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Subcommittee on Digital Assets, Financial Technology, and Innovation

Hearing Entitled

“Bureaucratic Overreach or Consumer Protection? Examining the CFPB’s Latest Action to
Restrict Competition in Payments”

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Introduction

Chairman Hill, Ranking Member Lynch, and members of the Subcommittee on Digital Assets, Financial Technology, and Innovation, thank you for the opportunity to discuss the Consumer Financial Protection Bureau’s (the “CFPB” or the “Bureau”) proposed rule on Defining Larger Participants of a Market for General-Use Consumer Payment Applications (the “Proposed Rule”). I am Carl Holshouser, Executive Vice President of TechNet, the national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet’s diverse membership includes dynamic American businesses ranging from startups to the most iconic companies on the planet and represents over 4.2 million employees and countless customers in the fields of information technology, artificial intelligence, e-commerce, the sharing and gig economies, advanced energy, transportation, cybersecurity, venture capital, and finance.

As you know, technology plays an important role in removing barriers to financial access and empowering Americans of all backgrounds to better manage their financial lives through safe, secure, inclusive, and reliable financial tools, including digital wallets and payment applications. Policymakers should adapt and update outdated laws and regulations to meet the growing demand from consumers and businesses for these innovative financial technology (fintech) products. Any regulations focused on fintechs must ensure consumers are protected while continuing to allow innovation to flourish. The CFPB’s proposed rule fails to accomplish this on both fronts and takes a one-size-fits-all approach that deviates from past precedent. If enacted without a process to address concerns from stakeholders, the proposed rule would introduce tremendous complexity and uncertainty into digital payments markets, to the detriment of consumers and businesses across our economy.

The current consumer payments ecosystem is highly diversified. Companies across the ecosystem play a wide array of varying roles, each serving different markets and offering different functionalities. Rather than completing the required analysis to define the markets and identify the one ripe for larger participant rulemaking, the Proposed Rule conflates different markets and proposes a one-size-fits-all approach for much of the digital payments

ecosystem. This approach deviates from historic precedent and the legal standard for defining markets.¹

Under Dodd-Frank and the *Administrative Procedure Act* ("APA"), the Bureau must conduct thorough due diligence before issuing a proposed rule. The CFPB's Proposed Rule falls well short of satisfying this requirement because it fails to focus on a specific market, fails to identify specific consumer harms in that market, and fails to adequately address the costs and benefits of its misguided desire to combine disparate markets. The Proposed Rule also fails to properly identify and assess the consumer harms it seeks to address in any particular market, much less the arbitrary "general-use" payments market it aims to capture. It also does not adequately analyze the costs for the wide array of companies within the purview of the Proposed Rule and the related consumer benefits.

These deficiencies and the fact that the Proposed Rule is unsupported by reliable data render it defective as a matter of law. For these and the following reasons, it is critical that the CFPB more precisely and narrowly define the consumer payments market in which it seeks to supervise and conduct the empirical analysis required in the rulemaking process. In our comment submitted in response to the Proposed Rule, TechNet urged the CFPB to pause the rulemaking process, reconsider the Proposed Rule in its entirety, and conduct the analysis required by Dodd-Frank and the APA.

The Bureau Did Not Perform Adequate Cost-Benefit Analysis

Dodd-Frank requires the Bureau to exercise its supervisory authority based on "the risks to consumers created by the provision of such consumer financial products or services."² But the Proposed Rule dismisses this mandate:

[T]he CFPB is not proposing to determine the relative risk posed by this market as compared to other markets. 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."³

Although consumer protection is central to the Proposed Rule, it fails to identify specific harms to consumers that it seeks to address. Rather than conducting the required analysis, the Proposed Rule surmises that "as a result of supervisory activity, the CFPB and an entity *might* uncover compliance deficiencies indicating harm or risks of harm to consumers."⁴ This speculation is insufficient under Dodd-Frank.

The Proposed Rule also lacks any analysis explaining why vastly different payments markets have been grouped together under the same Proposed Rule, and why transaction volume is

¹ Over the past century, federal and state laws have been tailored to different types of consumer financial products, such as small-dollar loans, installment loans, student loan servicing, mortgages, and open-end lines of credit. The *Dodd-Frank Wall Street Reform and Consumer Protection Act* ("Dodd-Frank") and the Bureau's other larger market participant rules have followed that precedent. The Bureau's Remittance Transfer Rule, for example, focuses on international money transfers and the risks to consumers specific to that industry. It does not attempt to capture domestic money transfers, which is an entirely different market.

² 12 U.S.C. § 5514(b)(2)(C).

³ 88 Fed. Reg. at 80200 n.24 (second and third alterations in original) (emphasis added).

⁴ *Id.* at 80212 (emphasis added).

the best method for identifying the larger participants for any particular market, much less the broad universe of “general-use” applications under the Proposed Rule. Transaction volume does not necessarily correlate to potential consumer harm and there is a host of other factors that have not been considered. The risks of processing transactions with small dollar amounts are significantly lower than lower transaction volumes with higher dollar amounts. Furthermore, a company merely sending payment instructions poses significantly less risk to consumers than companies that hold, transmit, or receive money. Similarly, companies that provide merchant payment processing fall within the Proposed Rule, even though they are lower risk to consumers. There are many more examples, and it is unclear why the Proposed Rule failed to analyze the potential consumer harms relating to varying business activities and how they correspond to transaction volume.

While TechNet and its members understand that 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.

The Bureau Opportunistically Frames the Potential Costs and Benefits

The Proposed Rule conducts a perfunctory analysis of the putative benefits of increased supervision for larger participants versus the corresponding costs. While the Proposed Rule claims that increasing supervision will benefit consumers and the consumer financial market by mandating compliance with laws such as the *Electronic Fund Transfer Act* and the *Gramm-Leach-Bliley Act* and by examining for any unfair, deceptive, or abusive acts or practices, it notes only two costs associated with being supervised by the Bureau.⁵

The Proposed Rule discusses two categories of costs: costs incurred in preparing for an examination and the cost of supporting the examination. The CFPB estimates that a supervisory examination will last only eight weeks and require two weeks of preparation.⁶ The Proposed Rule also estimates that a company needs only one full-time compliance officer and one-tenth of the time of a full-time attorney to support an examination.⁷ The CFPB estimates the wages of a compliance officer at \$37 per hour and the national average hourly wage for an attorney is \$71.⁸ Based on these estimates, the Bureau calculates a total cost of \$25,001.⁹

Those figures grossly underestimate the actual costs of preparing for and supporting an examination by the CFPB, which typically include voluminous information requests and multiple rounds of follow-up requests. The 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, and meeting the Bureau’s expectations will cost multiples of \$25,000.¹⁰ 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

⁵ *Id.* at 80212–14.

⁶ *Id.* at 80213.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ For example, the costs of compliance with the orders issued by the CFPB to large technology companies under Section 1022(c)(4) of the *Consumer Financial Protection Act* (“CFPA”), were, at a minimum, \$1 million per company.

collaboration across departments, the creation of new reports and data fields, and engineers building new code. Companies also hire consultants and outside counsel to help support examinations. The Bureau has this information from conducting numerous examinations but fails to analyze the actual costs in the Proposed Rule.

The Bureau and the prudential regulators also expect companies to have robust compliance management systems (“CMS”) and personnel qualified and trained in applicable consumer compliance areas.¹¹ The CFPB claiming that responsible, compliant companies only need one full-time compliance officer and one-tenth of a full-time attorney defies the CFPB’s own expectations. Moreover, to recruit and retain people qualified for these positions requires salaries much higher than the “estimated” compensation in the Proposed Rule.

Dodd-Frank prohibits agencies from taking an opportunistic (*i.e.*, a selective) approach to assessing costs. The CFPB must properly assess costs based on the actual costs incurred during the numerous examinations the Bureau has conducted since 2011, rather than the “estimates” in the Proposed Rule which the CFPB describes as conservative.¹²

The Proposed Rule overstates the compliance benefits of supervision. The Proposed Rule also fails to acknowledge that many companies within the purview of the Proposed Rule are not “financial institutions” under the applicable definitions in Regulation E and the *Gramm-Leach-Bliley Act*. Therefore, the Proposed Rule has overstated the benefits of being supervised by the CFPB.

The Bureau Fails to Recognize that the Ambiguity of the Proposed Rule Will Cause Many Businesses to Incur Costs for Supervision

The Bureau expects 17 companies to fall within the scope of the Proposed Rule. Based on the ambiguity of the Proposed Rule and the CFPB’s admitted uncertainty about who it actually intends to supervise, however, many companies will unnecessarily expend significant resources to prepare for supervision. The Bureau ignores this uncertainty in its analysis. Moreover, in creating the list of 17 entities, the Bureau notes that it believes 190 entities provide general-use digital consumer payment applications, but after considering the small business exclusion, the Bureau concludes that only 17 companies will be supervised.¹³ But the CFPB admits that it excludes from the 17 companies “entities where either (1) available information indicates that the small entity exclusion applies *or* (2) *the CFPB lacks sufficient information regarding the entity’s size to assess whether the small entity exclusion applies.*”¹⁴ Accordingly, it remains unclear which entities the Bureau thinks will be within the purview of the Proposed Rule because it appears that at least hundreds of companies are within the scope.¹⁵

¹¹ See TMX Fin. LLC, CFPB No. 2023-CFPB-0001 (Feb. 23, 2023) (requiring TMX Finance LLC to establish a compliance committee); *CFPB Supervision and Examination Manual*, CMR 1–19 (Sept. 2022), https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual_2022-09.pdf.

¹² 88 Fed. Reg. at 80213.

¹³ *Id.* at 80210 n.88.

¹⁴ *Id.* at 80210 n.89 (emphasis added).

¹⁵ Because of the overly broad and unclear language in the Proposed Rule, many companies believe that they fall within the scope of the Proposed Rule. For example, the Bureau’s inclusion of companies that simply send payment instructions received from consumers without a requirement that the companies receive, hold, or send funds will have the effect of causing more than 17 companies to believe that they fall within the scope of the Proposed Rule. This preparation will create inefficiencies for companies. Ambiguity will stifle innovation because resources will need to be allocated to preparing for supervision rather than innovation. These costs, both figurative and literal, will be passed onto consumers.

The Proposed Rule adds to the uncertainty about its admittedly ambiguous scope by stating that while the CFPB “would be authorized to undertake supervisory activities with respect to a nonbank covered person who qualified as a larger participant,” this “would not necessarily mean that the CFPB would in fact undertake such activities regarding that covered person in the near future. Rather, supervision of any particular larger participant as a result of this rulemaking would be probabilistic in nature.”¹⁶ This ambiguity about the Bureau’s supervisory authority, or lack thereof, over covered companies does not give companies sufficient notice about whether they fall within the purview of the Proposed Rule or if the CFPB plans to supervise them.

The Bureau Dismisses the Potential Costs, Including the Costs of Duplicative Supervision, but Nonetheless Issued the Proposed Rule

The Proposed Rule also glosses over and minimizes the robust state and federal supervision over money transmitters.¹⁷ Many companies covered by the Proposed Rule are currently supervised by multiple states. State law and federal regulations have carefully assessed which activities require licensing and supervision for transmitting money.¹⁸ The Proposed Rule does not mention how the Bureau intends to address the existing federal and state oversight over certain payments-related activities or overlapping authority or multiple supervisory examinations on the same subject matter, such as CMS, which will happen under the Proposed Rule. It also fails to address how the CFPB’s examinations will add value beyond the examinations already being conducted by the federal prudential regulators and the states, while downplaying the significant additional costs resulting from the duplication.

The Proposed Rule states that the frequency of examinations will depend on a number of factors and such factors are expected to change over time.¹⁹ However, the Proposed Rule fails to estimate how many examinations the CFPB will undertake each year for larger participants. Companies therefore cannot adequately prepare or plan for the potential costs that may be incurred by supervision.

Lastly, the Proposed Rule does not consider its potential impact on small businesses. For example, because larger participants offer payments-related products and services to small businesses, the companies within the scope of the Proposed Rule may stop or significantly reduce their offerings to these small businesses, or significantly increase the costs for these products and services charged to small businesses.²⁰

¹⁶ 88 Fed. Reg. at 80211.

¹⁷ Federal law defines “money transmission services” as “(A) the acceptance of currency, funds, or other value that substitutes for currency from one person and the transmission of currency, funds, or other value that substitutes for currency to another location or person by any means. ‘Any means’ includes, but is not limited to, through a financial agency or institution; a Federal Reserve Bank or other facility of one or more Federal Reserve Banks, the Board of Governors of the Federal Reserve System, or both; an electronic funds transfer network; or an informal value transfer system; or (B) Any other person engaged in the transfer of funds.” 31 C.F.R. § 1010.100(ff)(5)(i).

¹⁸ For example, many states have decided to supervise companies that meet the agent of the payee exemption due to the low risks that these companies pose. Similarly, under federal law, the definition of “money transmission services” contains exclusions, including, but not limited to, an exclusion for payment processors in addition to an exclusion for companies that “[a]ccept[] and transmit[] funds only integral to the sale of goods or the provision of services, other than money transmission services, by the person who is accepting and transmitting the funds.” 31 C.F.R. § 1010.100(ff)(5)(ii)(F).

¹⁹ 88 Fed. Reg. at 80213.

²⁰ The Proposed Rule discloses that, “[t]he Director of the CFPB certifies that the Proposed Rule, if adopted, would not have a significant economic impact on a substantial number of small entities and that an [initial regulatory

The Bureau Must Reconsider the Arbitrary “General-Use Digital Consumer Payment Applications” Market and Clarify Definitions Throughout

The definitions within the Proposed Rule do not provide meaningful parameters around the Proposed Rule’s scope. This ambiguity will: (1) result in confusion and unnecessary costs for companies, and (2) cause confusion relating to CMS requirements and preparation for supervision due to the one-size-fits-all treatment for high- and low-risk activities. The Bureau should not proceed with the Proposed Rule unless it includes the appropriate level of clarity and detail for companies to meaningfully prepare for supervision.

Additionally, the Bureau has committed a “serious procedural error” by failing to make portions of the data it relied upon in drafting the Proposed Rule available for public inspection and comment.²¹ More specifically, the Bureau “access[ed] nonpublic transaction and revenue data for potential larger participants from the Nationwide Mortgage Licensing System & Registry (“NMLS”).”²² The NMLS is “a centralized licensing database used by many States to manage their license authorities with respect to various consumer financial industries.”²³ The Bureau says it relied upon “quarterly 2022 and 2023 filings from nonbank money transmitters in the Money Services Business (MSB) Call Reports.”²⁴ Yet it has not made this data available for public inspection and comment. Instead, the Bureau has provided “a description of the types of data reported in the MSB call reports.”²⁵ This is plainly insufficient. If the Bureau used proprietary or confidential information, it was obligated to make a sanitized version of the data available as part of its rulemaking.²⁶

Defining the “market”

Defining a “market” is the fundamental prerequisite to determining who is a larger participant within the defined market.²⁷ Products are in the same “market” if they are

flexibility analysis] IRFA therefore is not required.” 88 Fed. Reg. at 80215. The IRFA exempts an agency from the requirement to publish an IRFA and convene a review panel to review the IRFA and collect advice and recommendations from affected small entity representatives if the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities[,]” and publishes the certification in the Federal Register at the time of publication of the general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification. 5 U.S.C. § 605(b). The Proposed Rule does not consider any impact on small businesses because the Bureau asserts that an IRFA is not required. 88 Fed. Reg. at 80215. The *Small Business Regulatory Enforcement Fairness Act* requires the CFPB to ensure that small entities are given an opportunity to participate in proposed agency regulations that are likely to have a “significant economic impact on a substantial number of small entities.” 5 U.S.C. § 609(a). Despite the Director’s certification, the Proposed Rule would benefit from an IRFA because there may be costs impacting small businesses, and an IRFA would assess such costs. For example, larger participants may decide to no longer offer products and services to small businesses or larger participants may pass along their additional costs to small businesses.

²¹ *Owner-Operator Indep. Drivers Ass’n, Inc.*, 494 F.3d at 199 (D.C. Cir. 2007) (citing *Solite Corp.*, 952 F.2d at 484.

²² 88 Fed. Reg. 80210.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Window Covering Manufacturers Ass’n v. Consumer Prod. Safety Comm’n*, 82 F.4th 1273, 1284 (D.C. Cir. 2023) (explaining that it is arbitrary and capricious when an agency “possessed the underlying data but failed to include it in the rulemaking record” and admonishing that the agency “could have redacted sensitive information from the reports before releasing them” (quoting *Coalition of Battery Recyclers Ass’n v. EPA*, 604 F.3d 613, 623 (D.C. Cir. 2010))).

²⁷ Although the term “market” is not defined, see 12 U.S.C. § 5481, other text within Dodd-Frank suggests that the term “market” must be read by reference to the applicable *product*, see *id.* § 5514 (“The Bureau shall exercise its authority under paragraph (1) in a manner designed to ensure that such exercise, with respect to persons

“reasonably interchangeable by consumers for the same purposes.”²⁸ Whether two products are in the same market depends “on a factual inquiry into the commercial realities faced by consumers”²⁹ and “tak[ing] account of the factors that influence consumer choices, including product function, price, and quality.”³⁰ Dodd-Frank authorizes the Bureau to supervise “larger participant[s] of a market for . . . consumer financial products or services.”³¹ Before issuing a proposed rule, the Bureau must consult with the FTC to get its input regarding the market to be defined in the rulemaking and the larger participants in the market.³² Congress included that requirement because the FTC analyzes market concentration and enforces federal antitrust laws. With that in mind, the Bureau’s requirement to consult with the FTC clearly indicates that the FTC should provide a check on the CFPB’s determination of the market at issue.

In response to the statutory requirement to consult with the FTC about the scope of the Proposed Rule, the Bureau states that it “consulted with *or provided an opportunity for consultation*.”³³ This carefully-worded sentence suggests the CFPB may have avoided the requirement. Dodd-Frank plainly provides that the Bureau “shall consult” with the FTC to define the covered persons subject to larger participant rules.³⁴ Moreover, the Proposed Rule lacks any discussion about the factors determining which products and services should be included within the same payments market.³⁵

Without that essential market-defining discussion, the Proposed Rule summarily concludes that “general-use digital consumer payment applications” is a single, coherent market. As an example, the Proposed Rule includes both “funds transfer functionality” and “wallet functionality” within the definition of “covered payment functionality.”³⁶ The Proposed Rule “treat[s] these two covered payment functionalities as part of a single market for general-use digital consumer payment applications” even though the Bureau concedes that the “technological and commercial processes these two payment functionalities use to facilitate consumer payments may differ in some ways.”³⁷ The overly broad market definition potentially conflates companies as disparate as, for example, (1) a company that allows consumers to make payments using a stored balance held by that company; (2) a company that routes funds from a consumer’s bank account for transmission to a third party; (3) a company that offers 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 risk posed to consumers; and (4) a company that merely holds and passes payment information, such as card numbers, but never participates in the flow of funds from the consumer to the third-party recipient.

Dodd-Frank requires the Bureau to define a “market,” and it is contrary to the statutory mandate to conflate products that do not meet similar needs, do not have similar use cases, and are not reasonably substitute products. The Proposed Rule appears to violate the

described in subsection (a)(1), is based on the assessment by the Bureau of the risks posed to consumers in the *relevant product* markets and geographic markets”) (emphasis added).

²⁸ *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956).

²⁹ *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482 (1992) (internal quotation marks omitted).

³⁰ *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 335 (S.D.N.Y. 2001).

³¹ 12 U.S.C. § 5514(a)(1)(B).

³² 12 U.S.C. § 5514(a)(2).

³³ 88 Fed. Reg. at 80199.

³⁴ 12 U.S.C. § 5514(a)(2).

³⁵ *Id.*

³⁶ *See id.* at 80204.

³⁷ 88 Fed. Reg. 80204-80205.

requirements in Dodd-Frank to save the Bureau from the inconvenience of multiple rulemakings. That shortcut deprives stakeholders and the public of a meaningful opportunity to participate in the rulemaking process.

Further, the Proposed Rule considers different transaction volumes to define larger participants, but it ultimately sets the transaction threshold at a mere five million.³⁸ This threshold is strikingly low and does not attempt to target larger participants because many smaller to medium-size businesses have tens and sometimes hundreds of thousands of transactions per day. Transaction volume should be increased to properly capture only larger participants. For context, in 2022, the average *daily* volume of automated clearinghouse transactions processed by the Federal Reserve was 74.07 million.³⁹ In 2021, the total of number of noncash payments was 204.5 billion transactions.⁴⁰

The Bureau also fails to acknowledge the varying risks to consumers for smaller transactions versus larger-dollar transactions, and, instead, takes a one-size-fits-all approach. Relying on transaction threshold alone is overly-simplified. We recommend that the Bureau consider implementing a gross dollar volume of transactions processed in addition to a transaction threshold to properly capture only larger companies.

Defining “general use” payment applications

The Proposed Rule’s misguided conflation of different payments markets is reflected in its arbitrary definition of “general-use” payment applications. 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”⁴¹ does not provide sufficient guidance to ascertain the scope of “general use.” Due to the wide and varying nature of the products and services within the scope of the Proposed Rule, the Bureau should take a fresh approach to defining the particular payments market(s) that should be covered by the Proposed Rule. The few examples in the Proposed Rule do not provide meaningful guidance about how the Bureau will interpret “general use.” The current definition should be narrowed and clarified beyond the example of P2P payment applications being included and the limited exclusions mentioned in the analysis. Without additional clarification or limitations, the definition is overly broad, ambiguous, and lacks meaningful parameters. The broad nature of this definition should be reconsidered for the varying payment industries (*i.e.*, P2P transfers, wallet functionalities, and purchases made with digital assets) and tailored to each of these distinct markets.

Covered payment functionality

The definition of funds transfer functionality is one of the components that falls within a covered payment functionality. Accepting and receiving payment instructions is currently defined as a funds transfer functionality. We recommend excluding accepting and receiving payment instructions from the definition of funds transfer functionality. In addition, “wallet functionality” is defined under the Proposed Rule to mean “a product or service that: (1) Stores account or payment credentials, including in encrypted or tokenized form; and (2)

³⁸ See *id.* at 80210, 80214.

³⁹ Federal Reserve, Commercial Automated Clearinghouse Transactions processed by the Federal Reserve – Annual Data, https://www.federalreserve.gov/paymentsystems/fedach_yearlycomm.htm.

⁴⁰ Federal Reserve, Federal Reserve Payments Study (FRPS), <https://www.federalreserve.gov/paymentsystems/fr-payments-study.htm>.

⁴¹ 88 Fed. Reg. at 80216.

Transmits, routes, or otherwise processes such stored account or payment credentials to facilitate a consumer payment transaction."⁴²

The Proposed Rule does not consider that pass-through wallets are merely a record of the underlying provider's account, and that record is not related to the product or service being provided to the consumer. As an example, the CFPB includes "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."⁴³ A pass-through wallet should not be considered a covered payment functionality within the Proposed Rule 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. There are some wallets operated by third party payment processors where such processor is in the funds flow, but these companies may take advantage of state and federal law exemptions previously discussed.

Consumer payment transactions

The Proposed Rule should be reconsidered to identify and address the differing types of transactions that occur within the payments ecosystem and address the varying risks to consumers. At a minimum, the exclusions under a "consumer payment transaction" should include additional limitations.

Portions of the payments process that involve exclusively business-to-business transactions should be excluded from the Proposed Rule, as the business-to-business activity does not directly involve consumers. A payment lifecycle may go through many steps. Some of those steps are solely business-to-business, even though the end result may be by or on behalf of a consumer. We recommend excluding from the definition of a "consumer payment transaction" any portions of the payment lifecycle that are business-to-business.

Further analysis should also be performed to ascertain whether digital assets must be excluded from the Proposed Rule. Congress has yet to give authority to any regulatory body to govern digital assets. Moreover, both the Commodity Futures Trading Commission ("CFTC") and Securities and Exchange Commission ("SEC") have stated that certain digital assets are within their respective jurisdictions.

The commentary surmises that the use of the term "funds" within the definition of "financial product or service" within the CFPB in section 1002(15)(A)(iv) includes digital assets.⁴⁴ The Bureau cites that some courts have found that certain crypto assets constitute "funds" because they can be used to "conduct financial transactions."⁴⁵ The supposition that some courts have held that "funds" include crypto-assets should be bolstered with additional analysis and support to determine that digital assets should fall within the purview of the Proposed Rule.

⁴² 88 Fed. Reg. at 80216.

⁴³ *Id.* at 80204.

⁴⁴ 88 Fed. Reg. at 80215. at 80202.

⁴⁵ *United States v. Faiella*, 39 F. Supp. 3d 544, 545 (S.D.N.Y. 2014) (citing examples of financial transactions that can be conducted using Bitcoin including purchases of goods and services).

Both the SEC and CFTC have stated that digital assets are securities and commodities, respectively.⁴⁶ The CFPB does not have authority over entities regulated by the CFTC and SEC under Dodd-Frank.⁴⁷ For these reasons, the Bureau's conclusive statement that some digital assets are "funds" based on decisions from a limited number of courts should be reconsidered.

Digital application

The definition of "digital application" is vague, and the examples of "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 consumer's biometric identifier, such as a fingerprint, palmprint, face, eyes, or voice"⁴⁸ do not sufficiently narrow the scope.

At a minimum, the definition of "digital application" should be clarified to exclude covered payment functionalities that technology providers may supply to their merchant-customers that may then be used for those merchants to offer to consumers. These functionalities are business-to-business offerings where a consumer may use the end product. Any facilitation of application functionality between businesses should be excluded from the coverage of the Proposed Rule.

Conclusion

The CFPB's proposed rule on Defining Larger Participants of a Market for General-Use Consumer Payment Applications fails to comply with mandatory rulemaking requirements necessary to proceed with a final rulemaking. The Proposed Rule does not identify an appropriate market, does not identify specific consumer harms in the market, and fails to properly conduct the required cost-benefit analysis. The CFPB should pause the rulemaking process, reconsider the Proposed Rule in its entirety, and conduct the analysis required by law.⁴⁹

Thank you for your attention to our views. I look forward to your questions.

⁴⁶ See Complaint at 15, *SEC v. Payward, Inc.*, No. 3:23-cv-06003 (N.D. Cal. Nov. 20, 2023) ("Throughout the Relevant Period, Kraken has made available for trading many 'crypto assets securities.' These crypto asset securities are investment contracts represented by the underlying crypto asset."); *In re Opyrn, Inc.*, CFTC No. 23-40, at 4 (Sept. 7, 2023) ("Ether and stablecoins such as USDC are encompassed in the definition of 'commodity' in Section 1a(9) of the [Commodity Exchange] Act . . ."); *CFTC v. McDonnell*, 287 F. Supp. 3d 213, 228 (E.D.N.Y. 2018) ("Virtual currencies are 'goods' exchanged in a market for a uniform quality and value . . . [t]hey fall well within the common definition of 'commodity' as well as the CEA's definition of 'commodities' as 'all other goods and articles . . . in which contracts for future delivery are presently or in the future dealt in.'" (alteration in original) (citation omitted).

⁴⁷ 12 U.S.C. § 5517(i)-(j).

⁴⁸ 88 Fed. Reg. at 80216.

⁴⁹ The Bureau should also suspend the rulemaking process pending the United States Supreme Court's decision in *CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, No. 22-448 (U.S. argued Oct. 3, 2023).