

CFPB seeks to expand federal oversight for digital wallets and payment providers

Initial perspectives related to the Consumer Financial Protection Bureau’s (CFPB) proposed rule aiming to define a market for general-use digital consumer payment applications and subjecting the larger participants within this market to the CFPB’s supervisory authority



On November 7, 2023, the CFPB proposed expanding federal oversight of big tech companies offering services for general-use digital consumer payment applications.¹ This is the sixth in a series of CFPB rulemakings to define larger participants of markets for consumer financial products. The proposal would cover nonbank providers of funds transfer and wallet functionalities through consumer digital applications, such as digital wallets, payment apps, and peer-to-peer payment providers, and subject large nonbank companies to similar supervisory examinations as banks. The proposal would impose additional regulatory scrutiny on nonbanks and require more mature compliance and risk management practices to adequately manage regulatory risks arising from funds transfer, privacy, and other consumer protection laws.

5 insights you should know

Two-factor test: The proposal sets forth a two-factor test to ascertain if a nonbank covered person qualifies as a "larger participant," thereby subjecting them to CFPB's supervision and examination. The larger participant criteria are as follows: (1) the nonbank must offer a general-use digital consumer payment application with an annual volume of at least five million transactions (aggregate including affiliates), and (2) the nonbank must not be classified as a small business as defined by the Small Business Administration under 12 CFR part 121.

Defining “general use”: The proposal defines “general use” as “the absence of significant limitations on the purpose of consumer payment transactions.” Therefore, the focus is on those applications with wide-ranging functions like transferring money to peers or purchasing various goods from different vendors. Relevant factors to consider include the universe of potential recipients and the type of goods and services purchasable through the application.

Scope of “consumer payment transactions”: The proposal defines “consumer payment transactions” as 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.” Notably, the emphasis of the definition is on the sending of a payment, and not on the receipt. Additionally, the CFPB does not limit the scope of the proposal to fiat currency, but also includes the transfer of digital assets within the term “funds.”

Determination process and two-year lock-in period: The CFPB will inform entities of upcoming supervisory activities and may request records and information to determine if a nonbank is a larger participant. Nonbanks may dispute their categorization and present evidence during the review process. Once classified as a larger participant, however, a nonbank will be under CFPB supervision for at least two years from the first day of the tax year when it last met the larger-participant criteria.

CFPB supervision of nonbanks: Nonbanks that qualify as larger participants may not necessarily undergo CFPB supervision immediately. The timing and frequency of examinations will likely depend on a number of factors, including the nonbanks’ size, risks to consumers, and extent of state regulatory oversight, among others. Where the CFPB does initiate an examination, nonbanks should be responsive to requests for documents, records, and accounts to assess and evaluate the entity’s compliance management system.

5 considerations to evaluate

Enhancing federal oversight uniformity for banks and nonbanks: While the CFPB has existing enforcement authority over nonbanks with respect to federal financial consumer laws, the proposal would enable ongoing supervision and examination of nonbanks, similar to that of depository institutions. Among the consumer laws the CFPB will likely focus on include the privacy provisions of the Gramm-Leach-Bliley Act (GLBA); the Electronic Fund Transfer Act (EFTA); and unfair, deceptive, and abusive acts and practices (UDAAP).

Perform careful review of how application is used: Nonbanks should thoroughly review how their application’s usage intersects with the proposal’s definition. For example, applications limited to peer-to-peer payments, although confined in purpose, would not be sufficiently limited to fall outside the proposal’s scope. Additionally, a general-use third-party application accessed through a non-general use application (e.g., merchant app) would still be considered covered market activity.

Develop detailed transaction metrics: Given the importance of scoping within the proposal, nonbanks should be aware of transaction-level indicators to analyze activities that constitute “consumer payment transactions.” Among the relevant transaction-level indicators include: (i) whether the funds are transferred to another person or between a consumer’s own accounts; (ii) the location of the consumer at the time of a transaction; and (iii) the purpose of the transaction (e.g., those primarily for personal, family, or household purposes vs business-to-business payments).

Conduct individual assessment and prepare to evidence accordingly: Nonbanks potentially covered by the proposal should conduct an in-depth assessment of their activities, considering affiliate transactions, to determine the likelihood of a CFPB determination. As proposed, the rule would cover approximately 17 entities, representing about 88% of known transactions in the nonbank market for general-use digital consumer payment applications. Entities disputing a larger participant determination will need to be submit documentary evidence and written arguments during review.

Prepare: Covered nonbanks should be prepared to direct more resources to ensuring compliance with federal consumer financial laws. Covered nonbanks should consider how Compliance Programs could meet CFPB expectations. The CFPB will likely consider an entity’s risk to consumers and past noncompliance when planning examinations. Therefore, enhancing compliance management systems early may mitigate future supervisory attention.

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