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January 8, 2024

Via Email Submission

Comment Intake – LP Payments App Rulemaking
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Comments Regarding CFPB's Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications – Docket No. CFPB-2023-0053; RIN 3170-AB17

Dear Director Chopra:

On behalf of the Electronic Transactions Association (ETA), we appreciate the opportunity to share our thoughts in response to the Consumer Financial Protection Bureau's (CFPB) request for feedback regarding the proposed rule to establish the CFPB's supervisory authority over certain nonbank covered persons participating in a market for "general-use digital consumer payment applications."[1]

ETA members play an important role in providing consumers and businesses with safe, reliable, innovative, and cost-efficient payments products and services, and we share the same goals of protecting consumers from fraud and other unlawful practices.

ETA members have been recognized by consumers and regulators alike for the innovation that they have brought to these markets and the access they have provided to small businesses. While the CFPB seeks to better understand these products and services, we encourage the CFPB not to hinder further innovation and expansion of access and to exercise its authority, "for the purposes of ensuring that … markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation."[2]

Who We Are

ETA is the world's leading advocacy and trade association for the payments industry. Our members span the breadth of significant payments and fintech companies, from the largest incumbent players to the emerging disruptors in the U.S and in more than a dozen countries around the world. ETA members make commerce possible by processing more than $44 trillion in purchases worldwide and deploying payments innovation to merchants and consumers.

ETA's Input on CFPB's Proposed Rule

Caution Against Prescribing Same Risk Profile to Different Product Markets

ETA's members provide payment processing, merchant acquiring, money transmission, and other payments-related services for consumers and businesses. Our members use merchant and transactional data to provide a wide range of products and services designed to enhance and secure electronic payments

[1] 88 Fed. Reg. 80197
[2] 12 U.S.C. § 5511(b)(5)

and related transactions, including to reduce fraud and authenticate transactions. These activities are carried out within a comprehensive legal and regulatory framework that governs payments and related financial products and services. There are numerous federal and state laws and regulations that govern activities such as money transmission, customer due diligence, credit reporting, information security, data protection, privacy, and prohibitions on unfair, deceptive, or abusive acts or practices. Within these regulatory regimes, the payments industry has done a remarkable job in developing cutting-edge products that pair enhanced customer experience with robust security measures to help consumers connect with merchants, make payments, and move money.

While payments are heavily regulated, these regulations are tailored to the products they cover. When looking across the entire payments landscape and comparing it to the broader financial services industry, there are significant differences in the application of existing laws and regulations across industry players. ETA believes entities should be regulated based on the risk profile presented by payments activities to ensure consumer protection, the safety and soundness of the payments system, and overall financial stability. ETA is committed to ensuring that consumers enjoy robust protections when utilizing electronic payments.

ETA strongly encourages the CFPB to follow its mission[3] to promote competition and innovation that benefits consumers and not risk stifling creativity in the market that could occur if future rules for payments products and services are developed without an appreciation of differences in products and services and consumer needs.

Rather the CFPB needs to evaluate how extending supervision of this disparate collection of services impacts innovation in each of the markets affected as part of the cost-benefit analysis. This may also lead to unforeseen costs to consumers or, worse, loss of access to tools to participate in financial empowerment. As technology and innovation continue to shape how payments products are created and how these products are delivered and employed by customers, regulation in this space must remain adaptable and should neither impose rigid rules that have the effect of unnecessarily restraining innovation or the many benefits the payments industry provides to consumers and businesses, nor fail to acknowledge the protections that industry already provides and will continue to provide.

Digital Assets Defined as *Funds*

Notably, the proposed rule includes the CFPB's first public statement that the term "funds" is not limited to fiat currency or legal tender. Under this proposed rule, digital assets with "monetary value readily useable for financial purposes, including as a medium of exchange," may be considered "funds" under the Consumer Financial Protection Act.

This is a significant development as it marks the CFPB's first exertion of legal authority over digital assets and signals that the CFPB may attempt to apply Regulation E (and associated error resolution provisions) to digital asset transactions. Determining where digital assets fall on the spectrum of funds, securities, or commodities carries broad implications. Instead, a comprehensive definition could be crafted through a collaborative effort, encompassing input from all relevant regulatory bodies and Congress.

ETA does not believe bringing digital assets into Regulation E is thoughtful without explicit feedback from the industry and consumers given the broad implications of determining where digital assets are

[3] *Id.*

"funds" rather than securities or commodities. Given the legal and technical considerations surrounding digital assets, including their characteristics and potential interplay with existing regulatory frameworks, we encourage the CFPB to engage in thorough consultation with industry stakeholders and consumers to gain a comprehensive understanding of the potential implications of applying Regulation E in this context.

Market Definition and Scope

The proposed rule lacks a clear delineation or explanation of what constitutes a "general-use digital consumer payment application" and how the CFPB identified these services as collectively worthy of supervision. distinguishes itself from other payment applications limited to specific merchants, platforms, or purposes. This ambiguity generates confusion for both providers and costs to consumers without any countervailing benefit.

Historically the CFPB has used larger participant rules to define coherent markets where the services are competing to serve the same need and are governed by the same rules. In contrast, this proposed rule relies on a definition of "general use" that is exceedingly broad and ambiguous. The section-by-section analysis states that peer-to-peer payment applications are included within the "general use" definition, even though these systems are closed-loop and a consumer must register to receive payment. The CFPB also seems to use "general use" to characterize express checkout services, even though these do not function generally across merchants but instead require individual agreements with each merchant who accepts them. The proposed rule cites as an example that payment applications used exclusively by people who are incarcerated are still "general use" if the inmate can use the application to buy various goods and services. These are different markets serving different needs governed by different rules, none of which are "general use" in its conventional meaning. The resulting market is, as a result, extremely broad. In point of illustration, international money transfer services has its own larger participant rule, but this proposed rule covers domestic money transfer services among many other unrelated services.

As a result of covering many and diverse services, the proposal fails to provide a sufficient cost-benefit analysis of the potential impacts of such a rule. The CFPB had previously stated that a tailored approach is necessary when "firms in markets perform entirely different functions and interact with consumers in different ways, the market structures are different, the substantive federal consumer financial laws principally relevant to the three markets differ substantially, and the manner in which annual receipts connect to consumer interactions is different in each of the markets."[4] The CFPB seems to be abandoning that approach here, by combining these markets into a single rule. However, if the CFPB intends to write one rule for several services that meet different needs, have different risks of harm, and have different existing regulatory regimes, the cost-benefit analysis should be conducted and explained for each product market separately, with an explanation of the risks in each market that the Bureau seeks to reduce to generate the rule's benefits to consumers.

Despite its breadth, the proposed rule lists exemptions for the purchase or lease of certain goods, services, or other property, including a mobile payment application that may be used to buy food. The inclusion of certain narrow payment applications within the definition of "general use," while simultaneously excluding similar or the same payment applications, is confusing and requires clarification as to which markets are included and why.

[4] https://www.federalregister.gov/documents/2013/12/06/2013-29145/defining-larger-participants-of-the-student-loan-servicing-market#p-192

The CFPB should clarify how the definition applies to diverse features and functionalities within payment applications, including those offering digital assets or novel payment methods, or those integrated with other consumer financial products or services.

For example, will internet browsers that have the ability to save credit card information be considered to "facilitate a consumer payment?" Is the CFPB taking the position that a mobile phone itself is an "access device" under Regulation E given the proposal under "wallet functionality?"

Interplay with Other Ongoing Regulations

The CFPB is currently engaged in a separate rulemaking process to implement section 1033 of the Dodd-Frank Act[5]. As the CFPB continues with both the larger participant proposed rule and section 1033 rulemaking, it is important that there be coordination between the two as there are issues in the section 1033 rulemaking that may have implications for the larger participant proposed rule.

Our primary concern is that the term "digital wallets" is defined differently in the larger participant proposed rule and section 1033. If not appropriately addressed, entities may face significant compliance burdens and liabilities under the larger participant proposed rule as well as competing obligations under both sets of rules. To address these concerns, we recommend that the section 1033 or any larger participant rules contain a limited safe harbor stating that entities acting on their section 1033 responsibilities will not trigger any potential obligations as a larger participant and vice versa.

Defining Scope of "covered payment transaction(s)" Soley on Physical Location

The CFPB is authorized to supervise nonbank covered persons for purposes of assessing compliance with Federal consumer financial law, such as the Electronic Fund Transfer Act and its implementing Regulation E, as well as the privacy provisions of Title V of the Gramm-Leach-Bliley Act (GLBA).[6] And as stated in the Proposed Rule, the CFPB does not intend to "impose new substantive consumer protection requirements or alter the scope of the CFPB's other authorities."[7] Accordingly, we believe that the scope of nonbank covered persons subject to the proposed rule should align with the scope of such persons that are subject to Federal consumer financial law.

For example, Regulation E applies to all persons that offer electronic fund transfer (EFT) services to residents of any state and it covers any account located in the U.S. through which EFT services are offered to a resident of a state, no matter where a particular transfer occurs or where the financial institution is chartered.[8] Regulation E does not apply to a foreign branch of a U.S. financial institution unless the EFT services are offered in connection with an account in a state.[9] We believe similar arguments can be made under the privacy provisions of Title V of the GLBA as well as other federal consumer financial laws.

Defining the scope of "consumer payment transaction(s)" by reference to the physical location of the payer has perverse results, and we believe unintended consequences. As drafted, the proposed rule could apply to a foreign provider of a payment application designed, marketed, and targeted towards foreign

[5] 88 Fed. Reg. 74796; Comments were due on December 29, 2023.
[6] *See* 88 Fed. Reg. 80197, 80198.
[7] *Id.*
[8] 12 C.F.R. Part 1005, Supp. I, Official Interpretation 3(a)–3.
[9] *Id.*

consumers when their users make payments using their home country payment application while traveling temporarily to the U.S. We understand that the CFPB has an interest in protecting U.S. consumer transactions in the U.S., but the proposed rule has the much larger impact of potentially imposing a new supervisory regime on foreign providers and potentially causing such foreign providers to remove or limit transactions on payment applications that their users rely upon when traveling to the U.S. in order to avoid being subject to a U.S. supervisory regime.

In order to address these concerns, we recommend that the market definition of "covered payment transaction(s)" only apply to transactions where all of the following conditions apply:

1. The consumer is a resident of a state;
2. Using a U.S. bank account or debit / credit card or stored value account issued by a U.S. financial institution to make the payment; and
3. Where the transaction is initiated by a consumer physically located in a state.

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ETA appreciates the opportunity to provide input on this important issue. If you have any questions, please contact me or Scott Talbott, ETA's Executive Vice President, at stalbott@electran.org.

Sincerely,

Jeff Patchen
Director of Government Affairs
Electronic Transactions Association