January 8, 2024

Comment Intake—LP Payment Apps Rulemaking
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Proposed Rule Defining Larger Participants of a Market for General-Use Digital Consumer Payment; Docket No. CFPB-2023-0053; RIN 3170-AB17

To Whom It May Concern:

Better Markets[1] appreciates the opportunity to comment on the above-captioned proposed rule ("Proposal" or "Proposed Rule") issued by the Consumer Financial Protection Bureau ("CFPB" or "Bureau").[2] The Proposal will ensure that the CFPB has supervisory authority over the growing number of firms that provide digital payment applications for financial consumers. That in turn will better equip the Bureau to examine, and where appropriate, investigate this class of firms for possible violations of the financial consumer protection laws. And ultimately, that means holding firms accountable through enforcement actions where violations are found.

The CFPB's supervisory authority is an important part of the agency's all-encompassing effort to oversee the markets for financial products and services, assess and mitigate systemic risks to the financial system, and better protect American consumers.[3] Under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), the CFPB has supervisory authority over "larger participant[s] of a market for . . . consumer financial products or services," as the CFPB defines by rule.[4] Supervision may involve requests from companies for information or records, on-site or off-site examinations, or some combination of these activities. As stated in the Proposal, the CFPB is authorized to supervise nonbank covered persons for purposes of "(1)

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1 Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies — including many in finance — to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

2 Defining Larger Participants of a Market for General-Use Digital Consumer Payment, 12 CFR 1090, 88 Fed. Reg. 80197 (Nov. 07, 2023), https://www.consumerfinance.gov/rules-policy/rules-under-development/defining-larger-participants-of-a-market-for-general-use-digital-consumer-payment-applications/.

3 *See* Braucher & Littwin, *infra* note 20.

4 12 U.S.C. 5514(a)(1)(B), (a)(2).

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."[5]

To that end, the CFPB has proposed to establish the CFPB's supervisory authority over certain nonbank covered persons participating in a market for "general-use digital consumer payment applications."[6] The Bureau's Proposal would cover nonbanks that "provide funds transfer or wallet functionalities through a digital application for consumers' general use in making consumer payments transactions."[7] The Proposal defines "consumer payment transactions" to include "payments to other persons for personal, household, or family purposes," excluding certain transactions.[8] The Proposed Rule would apply to nonbank payments companies that offer digital wallets or person-to-person payments through mobile and web applications, process a transaction volume of more than five million covered transactions per year, and are not a "small business concern," as defined by the Small Business Act ("SBA"). In other words, the Proposed Rule would define 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 authorize the CFPB to undertake supervisory activities with respect to those providers.

We support the Bureau's Proposed Rule to supervise the covered providers of digital wallet and consumer payment applications. This Proposal not only fulfills the statutory supervisory mandates of Dodd-Frank[9] but will also enhance compliance and consumer protection within the digital consumer payment application ecosphere. We applaud the Bureau for this important Proposal and look forward to seeing its beneficial impact in the financial markets.

COMMENTS

I. Digital nonbank consumer payment applications are proliferating among American consumers, presenting unique risks to markets and consumers.

Digital nonbank payment applications are becoming increasingly prolific among American consumers, with 4 in 5 Americans using one of these apps in 2020.[10] In recent years, transaction volumes on these nonbank payment applications, such as PayPal, CashApp, and Venmo, have also dramatically increased. For example, between 2018 and 2022, the total person-to-person (P2P)

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5 12 U.S.C. 5514(b)(1).

6 Proposal, at 80197.

7 Proposal, at 80199.

8 Proposal, at 80197.

9 12 U.S.C. 5514(b)(1).

10 Erin El Issa, *Most Americans Go Mobile With Payment Apps — Here's How They Roll*, NERD WALLET (Feb. 26, 2020), https://www.nerdwallet.com/article/banking/mobile-payment-app-survey; Ellen Sheng, *Peer-to-peer payment apps like Venmo, Cash, PayPal are booming. Do you still need a bank?*, CNBC (Apr. 11, 2022), https://www.cnbc.com/2022/04/11/how-to-use-peer-to-peer-payment-apps-like-venmo-cash-paypal-zelle.html.

payment dollar volume quadrupled.[11] As of 2022, more than three-quarters of U.S. adults have used a payment app, according to the Pew Research Center.[12] For better or worse, it is clear that these applications are becoming an increasingly prevalent feature in Americans' lives. And while they offer benefits in terms of convenience and speed, they also pose risks to consumers as well as the financial system.

As these transaction volumes increase and more consumer funds flow through this ecosystem, many consumer advocates have raised legitimate concerns about the lack of consumer protections associated with these applications, as well as the possible systemic risks they may present to the financial markets.[13] For example, there is growing concern among many economic observers, including the CFPB itself, about the possible systemic risks posed by vast amounts of funds flowing away from depository institutions and into non-FDIC insured accounts.[14]

According to the Bureau's Issue Spotlight analysis of deposit insurance coverage on funds stored through payments apps, the standards for storing consumer funds differ from company to company. Some companies invest the money deposited into their payment application in interest-earning loans and bonds instead of depositing them into a traditional bank or credit union. As the CFPB correctly noted, this poses the risk of investment losses, interest rate changes, currency exchange rate fluctuations, and liquidity issues. As observed by the Bureau, some payment applications claim to offer "pass-through" insurance that ostensibly protects funds against the failure of the banking institution where the deposit is held.[15] However, the insurance is only

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[11] *CFPB Issue Spotlight: Analysis of Deposit Insurance Coverage on Funds Stored Through Payment Apps* (June 01, 2023), https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-analysis-of-deposit-insurance-coverage-on-funds-stored-through-payment-apps/full-report/.

[12] Monica Anderson, *Payment apps like Venmo and Cash App bring convenience – and security concerns – to some users*, PEW RESEARCH CENTER (Sept. 08, 2022), https://www.pewresearch.org/short-reads/2022/09/08/payment-apps-like-venmo-and-cash-app-bring-convenience-and-security-concerns-to-some-users/.

[13] *See* Rachel Gittleman, Brianna Rodriguez, & Erin Witte, *Digital Wallets – Peer-to-Peer "P2P" Payment Systems*, CONSUMER FEDERATION OF AMERICA (June 27, 2022), https://consumerfed.org/digital-wallets-peer-to-peer-p2p-payment-systems/ (noting the lack of FDIC insurance, high prevalence of fraud and scams, and ineffective consumer privacy and other protections found within digital consumer payment applications); *see also generally* Dan Awrey, *Unbundling Banking, Money, and Payments*, 110 GEO. L. J. 715 (2022); Jeffrey Luther, *Twenty-First Century Financial Regulation: P2P Lending, Fintech, and the Argument for a Special Purpose Fintech Charter Approach*, 168 U. PENN. L. REV. 1013 (2020); *infra* note 14 and accompanying text.

[14] *See CFPB Issue Spotlight: Analysis of Deposit Insurance Coverage on Funds Stored Through Payment Apps*, *supra* note 11; Press Release, CFPB, *CFPB Finds That Billions of Dollars Stored on Popular Payment Apps May Lack Federal Insurance* (June 01, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-billions-of-dollars-stored-on-popular-payment-apps-may-lack-federal-insurance/; Ann Carrns, *The Risks of Storing Money in Apps Like Venmo and Cash App*, THE NEW YORK TIMES (June 09, 2023), https://www.nytimes.com/2023/06/09/your-money/venmo-cash-app-paypal-payment-apps.html; Martin Kleinbard & Amy Zirkle, *New risks emerge as line between payments and commerce blurs*, CFPB (Aug. 04, 2022), https://www.consumerfinance.gov/about-us/blog/new-risks-emerge-as-line-between-payments-and-commerce-blurs/.

[15] *See* CFPB Issue Spotlight, *supra* note 14.

provided under certain conditions and does not protect users' money if the parent app collapses, raising significant concerns regarding the potential for customer losses.

Moreover, officials from the FDIC and elsewhere have similarly raised concerns that many consumers may not even be aware that these applications in fact do not offer FDIC insurance, exacerbating their potential risk.[16] The recent failures of platforms like FTX, as well as the failures of several banks such as Silicon Valley Bank,[17] First Republic Bank, Signature Bank,[18] and others highlight these risks and show the importance of ensuring consumers are well aware of whether their funds are protected by depository insurance.[19]

II. The Bureau's Supervision of These Nonbank Payment Applications Would Reduce Systemic Financial Risk, Enhance Consumer Protection, Increase Compliance with Federal Consumer Financial Law, and Level the Competitive Playing Field between Nonbank and Depository Institutions.

As stated above, the CFPB's supervisory examination authority is an important regulatory oversight and consumer protection tool that benefits both markets and consumers alike.[20] The Bureau's supervisory efforts over the digital payment application ecosystem will significantly enhance compliance with federal consumer financial law and will better equip regulators with the information needed to adequately police financial markets. Indeed, the Dodd-Frank Act's stated purposes of the CFPB's examination authority are assessing compliance with federal consumer financial law, obtaining information about the activities and compliance systems of supervised

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16 *See* Press Release, FDIC, *FDIC Launches Public Campaign to Raise Awareness About Deposit Insurance* (Oct. 11, 2023), https://www.fdic.gov/news/press-releases/2023/pr23083.html; *CFPB Issue Spotlight: Analysis of Deposit Insurance Coverage on Funds Stored Through Payment Apps*, *supra* note 11 ("[C]onsumers may not fully appreciate when, or under what conditions, they would be protected by deposit insurance.").

17 *See Review of the Federal Reserve's Supervision and Regulation of Silicon Valley Bank*, Bd. of Governors of the Fed. Reserve Sys. (Apr. 28, 2023), https://www.federalreserve.gov/publications/files/svb-review-20230428.pdf.

18 *See FDIC's Supervision of Signature Bank*, FDIC (Apr. 28, 2023), https://www.fdic.gov/news/press-releases/2023/pr23033a.pdf.

19 *See Analysis: Options for Deposit Insurance Reform*, FDIC (May 10, 2023), https://www.fdic.gov/analysis/options-deposit-insurance-reforms/index.html.

20 *See* Jean Braucher & Angela K. Littwin, *Examination as a Method of Consumer Protection*, 58 ARIZ. L. REV. 33 (2016 ("Although examination is time-consuming and commands devotion of resources both by the agency and regulated entities, it is still less resource-consuming than litigation. It thus provides a relatively cost-effective way for an agency to obtain both changes in company practices and compensation for victims."); Lev Menand, *Why Supervise Banks? The Foundations of the American Monetary Settlement*, 74 VAND. L. REV. 951, 952 (2021) ("Desupervision, in turn, cedes public power to private actors and risks endemic economic instability."); Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PENN. L. REV. 1311 (2015); William C. Whitford, *Structuring Consumer Protection Legislation to Maximize Effectiveness*, 1981 WIS. L. REV. 1018, 1018 (1981).

entities, and detecting and assessing risks to consumers and consumer financial markets.[21] Congress was well aware of these considerations when it established the CFPB, making supervisory examination a critical component of the agency's efforts.

Given the nascent risks that are newly emerging in the rapidly evolving digital payment application space, the Bureau's supervision of these entities will serve an important role in identifying and mitigating key systemic risks to markets and consumers. As the Proposal itself states: "As firms increasingly offer funds transfer and wallet functionalities through general-use digital consumer payment applications, the rule would enable the CFPB to monitor for new risks to both consumers and the market. The CFPB's ability to monitor for emerging risks is critical as new product offerings blur the traditional lines of banking and commerce."[22] These risks are especially worthy of regulatory attention given the increased flow of funds to these applications and the lack of FDIC insurance in this space.[23]

The prospect of the CFPB exercising supervisory authority over these applications would create a significant incentive for covered persons to allocate additional resources and attention to compliance with federal consumer financial law, almost certainly leading to higher rates of overall compliance. Firms might reasonably anticipate that by allocating these extra resources to compliance — thereby decreasing risk to consumers — they may be decreasing their chances of becoming the focus of Bureau supervision, investigation, or enforcement actions. In addition, as the Bureau itself puts it:

> [A]n actual examination would be likely to reveal any past or present noncompliance, which the CFPB could seek to correct through supervisory activity or, in some cases, enforcement actions. Larger participants might therefore judge that the prospect of 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.[24]

Moreover, under the Bureau's supervision proposal, information would flow more freely than it currently does, because supervision occurs outside of adversarial legal processes. This sort of rapid exchange of information is vitally important for ex ante regulation because it allows dubious practices to be identified and stopped *as* they develop, or even *before* they develop, rather than after the fact through ex post litigation. As one author has explained, this exchange of

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[21] Dodd-Frank Wall Street Reform and Consumer Protection Act Pub. L. No. 111-203, §§ 1024(b)(1)(A)–(B), 1025(b)(1)(A)–(B), 124 Stat. 1987, 1990 (codified at 12 U.S.C. §§ 5514(b)(1)(A)–(B), 5515(b)(1)(A)–(B) (2012)) (giving the CFPB authority to require reports and conduct examinations of, respectively, nondepository and depository entities, for the purposes of "assessing compliance with the requirements of Federal consumer financial law" and "obtaining information about the activities and compliance systems or procedures" of supervised entities).

[22] Proposal, at 80201.

[23] *See supra* note 14 and accompanying text.

[24] Proposal, at 80212.

information benefits both regulators and industry participants, as market actors can be put on notice of incipient violations that could later lead to liability if not rectified:

> [I]ndustry-wide aggregate exam reports—standard practice in consumer finance—help put firms on notice of nascent harmful practices that violate consumer protection laws. Additionally, industry-wide information collection would flow more smoothly into industry-wide rulemaking. This ex ante process is preferable to the current approach of waiting for adequate public information to reveal problematic practices—which often takes years—and only then stopping those practices through punitive enforcement proceedings that are incapable of delivering compensation for widely dispersed harms. In many ways it also constitutes a lighter form of regulation than does a litigation-centered model.[25]

The Bureau's proposal would likely also help level the playing field between nonbanks and depository institutions, which the CFPB already supervises and which also provide similar general-use digital consumer payment applications. As it stands now, depository institutions already subject to CFPB supervision are at a disadvantage when competing with nonbank actors in the digital consumer payment application space, since these nonbank providers do not share the same regulatory and compliance burdens associated with supervision. As this Proposal levels the playing field between depository institutions and nonbanks, the entire consumer payment applications ecosystem would likely see pro-competitive benefits.

Moreover, to the extent the Proposed Rule would subject any cryptocurrency exchanges, wallets, or other cryptocurrency platforms or services to CFPB supervision, this would be a welcome change to an industry marked by a wide assortment of investor and consumer abuses.[26]

With respect to the Bureau's transaction volume threshold of five million, it appears, based on the Bureau's analysis, that lowering or raising the volume threshold — even to as low as one million or as high as 10 million — would make little difference in capturing the larger participants of this market. As the Bureau notes in the Proposal, the volume thresholds of both one million and five million would capture approximately the same portion — 88 percent — of activity in this market.[27] However, we urge the Bureau to nonetheless consider, when possible, whether to exercise supervisory authority over smaller participants of this market, including those with annual transaction volumes of less than five million, by virtue of the Bureau's separate supervisory authority in 12 U.S.C. 5514(a)(1)(C). That provision allows the Bureau 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

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25 *Helping Buyers Beware: The Need for Supervision of Big Retail*, *infra* note 20, at 1382–83.

26 *See* Ephrat Livni, *Crypto Needs More Rules and Better Enforcement, Regulators Warn*, THE NEW YORK TIMES (Oct. 03, 2022), https://www.nytimes.com/2022/10/03/business/cryptocurrency-regulation-stablecoin.html.

27 Proposal, at 80210.

products or services."[28] While such smaller firms may pose less systemic risk to markets overall, these markets can still be rife with fraud, posing serious risks to consumers. The Bureau's exercise of authority over such smaller firms, to the extent permitted under the law, can serve as an important shield against investor or consumer abuse.

III. <u>The Bureau's Cost-Benefit Analysis Is Appropriate.</u>

The Bureau's Proposal also faithfully implements the Consumer Financial Protection Act's cost-benefit analysis requirements without needlessly attempting an exhaustive quantitative analysis.[29] With respect to cost-benefit analysis, the Consumer Financial Protection Act provides that:

> In prescribing a rule under the Federal consumer financial laws— (A) the Bureau shall consider— (i) 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 such rule; and (ii) the impact of proposed rules on covered persons, as described in section 5516 of this title, and the impact on consumers in rural areas . . . .[30]

We note that decades ago, the Supreme Court held that an agency's duty to conduct cost-benefit analysis is not to be inferred without a clear indication from Congress: "Congress uses specific language when intending that an agency engage in cost-benefit analysis."[31] And one of the basic canons of judicial review of agency rules is that "the scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of an agency."[32] This is "especially true when the agency is called upon to weigh the costs and benefits of alternative policies,"[33] and in fact, "cost-benefit analyses epitomize the types of decisions that are most appropriately entrusted to the expertise of an agency."[34] The Supreme Court has also explained that the duty to "consider" various economic factors in the rulemaking process entails wide agency discretion. As the Court explained, when statutorily mandated "considerations" are not "mechanical or self-defining standards," they "in turn imply wide areas of judgment and therefore of discretion."[35]

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[28] 12 U.S.C. 5514(a)(1)(C).

[29] *See* 12 U.S.C. 5512(b)(2)(A).

[30] *Id.*

[31] *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-512 & n. 30 (1981).

[32] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

[33] *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 303 (D.C. Cir. 2003).

[34] *Office of Commc'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1440 (D.C.Cir. 1983).

[35] *See Sec'y of Agriculture v. Cent. Roig Refining Co.*, 338 U.S. 604, 611-12 (1950).

The Bureau has thus rightfully exercised its discretion in conducting an appropriately qualitative cost-benefit analysis, one that clearly supports the Proposal. Indeed, the Bureau canvassed in detail the many benefits of the Proposal while considering the costs on covered persons and consumers.[36] The Bureau's Proposal is thus well justified not only on policy and legal grounds but also on economic ones.

CONCLUSION

We hope these comments are helpful in guiding the Bureau's important and ongoing work to make the financial system more fair, stable, and transparent—and therefore more trustworthy—for the benefit of all Americans.

Sincerely,

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36 *See* Proposal, at 80211–15.