentivize offering credit products through wallets, in particular as a lender's own app-based lending activity can be excluded by paragraph (D) of the definition of ''consumer payment transaction'' as discussed in part V of the rule. With respect to the statement by one commenter that the cost of the Rule could disincentivize investments in the tokenization of payments, as discussed in part V above, the commenter did not commenter did not explain why larger participants would seek to offset the costs of CFPB examination by reducing investment specifically in anti-fraud protections or provide evidence to support its view, and the CPFB notes that the Rule also could incentivize investments.

As explained above, the CFPB also does not expect larger participants to pass through the full cost of supervisory examinations to consumers directly. However, even if they passed through $1.4 million annually to the millions of consumers who use these products, the cost per consumer would likely be low.[422]

As a result of some examinations, supervised entities may incur costs associated with addressing the CFPB's supervisory communications and actions, such as by making changes to its compliance systems or procedures. As noted above, the CFPB considers these costs as a separate category of costs from the costs of supporting an exam. Where appropriate, in exercising its supervisory authority, the CFPB conveys its findings, conclusions, expectations, and recommendations to a supervised entity regarding its compliance, and utilizes various forms of supervisory communications and actions to promote compliance and address associated risks.[423] The CFPB's supervisory communications may specify corrective actions such as changes to practices and operations, payment of remediation to consumers,[424] and steps to prevent such violations from occurring or recurring, including compliance-management-system improvements. In the CFPB's experience, when an entity adopts preventive measures in response to those types of CFPB supervisory communications and actions, the entity's actions generally will reduce risk of violation of Federal consumer financial law. As such, these costs may be necessary to maintain compliance with Federal consumer financial law, as described in the CFPB Supervision and Examination Manual. In any event, the CFPB is not able to estimate these costs in advance, as such costs will vary depending on the nature and scope of the CFPB's supervisory communications and actions and the entity's response. As discussed above, in many cases CFPB supervision also may benefit providers under supervision by detecting compliance problems early, which can reduce costs in the long run.

Regarding the risk of privacy breaches, the CFPB agrees with the commenter that consumer data privacy is important. The CFPB recognizes that data privacy breaches can impose costs on consumers and firms and therefore adheres to the Federal requirements to reduce the risk of data and other privacy breaches. For example, the CFPB complies with requirements provided in the Presidential Executive Orders, Federal Information Security Management Act (FISMA), applicable Office of Management and Budget (OMB) Memoranda, U.S. Department of Homeland Security (DHS) Cybersecurity

supervisory conclusions that particular entities are larger participants; once the Final Rule takes effect, the CFPB will make those assessments and will prioritize conducting supervisory activity at specific larger participants in this market based on risk as described in the Supervision and Examination Manual, consistent with CFPA section 1024(b)(2). Therefore, the CFPB cannot predict in this Final Rule how many examinations or other types of supervisory events it will conduct at larger participants of this market in a given year. However, based on its experience with prioritization of supervisory activity at larger participants in five other markets, the CFPB believes it is unlikely that it would conduct eight-week on-site examinations of most or even many larger participants in a single year.

[418] Using revenue information from annual report filings with the U.S. Securities and Exchange Commission described above, the CFPB estimates the average total annual revenue of larger participants to be approximately $208 billion in 2023. As an alternative comparison, and in response to one industry commenter, this cost comprises approximately 0.0003 percent of larger participants' average annual total transaction value in 2021–2023. This number is likely higher in 2024, as the majority of data points for transaction values stem from 2021 and the market continued to expand during this period. In any event, the CFPB views this number as small.

[419] *See* Capital One, *Total Number of Online Stores* (July 24, 2024), *at https://capitalone shopping.com/research/number-of-online-stores/* (last visited Aug. 26, 2024).

[420] See PYMNTS, *6 in 10 Subscription Merchants Drive Conversion with 'Buy Buttons,' at https://www.pymnts.com/subscriptions/2023/60percent-subscription-merchants-drive-conversion-with-buy-buttons/* (last visited Aug. 26, 2024).

[421] For e-commerce retail sales, see the Federal Reserve Bank of St. Louis, *E-Commerce Retail Sales, at https://fred.stlouisfed.org/series/ECOMSA* (last visited Aug. 26, 2024).

[422] *See* U.S. Census Bureau, *National Population by Characteristics: 2020–2023,* at *https://www.census.gov/data/tables/time-series/demo/popest/2020s-national-detail.html* (last visited Aug. 26, 2024); *see, e.g., Pew 2022 Payment App Article, supra.*

[423] *See, e.g., CFPB Bulletin 2021–01, supra.*

[424] *See id.*

and Infrastructure Security Agency (CISA) Binding Operational Directives, as well as National Institute of Standards and Technology (NIST) Federal Information Processing Standards and Special Publications, and other applicable guidance. Further, CFPB implements improvements from annual information security audits of its data security practices by the Office of Inspector General (OIG), the Government Accountability Office (GAO) and other auditors, as recommended. The CFPB believes that these steps mitigate the risk of privacy breaches.

3. Costs of Assessing Larger-Participant Status

Providers of general-use digital consumer payment applications might decide to incur costs to assess whether they qualify as larger participants, to respond to CFPB requests for information to assess larger participant status under 12 CFR 1090.103(d), or potentially to dispute their status.[425] Larger-participant status would depend on both a nonbank's aggregate annual covered consumer payment transaction volume and whether the entity is a small business concern based on the applicable SBA size standard. The CFPB expects that many market participants already assemble general data related to the number of transactions that they provide for general-use digital consumer payment applications. Moreover, many providers are required to report certain transaction data to State regulators.[426]

To the extent that some providers of general-use digital consumer payment applications do not already know whether their transactions exceed the threshold, such nonbanks might, in response to the Final Rule, develop new systems to count their transactions in accordance with the proposed market-related definitions of ''consumer payment transactions,'' ''covered payment functionality,'' ''general use,'' and ''digital application'' discussed above. The data that the CFPB had at the time of the Proposed Rule did not support a detailed estimate of how many providers of general-use digital consumer payment applications would engage in such development or how much they would spend, and commenters did not provide this information. Commenters also did not provide any estimates or data to support estimates. Regardless, providers of general-use digital consumer payment applications would be unlikely to spend significantly more on specialized systems to count transactions than it would cost to be supervised by the CFPB as larger participants.

The CFPB notes that larger-participant status also depends on whether an entity is subject to the proposed small business exclusion. In certain circumstances, larger-participant status may depend on determinations of which SBA size standard applies, and by extension, which NAICS code is most applicable. Therefore, providers of general-use digital consumer payment applications may choose to incur some administrative costs to evaluate whether the small business exclusion applies. However, providers would not need to engage in this evaluation if they could establish that their annual covered consumer payment transaction volume was below 50 million.

It bears emphasizing that even if a nonbank market participant's expenditures on a new transaction counting system enabled it to successfully prove that it was not a larger participant (which, again, it would not need to do if it was a small business concern according to SBA standards), it would not necessarily follow that this entity could not be supervised under other supervisory authorities the CFPB has that this rulemaking does not establish. For example, the CFPB can supervise a nonbank entity whose conduct the CFPB determines, pursuant to CFPA section 1024(a)(1)(C) and regulations implementing that provision, poses risks to consumers.[427] Thus, a nonbank entity choosing to spend significant amounts on a transaction counting system directed toward the larger-participant transaction volume test could not be sure it would not be subject to CFPB supervision notwithstanding those expenses. The CFPB therefore believes very few if any nonbank entities would be likely to undertake such expenditures.

Commenters on the Proposed Rule stated that providers of digital applications to make payments using cryptocurrency-assets may need to change their product design to capture data that would allow them to identify consumer payment transactions that would determine larger participant status under the Proposed Rule. However, because the Final Rule adopts a larger participant test based on the transfer of funds in consumer payment transactions denominated in U.S. dollars, those providers would not face the potential for those types of impacts.

An industry association commented that the ambiguity of the proposal could cause firms to incur costs when assessing their larger participant status. The significantly higher threshold test of 50 million annual transactions adopted in the Final Rule should substantially diminish the level of uncertainty compared to the proposal regarding an entity's larger participant status. Additional clarifications of the market in the Final Rule, including clarifying the definition of ''general use'' and limiting the definition of ''annual covered consumer payment transaction volume'' to transactions denominated in U.S. dollars, should further facilitate the determination of whether an entity is a larger participant.

E. Potential Specific Impacts of the Final Rule

1. Insured Depository Institutions and Insured Credit Unions With $10 Billion or Less in Total Assets, as Described in Dodd-Frank Act Section 1026

The Rule does not apply to insured depository institutions or insured credit unions of any size. However, as noted in the section-by-section analysis of ''digital application'' above, it may apply to nonbank covered persons to the extent that they provide covered payment functionalities through a digital application of an insured depository institution or insured credit union. In addition, it might have some competition-related impact on insured depository institutions or insured credit unions that provide general-use digital consumer payment applications. For example, if the relative price of nonbanks' general-use digital consumer payment applications were to increase due to increased costs related to supervision, then insured depository institutions or insured credit unions of any size might benefit by the relative change in costs. These effects, if any, would likely be small.

[425] A nonbank covered person that is subject to certain orders may be required to register pursuant to the CFPB's nonbank registration regulation, 12 CFR part 1092. If such a registered entity is not already supervised by the CFPB under section 1024(a), and it participates in this market, then it may need to assess its larger participant status to determine whether it must comply with certain additional requirements under that rule that may apply to persons supervised under CFPA section 1024(a), including larger participants. *See also* response to general comments on promoting compliance with Federal consumer financial law, *supra.*

[426] As noted above, the States have been active in regulation of money transmission by money services businesses. For example, 49 States and the District of Columbia requiring entities to obtain a license to engage in money transmission, as defined by applicable law. Further, many States also actively examine money transmitters, including certain products and services they provide through general-use digital consumer payment applications. *See, e.g., CSBS Reengineering Nonbank Supervision MSB Chapter* at 4 (discussing how providers of digital wallets hold and transmit monetary value).

[427] *See* 12 U.S.C. 5514(a)(1)(C); 12 CFR part 1091.

2. Impact of the Provisions on Consumers in Rural Areas

Because the Rule would apply uniformly to consumer payment transactions that both rural and non-rural consumers make through general-use digital consumer payment applications, the Rule should not have a unique impact on rural consumers. The CFPB is not aware of any evidence suggesting that rural consumers have been disproportionately harmed by Federal consumer financial law noncompliance by providers of general-use digital consumer payment applications.

Comments Received

The CFPB sought information from commenters related to how digital consumer payments affect rural consumers. A nonprofit associated with decentralized finance commented that rural communities in particular may benefit from digital payment technologies due to limited access to brick-and-mortar financial services and suggested that costs imposed by this Rule could limit rural communities' access to such technology. That commenter did not offer research to substantiate this assertion. In contrast, a nonprofit commented that 94 percent of their member webinar participants did not believe that digital consumer payments impacted rural consumers differentially. Several State attorneys general advocated for increased oversight in this market in part because they believe it would benefit in particular some consumers who rely on applications covered by this Rule and who do not use traditional banks and their bank-provided digital consumer payment applications.

Response to Comments

The CFPB believes that both rural and non-rural consumers may benefit from general-use digital consumer payment applications as defined in the Final Rule. As discussed further above, the Bureau does not expect the costs imposed by this Rule to be high enough to impact the availability of this technology to consumers irrespective of whether they reside in rural or non-rural areas. Moreover, the Final Rule does not cover transactions in cryptocurrencies or stablecoins.

VIII. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-profit organizations.[428] The RFA defines a ''small business'' as a business that meets the size standard developed by the SBA pursuant to the Small Business Act.[429]

The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) of any Proposed Rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the Proposed Rule would not have a significant economic impact on a substantial number of small entities.[430] The CFPB also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small entity representatives prior to proposing a rule for which an IRFA is required.[431]

In the Proposed Rule, the undersigned certified that the proposal would not have a significant impact on a substantial number of small entities (SISNOSE) and that an IRFA was therefore not required.

Comments Received

The CFPB received comments from several industry associations and some Members of Congress suggesting that the RFA should include potential indirect effects on small merchants that allow consumers to use general-use digital consumer payment applications. Another industry association expressed support for the small business exclusion in the proposal, but objected to certification that the Rule would not result in a significant impact on a substantial number of small entities without providing a more comprehensive analysis of entities that would not qualify as larger participants due to the small business exclusion alone.[432]

Response to Comments

The Bureau notes that, in line with statutory requirements, the RFA analysis analyzes the potential impacts on small entities *to which the Rule applies.* Therefore, the CFPB declines the request by some commenters that the analysis of potential indirect effects be incorporated into the RFA analysis. However, the CFPB considered these potential impacts of pass-through costs on merchants that may be small business concerns in the cost-benefit analysis, as described in the 1022(b) analysis above.

Compared to the proposal, the Final Rule adopts in paragraph (b)(3) a significantly higher threshold of 50 million annual consumer payment transactions denominated in U.S. dollars. At this threshold, no entity for which the CFPB has complete transaction information indicating transaction volumes of at least 50 million annually would be excluded from larger participant status based on the small business concern exclusion.[433]

The Final Rule defines a class of providers of general-use digital consumer payment applications as larger participants of a market for general-use digital consumer payment applications and thereby authorizes the CFPB to undertake supervisory activities with respect to those nonbank covered persons. The Rule establishes a two-pronged test for determining larger-participant status. First, the Rule adopts a threshold for larger-participant status of at least 50 million in annual covered consumer payment transactions denominated in U.S. dollars in the previous calendar year. Second, the larger-participant test incorporates a small entity exclusion. As a result, larger-participant status only applies to a nonbank covered person that, together with its affiliated companies, both meets the 50 million transaction threshold and

[428] 5 U.S.C. 601 *et seq.* The term '' 'small organization' means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes [an alternative definition after notice and comment].'' 5 U.S.C. 601(4). The term '' 'small governmental jurisdiction' means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes [an alternative definition after notice and comment].'' 5 U.S.C. 601(5). The CFPB is not aware of any small governmental units or small not-for-profit organizations to which the Proposed Rule would apply.

[429] 5 U.S.C. 601(3). The CFPB may establish an alternative definition after consultation with SBA and an opportunity for public comment. As mentioned above, the SBA defines size standards using NAICS codes that align with an entity's primary line of business. The CFPB believes that many—but not all—entities in the proposed market for general-use digital consumer payment applications are primarily engaged in financial services industries. *See, e.g.,* SBA, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (eff. Mar. 17, 2023), sector 52 (Finance and Insurance), *at https://www.sba.gov/document/support--table-size-standards* (last visited Oct. 26, 2023).

[430] 5 U.S.C. 605(b).

[431] 5 U.S.C. 609.

[432] It added that in its view, notwithstanding the assessment in the Proposed Rule that it would not have a significant impact on a substantial number of small entities, the Small Business Regulatory Enforcement Fairness Act (SBREFA) review process still provides an informative tool to consider these types of issues. For the reasons discussed in part VII and this part VIII, the CFPB does not believe that discretionary application of the SBREFA review process is warranted here.

[433] See section-by-section analysis of threshold adopted in final rule, *supra.* The CFPB has complete transaction information for roughly two-thirds of known market participants.

is not a small business concern based on the applicable SBA size standard. Because of that exclusion, the number of directly affected small business entities participating in the market that would experience a significant economic impact due to the Rule is, by definition, zero.[434]

Finally, CFPA section 1024(e) authorizes the CFPB to supervise service providers to nonbank covered persons encompassed by CFPA section 1024(a)(1), which includes larger participants.[435] Because the Rule does not address service providers, effects on service providers need not be discussed for purposes of this RFA analysis. Even if such effects were relevant, based on the frequency with which the CFPB typically examines service providers of nonbank larger participants, the CFPB believes that it would be very unlikely that any supervisory activities with respect to the service providers to the approximately seven larger participants of the nonbank market for general-use digital consumer payment applications would result in a significant economic impact on a substantial number of small entities.[436]

The Final Rule adopts the Proposed Rule, with some modifications that do not lead to a different conclusion. Therefore, a final regulatory flexibility analysis is not required.

IX. Paperwork Reduction Act

The CFPB has determined that the Final Rule does not impose any new recordkeeping, reporting, or disclosure requirements that would constitute collections of information requiring approval under the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*

[434] In addition, the CFPB is not aware of any nonprofit entities that would be larger participants under the Final Rule.

[435] 12 U.S.C. 5514(e); 12 U.S.C. 5514(a)(1).

[436] Particularly in light of complexity in the applicable market, including how larger participants generally serve a variety of consumer populations across many States and facilitate very substantial volumes of consumer payment transactions for multiple types of recipients using multiple different payment methods, these firms typically would rely upon numerous service providers. However, as explained in its prior larger participant rules and as noted above with respect to the larger participants themselves, the frequency and duration of examinations that would be conducted at any particular service provider would depend on a variety of factors. Based on its experience conducting service provider examinations, the CFPB concludes that it is implausible that in any given year a substantial number of service providers that are small business concerns are subject to CFPB examinations. In any event, the impact of any supervisory activities at any small firm service providers can be expected to be less than at the larger participants themselves given the CFPB's exercise of discretion in supervision.

X. Congressional Review Act

Pursuant to the Congressional Review Act,[437] the CFPB will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to the rule taking effect. The Office of Information and Regulatory Affairs has designated this rule as not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 12 CFR Part 1090

Consumer protection, Credit.

Authority and Issuance

For the reasons set forth in the preamble, the CFPB amends 12 CFR part 1090 as set forth below:

PART 1090—DEFINING LARGER PARTICIPANTS OF CERTAIN CONSUMER FINANCIAL PRODUCT AND SERVICE MARKETS

■ 1. The authority citation for part 1090 continues to read as follows:

Authority: 12 U.S.C. 5514(a)(1)(B); 12 U.S.C. 5514(a)(2); 12 U.S.C. 5514(b)(7)(A); and 12 U.S.C. 5512(b)(1).

■ 2. Add § 1090.109 to subpart B to read as follows:

§ 1090.109 General-use digital consumer payment applications market.

(a)(1) *Market definition. Providing a general-use digital consumer payment application* means providing a covered payment functionality through a digital payment application for consumers' general use in making consumer payment transaction(s) as defined in this subpart.

(2) *Market-related definitions.* As used in this section:

(i) *Consumer payment transaction(s)* means, except for transactions excluded under paragraphs (a)(2)(i)(A) through (D) of this section, the transfer of funds by or on behalf of a consumer who resides in a State to another person primarily for personal, family, or household purposes. The term applies to transfers of consumer funds and transfers made by extending consumer credit, except for the following transactions:

(A) An international money transfer as defined in § 1090.107(a);

(B) A transfer of funds by a consumer:

(*1*) That is linked to the consumer's receipt of a different form of funds, such as a transaction for foreign exchange as defined in 12 U.S.C. 5481(16); or

(*2*) That is excluded from the definition of ''electronic fund transfer'' under § 1005.3(c)(4) of this chapter;

(C) A payment transaction conducted by a person for the sale or lease of goods or services that a consumer selected from that person or its affiliated company's online or physical store or marketplace, or for a donation to a fundraiser that a consumer selected from that person or its affiliated company's platform; and

(D) An extension of consumer credit initiated through a digital application that is provided by a person who is extending, brokering, acquiring, or purchasing the credit or that person's affiliated company.

(ii) *Covered payment functionality* means a funds transfer functionality as defined in paragraph (a)(2)(ii)(A) of this section, a wallet functionality as defined in paragraph (a)(2)(ii)(B) of this section, or both.

(A) *Funds transfer functionality* means, in connection with a consumer payment transaction:

(*1*) Receiving funds from a consumer for the purpose of transmitting them; or

(*2*) Accepting from a consumer and transmitting payment instructions.

(B) *Payment wallet functionality* means a product or service that:

(*1*) Stores for a consumer account or payment credentials, including in encrypted or tokenized form; and

(*2*) Transmits, routes, or otherwise processes such stored account or payment credentials to facilitate a consumer payment transaction.

(iii) *Digital payment application,* for purposes of this subpart, means a software program a consumer may access through a personal computing device, including but not limited to a mobile phone, smart watch, tablet, laptop computer, or desktop computer. Examples of digital payment applications covered by this definition include an application a consumer downloads to a personal computing device, a website a consumer accesses by using an internet browser on a personal computing device, or a program the consumer activates from a personal computing device using a personal identifier such as a passkey, password, PIN, or consumer's biometric identifier, such as a fingerprint, palmprint, face, eyes, or voice. Operating a web browser is not an example of providing a digital payment application.

(iv) *General use,* for purposes of this subpart, means usable for a consumer to transfer funds in a consumer payment transaction to multiple, unaffiliated persons, subject to an exception for a payment functionality provided through

[437] 5 U.S.C. 801 *et seq.*

a digital consumer payment application solely for the following:

(A) Using accounts described in § 1005.2(b)(3)(ii)(A), (C) or (D) of this chapter; or

(B) To pay a specific debt or type of debt including:

(*1*) Debts owed in connection with origination or repayment of an extension of consumer credit; or

(*2*) Debts in default.

(v) *State* means any State, territory, or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico; or any political subdivision thereof.

(b) *Test to define larger participants.* A nonbank covered person is a larger participant of the general-use digital consumer payment applications market if the nonbank covered person met both of the following criteria during the preceding calendar year:

(1) It provided annual covered consumer payment transaction volume as defined in paragraph (b)(3) of this section of at least 50 million consumer payment transactions; and

(2) It was not a ''small business concern'' as that term is defined by section 3(a) of the Small Business Act, 15 U.S.C. 632(a) and implemented by the Small Business Administration under 13 CFR part 121, or any successor provisions.

(3) *Annual covered consumer payment transaction volume* means the sum of the number of consumer payment transactions denominated in U.S. dollars that the nonbank covered person and its affiliated companies facilitated in the preceding calendar year by providing general-use digital consumer payment applications.

(i) *Method of aggregating the annual covered consumer payment transaction volume of affiliated companies.* The annual covered consumer payment transaction volume of each affiliated company of a nonbank covered person is first calculated separately, treating the affiliated company as if it were an independent nonbank covered person for purposes of the calculation. The annual covered consumer payment transaction volume of a nonbank covered person then must be aggregated with the separately-calculated annual covered consumer payment transaction volume of each person that was an affiliated company of the nonbank covered person at any time in the preceding calendar year. However, if any two or more of these companies facilitated a single consumer payment transaction denominated in U.S. dollars, that consumer payment transaction shall only be counted one time in the aggregated annual covered consumer payment volume calculation. The annual covered consumer payment transaction volumes of the nonbank covered person and its affiliated companies are aggregated for the entire preceding calendar year, even if the affiliation did not exist for the entire calendar year.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2024–27836 Filed 12–9–24; 8:45 am]

BILLING CODE 4810–AM–P

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

TechNet and NetChoice, LLC

Plaintiff(s)

v.

Consumer Financial Protection Bureau and Rohit Chopra, in his official capacity as Director of the Consumer Financial Protection Bureau

Defendant(s)

Civil Action No. 25-118

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Mayer Brown LLP
Andrew J. Pincus
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____ was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

Print Save As... Reset

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

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TechNet and NetChoice, LLC

Plaintiff(s)

v.

Consumer Financial Protection Bureau and Rohit Chopra, in his official capacity as Director of the Consumer Financial Protection Bureau

Defendant(s)

Civil Action No. 25-118

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Rohit Chopra, in his official capacity as Director of the Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Mayer Brown LLP
Andrew J. Pincus
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

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❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

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Server's signature

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Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

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v.

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Defendant(s)

Civil Action No. 25-118

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* United States Attorney for the District of Columbia
Matthew M. Graves
c/o Civil Process Clerk
601 D Street, NW
Washington, DC 20004

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Mayer Brown LLP
Andrew J. Pincus
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

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❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

Print Save As... Reset

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Plaintiff(s)

v.

Consumer Financial Protection Bureau and Rohit Chopra, in his official capacity as Director of the Consumer Financial Protection Bureau

Defendant(s)

Civil Action No. 25-118

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* United States Attorney General
Merrick B. Garland
950 Pennsylvania Avenue, NW
Washington, DC 20530

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Mayer Brown LLP
Andrew J. Pincus
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

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❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

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I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

Print Save As... Reset

CIVIL COVER SHEET

JS-44 (Rev. 11/2020 DC)

I. (a) PLAINTIFFS
TechNet
NetChoice, LLC

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF 11001
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS
Consumer Financial Protection Bureau
Rohit Chopra, in his official capacity as Director of the Consumer Financial Protection Bureau

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

ATTORNEYS (IF KNOWN)

II. BASIS OF JURISDICTION
(PLACE AN x IN ONE BOX ONLY)

- ○ 1 U.S. Government Plaintiff
- ○ 3 Federal Question (U.S. Government Not a Party)
- ◉ 2 U.S. Government Defendant
- ○ 4 Diversity (Indicate Citizenship of Parties in item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) **FOR DIVERSITY CASES ONLY!**

	PTF	DFT		PTF	DFT
Citizen of this State	○ 1	○ 1	Incorporated or Principal Place of Business in This State	○ 4	○ 4
Citizen of Another State	○ 2	○ 2	Incorporated and Principal Place of Business in Another State	○ 5	○ 5
Citizen or Subject of a Foreign Country	○ 3	○ 3	Foreign Nation	○ 6	○ 6

IV. CASE ASSIGNMENT AND NATURE OF SUIT

(Place an X in one category, A-N, that best represents your Cause of Action and one in a corresponding Nature of Suit)

○ A. *Antitrust*
- ☐ 410 Antitrust

○ B. *Personal Injury/ Malpractice*
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Medical Malpractice
- ☐ 365 Product Liability
- ☐ 367 Health Care/Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Product Liability

◉ C. *Administrative Agency Review*
- ☐ 151 Medicare Act

Social Security
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

Other Statutes
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☒ 890 Other Statutory Actions (If Administrative Agency is Involved)

○ D. *Temporary Restraining Order/Preliminary Injunction*

Any nature of suit from any category may be selected for this category of case assignment.

(If Antitrust, then A governs)

○ E. *General Civil (Other)* OR **○ F. *Pro Se General Civil***

Real Property
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent, Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

Personal Property
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

Bankruptcy
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

Prisoner Petitions
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Conditions
- ☐ 560 Civil Detainee – Conditions of Confinement

Property Rights
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent – Abbreviated New Drug Application
- ☐ 840 Trademark
- ☐ 880 Defend Trade Secrets Act of 2016 (DTSA)

Federal Tax Suits
- ☐ 870 Taxes (US plaintiff or defendant)
- ☐ 871 IRS-Third Party 26 USC 7609

Forfeiture/Penalty
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

Other Statutes
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 430 Banks & Banking
- ☐ 450 Commerce/ICC Rates/etc
- ☐ 460 Deportation
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions
- ☐ 470 Racketeer Influenced & Corrupt Organization
- ☐ 480 Consumer Credit
- ☐ 485 Telephone Consumer Protection Act (TCPA)
- ☐ 490 Cable/Satellite TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes
- ☐ 890 Other Statutory Actions (if not administrative agency review or Privacy Act)

○ **G. *Habeas Corpus/ 2255***	○ **H. *Employment Discrimination***	○ **I. *FOIA/Privacy Act***	○ **J. *Student Loan***
☒ 530 Habeas Corpus – General ☐ 510 Motion/Vacate Sentence ☐ 463 Habeas Corpus – Alien Detainee	☐ 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation) *(If pro se, select this deck)*	☐ 895 Freedom of Information Act ☐ 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)*	☐ 152 Recovery of Defaulted Student Loan (excluding veterans)
○ **K. *Labor/ERISA (non-employment)***	○ **L. *Other Civil Rights (non-employment)***	○ **M. *Contract***	○ **N. *Three-Judge Court***
☐ 710 Fair Labor Standards Act ☐ 720 Labor/Mgmt. Relations ☐ 740 Labor Railway Act ☐ 751 Family and Medical Leave Act ☐ 790 Other Labor Litigation ☐ 791 Empl. Ret. Inc. Security Act	☐ 441 Voting (if not Voting Rights Act) ☐ 443 Housing/Accommodations ☐ 440 Other Civil Rights ☐ 445 Americans w/Disabilities – Employment ☐ 446 Americans w/Disabilities – Other ☐ 448 Education	☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholder's Suits ☐ 190 Other Contracts ☐ 195 Contract Product Liability ☐ 196 Franchise	☐ 441 Civil Rights – Voting (if Voting Rights Act)

V. ORIGIN

○ 1 Original Proceeding ○ 2 Removed from State Court ○ 3 Remanded from Appellate Court ○ 4 Reinstated or Reopened ○ 5 Transferred from another district (specify) ○ 6 Multi-district Litigation ○ 7 Appeal to District Judge from Mag. Judge ○ 8 Multi-district Litigation – Direct File

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)

The Administrative Procedure Act, 5 U.S.C. § 706(2)(C) and 5 U.S.C. § 706(2)(A). Defendants exceeded their statutory authority, and acted arbitrarily and capriciously, in issuing a final rule, 89 Fed. Reg. 99,582, by failing to consider risks to consumers; asserting supervisory authority beyond the relevant "market"; and failing to adequately perform a cost-benefit analysis. Defendants also acted arbitrarily and capriciously by failing to identify an appropriate "market."

VII. REQUESTED IN COMPLAINT ☐ CHECK IF THIS IS A **CLASS ACTION** UNDER F.R.C.P. 23 **DEMAND $** **JURY DEMAND:** Check YES only if demanded in complaint **YES** ☐ **NO** ☒

VIII. RELATED CASE(S) IF ANY (See instruction) **YES** ☐ **NO** ☒ If yes, please complete related case form

DATE: January 16, 2025 **SIGNATURE OF ATTORNEY OF RECORD** /s/ Andrew J. Pincus

INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

I. COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.

III. CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.

IV. CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.

VI. CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.

VIII. RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.