

*Before the*

**Consumer Financial Protection Bureau**  
Washington, D.C.

*In re*

CFPB’s Proposed Rule Defining Larger  
Participants of a Market for General-Use  
Digital Consumer Payment Applications

Docket No. CFPB-2023-0053

**COMMENTS OF  
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)**

In response to the Consumer Financial Protection Bureau’s (“CFPB”) Proposed Rule Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications (“LPR”), released on November 7, 2023,<sup>1</sup> the Computer & Communications Industry Association (“CCIA”)<sup>2</sup> is pleased to submit the following comments.

CCIA acknowledges the important work done by the CFPB by reviewing the digital payments market and engaging with stakeholders to review the LPR. These comments provide CCIA’s general observations on the LPR, as well as more specific comments on the proposal.

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<sup>1</sup> Proposed Larger Participant Rule for general-use digital consumer payment applications for Public Comment (Nov. 7, 2023), CFPB (hereinafter “LPR”), [https://files.consumerfinance.gov/f/documents/cfpb\\_nprm-digital-payment-apps-lp-rule\\_2023-11.pdf](https://files.consumerfinance.gov/f/documents/cfpb_nprm-digital-payment-apps-lp-rule_2023-11.pdf); “CFPB Proposes New Federal Oversight of Big Tech Companies and Other Providers of Digital Wallets and Payment Apps” (Nov. 7, 2023), <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/>.

<sup>2</sup> CCIA is an international, not-for-profit trade association representing a broad cross-section of technology and communications firms. For over fifty years, CCIA has promoted open markets, open systems, and open networks. The Association advocates for sound digital competition policy and regulatory practices. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit [www.ccianet.org](http://www.ccianet.org).

## 1. Key Considerations and Principles to Guide Regulatory Proposals

Global digitalization across numerous industries of the economy has provided consumers and businesses with tremendous benefits.<sup>3</sup> Numerous studies have confirmed the many ways in which digital services and multi-sided business models create and stimulate competition in the economy.<sup>4</sup> Given the dynamic and innovative nature of digital markets, any proposed digital regulation needs to consider the wider potential implications for businesses, consumers, innovation, and the broader economy.

The financial technology (“fintech”) sector covers a variety of products and services such as online banking, mobile payments, peer-to-peer (“P2P”) lending, digital wallets, and financial management tools that provide great benefits and financial freedom to consumers.<sup>5</sup> Fintech companies often use advanced technologies such as artificial intelligence, blockchain, and big data mapping to create new financial products and services that benefit consumers and are more efficient, accessible, and user-friendly than traditional financial institutions, providing consumers expanded access to credit and financial services, speed, convenience, security, and reduced cost of services.<sup>6</sup>

In 2021 alone, global fintech investment stood at US\$210 billion, a 68 percent increase from the US\$125 billion invested in 2020.<sup>7</sup> In the US, digital payment fintech companies alone

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<sup>3</sup> See, e.g., “Four pillars of a trusted industrial information infrastructure,” Sarah Robson, Tim Cowell (2023), AVEVA, <https://cdn.osisoft.com/osi/presentations/2022-AVEVA-Amsterdam/UC22EU-D1CD040-AVEVA-Sowell-Four-Pillars-of-a-Trusted-Information-Infrastructure.pdf>; “Digital Transformation: Examples from 5 Industries,” Yifat Perry (2022), <https://bluexp.netapp.com/blog/cvo-blg-digital-transformation-examples-from-5-industries>.

<sup>4</sup> See, e.g., European Commission, “Staff Working Document: Evaluation of the Vertical Block Exemption Regulation” (Sep. 8, 2020), [https://ec.europa.eu/competition/consultations/2018\\_vber/staff\\_working\\_document.pdf](https://ec.europa.eu/competition/consultations/2018_vber/staff_working_document.pdf), at 32 (“[A]lternative online distribution models such as online marketplaces have made it easier for retailers to access customers. By using these third-party platforms, small retailers may, with limited investments and effort, become visible to potential customers and sell products to a large customer base and in multiple Member States.”); Oxera, “How platforms create value for their users: implications for the Digital Markets Act” (May 12, 2021), <https://www.oxera.com/wp-content/uploads/2021/05/How-platforms-create-value.pdf>, at 34 (“The bundling and tying of different features and services by a platform can boost the efficiency of a market by reducing transaction costs, increasing choice for consumers, and helping businesses to achieve scale economies.”).

<sup>5</sup> Market Insights, FinTech – United States, Statista (2023), <https://www.statista.com/outlook/dmo/fintech/united-states>.

<sup>6</sup> See OECD, “Digital Disruption in Financial Markets – Note by the United States” (Jun. 5, 2019), at 2, [https://one.oecd.org/document/DAF/COMP/WD\(2019\)55/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2019)55/en/pdf).

<sup>7</sup> See “Total fintech investment tops US\$210 billion, as interest in crypto and blockchain surges, says KPMG’s Pulse of Fintech,” KPMG (Feb. 7, 2022), <https://kpmg.com/xx/en/home/media/press-releases/2022/02/total-fintech-investment-tops-us-210-billion.html>.

raised US\$12.6 billion in the first half of 2023,<sup>8</sup> while over six fintech funding deals surpassed the US\$1 billion mark.<sup>9</sup> Research has shown the importance of the fintech sector and the dynamism and increased investment fintech companies bring to the economy.<sup>10</sup>

Overly burdensome or heavy-handed digital regulation could significantly hinder U.S. innovation and economic growth. Importantly, in addition to deterring new market participants, onerous and overbroad digital regulation will likely have negative knock-on impacts in other policy areas as well, such as data privacy, national security, cybersecurity, and intellectual property, with important ramifications for businesses operating across the economy. This interconnectedness of policy areas in the digital space requires a particularly careful calibration of any digital regulatory proposal.<sup>11</sup>

### **1.A. It is Important to Analyze the Costs and Benefits of Implementing New Regulation**

As the Organisation for Economic Cooperation and Development (OECD) and the International Competition Network (ICN) have underscored, to ensure that the cost of any new regulation does not outweigh its benefits, it should allow clearly procompetitive or competitively benign conducts, and recognize justifications for legitimate protections.<sup>12</sup> Without appropriate

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<sup>8</sup> See “Pulse of Fintech H1’23 – Global analysis of fintech funding,” KPMG (Jul. 2023), at 14, <https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2023/07/global-pulse-of-fintech-h123-report-web.pdf>.

<sup>9</sup> *Id.*, at 27. The U.S. accounted for the vast bulk of fintech funding, including six deals over \$1 billion: Coupa (\$8 billion), Stripe (\$6.8 billion), EVO Payments (\$4 billion), Duck Creek Technologies (\$2.6 billion), Moneygram (\$1.8 billion), and Paya (\$1.3 billion).

<sup>10</sup> See “Global fintech funding nearly halves to \$23B in H1 2023,” S&P Global Market Intelligence (Jul. 13, 2023), <https://www.spglobal.com/marketintelligence/en/news-insights/research/global-fintech-funding-nearly-halves-to-23b-in-h1-2023>.

<sup>11</sup> See, e.g., “The age of digital interdependence,” Report of the UN Secretary-General’s High-level Panel on Digital Cooperation (2019), at 6, <https://www.un.org/en/pdfs/DigitalCooperation-report-for%20web.pdf>; “Achieving Inclusive Growth in the Face of Digital Transformation and the Future of Work,” OECD report to G-20 Finance Ministers (Mar. 19, 2018), [https://www.oecd.org/g20/OECD\\_Achieving%20inclusive%20growth%20in%20the%20face%20of%20FoW.pdf](https://www.oecd.org/g20/OECD_Achieving%20inclusive%20growth%20in%20the%20face%20of%20FoW.pdf).

<sup>12</sup> “Key Issues in Digital Trade,” OECD Global Forum on Trade 2023 (Oct. 2023), at 13, <https://www.oecd.org/trade/OECD-key-issues-in-digital-trade.pdf>; <https://www.oecd.org/trade/OECD-key-issues-in-digital-trade.pdf>; “Framework of Competition Assessment Regimes,” ICN Advocacy Working Group (Apr. 2015), [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG\\_FrameworkCompetitionAssessmentRegimes.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_FrameworkCompetitionAssessmentRegimes.pdf); “Maintaining Competitive Conditions in the Era of Digitalization,” OECD (Jul. 2018), at 4, <https://www.oecd.org/g20/Maintaining-competitive-conditions-in-era-of-digitalisation-OECD.pdf>.

safeguards, a digital regulation may harm American consumers and businesses, including small and medium-sized businesses (“SMBs”) that use and rely on digital services. Therefore, it is paramount for the CFPB to conduct a comprehensive cost-benefit and risk assessment to assess the risks to consumers and markets for consumer financial products and services.<sup>13</sup> Here, the LPR fails to clearly identify a specific risk it seeks to address and merely identifies the possibility of “new risks” from “new product offerings” without explicitly stating what those risks might be.<sup>14</sup>

The Dodd-Frank Act requires the CFPB to “consider the potential benefits and costs to consumers and covered persons,” when promulgating a proposed rule.<sup>15</sup> The CFPB must also consider the potential reduction of access by consumers to consumer financial products or services resulting from such proposal – access that the CFPB itself recognizes has increased and benefited consumers.<sup>16</sup> Further, the CFPB identifies increased compliance with federal consumer financial law as a benefit of the LPR.<sup>17</sup> Nevertheless, only three such federal laws are mentioned: the Electronic Fund Transfer Act and its implementing Regulation E, privacy provisions of the Gramm-Leach-Bliley Act, and the CFPB’s general unfair, deceptive, or abusive acts or practices (“UDAAP”) enforcement authority.<sup>18</sup> Many proposed covered persons that offer “general-use consumer digital payment applications” are not “financial institutions” under the applicable definitions in either Regulation E or Gramm-Leach-Bliley. In addition, the CFPB already possesses investigatory and enforcement powers to ensure compliance with financial regulations where and if it identifies any consumer protection issues through its market monitoring power. It is unclear how use of the CFPB’s supervisory authority is likely to bring additional compliance, and the LPR fails to explain why it would.

It is important to note that the cost estimate included in the LPR is unclear and questionable. According to the CFPB’s estimate, a supervisory examination will cost a covered

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<sup>13</sup> *Supra* n. 1 at 4.

<sup>14</sup> *Id.* at 13.

<sup>15</sup> 12 U.S.C. § 5512(b)(2)(A)(i).

<sup>16</sup> “CFPB Proposes New Federal Oversight of Big Tech Companies and Other Providers of Digital Wallets and Payment Apps” (Nov. 7, 2023), <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/>.

<sup>17</sup> *Supra* n. 1 at 47.

<sup>18</sup> *Id.* at 13.

person US\$25,001 in compliance officer and attorney’s fees.<sup>19</sup> The analysis seems to ignore the costs necessary to set up the compliance programs and systems, with the CFPB noting not having enough “detailed information”<sup>20</sup> to include these costs in the analysis. The LPR’s assumption that an entity might devote “the equivalent of one full-time compliance officer and one-tenth of a full-time attorney to the exam” is based on a 2014 estimate about a business that processed 1 million transfers per year.<sup>21</sup> Even then, industry members found the figure to be “grossly” underestimated.<sup>22</sup> These important flaws in the cost-benefit analysis would render a resulting rule arbitrary and unsubstantiated.<sup>23</sup>

### **1.B. Ex-Ante Regulatory Proposals Should Only be Brought in the Presence of Market Failures or Consumer Harm**

Overly complex, intrusive, or broad regulatory regimes are likely to deter entry and investment from innovative companies.<sup>24</sup> Therefore, any proposed regulation should only be introduced to address particular market failures, which is not the same as the mere existence of market power. Dynamic competition, which is particularly relevant in digital markets, comes forth as a natural way to resolve market failures by firms competing for the market and creating new and innovative products.<sup>25</sup> In this regard, a key consideration before proposing new regulations is whether the existing enforcement and policy frameworks, including competition, consumer protection, and data privacy already provide more proportionate ways to achieve the

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<sup>19</sup> *Id.* at 54.

<sup>20</sup> *Id.*

<sup>21</sup> Defining Larger Participants of the International Money Transfer Market, 79 Fed. Reg. 56,631, 56,647 (Sept. 23, 2014).

<sup>22</sup> *Id.* (discussing Comment of American Bankers Association, CFPB-2014-0003-0011 (Apr. 1, 2014)).

<sup>23</sup> See, e.g., *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012); *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1153-54 (D.C. Cir. 2011); *Cnty. Fin. Servs. Ass’n of Am.*, 558 F. Supp. 3d at 363.

<sup>24</sup> See, e.g., Aghion, Philippe and Bergeaud, Antonin and Van Reenen, John, “The Impact of Regulation on Innovation” (Jan. 16, 2023), Banque de France Working Paper No. 804, forthcoming, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4325116](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4325116); Regulatory Reform and Innovation, OECD (2012), <https://web-archiv.oe.cd.org/2012-06-15/164801-2102514.pdf>; “Regulation that enables innovation,” William D. Eggers, Sam J Walsh, Carsten Joergensen and Pankaj Kamleshkumar Kishnani (Mar. 23, 2023), <https://www2.deloitte.com/us/en/insights/industry/public-sector/government-trends/2023/regulatory-agencies-and-innovation.html>.

<sup>25</sup> Joseph A. Schumpeter, “Capitalism, Socialism, and Democracy,” 81 (1942).

desired outcomes. Hence, realistically clarifying the expected implications of a proposed regulatory framework in advance is particularly important for consumers and businesses alike.

Here, the LPR would subject larger nonbank digital consumer payment companies, including those whose payment options are limited to use on their own platform, to the CFPB's authority to conduct documentary examinations to ensure a consistent application of federal consumer financial laws across the marketplace.<sup>26</sup> That authority is quite broad and can carry heavy compliance burdens, along with significant costs for both businesses and consumers.

Digital payment applications have helped millions of American consumers send money to friends and family and they also made a variety of consumer retail payment transactions faster and more efficient.<sup>27</sup> Further, consumer feedback seems to point towards a general satisfaction with payment services, which suggests the absence of a market failure in the sector.<sup>28</sup>

Under section 1022(c)(4) of the Dodd-Frank Act, the CFPB has the authority to monitor risks to consumers in markets offering or providing consumer financial products or services.<sup>29</sup> To the extent the CFPB intends to use the information it collects through supervision to assess market risk,<sup>30</sup> it already has authority to do so pursuant to its market monitoring authority, and the agency has used that authority in relation to the proposed market specifically<sup>31</sup> without ever publishing a report identifying or defining any risk. Importantly, the CFPB also has enforcement authority to address potential violations of federal consumer financial laws.<sup>32</sup>

Participants in the proposed market are also subject to oversight by other regulators. For example, the Federal Trade Commission ("FTC") has broad authority to enforce consumer protection laws, including against companies offering general-use digital consumer payment

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<sup>26</sup> *Supra* n. 1, at 4, I. Overview; 12 U.S.C. 5514(b) (authorizing the CFPB both to conduct examinations and to require reports from entities subject to supervision).

<sup>27</sup> *Id.* at 10, IV. Section-by-Section Analysis (76 percent of Americans have used one of four major payment apps; 61 percent of low-income consumers report using payment apps). *See also* The Ascent, "PayPal, Venmo, and Zelle: What Americans Want Out of Digital Payment Apps" (Jul 27, 2023), <https://www.fool.com/the-ascent/research/paypal-venmo-zelle-survey/>; Kiplinger, "What to Look Out for Using Digital Payments Like Venmo and Zelle" (Apr. 25, 2023), <https://www.kiplinger.com/personal-finance/banking/no-cash-no-problem>.

<sup>28</sup> *See* "National Tracking Poll #170708," Morning Consult (Jul. 20-24, 2017), at 33–54, [https://morningconsult.com/wp-content/uploads/2017/07/170708\\_crosstabs\\_BRANDS\\_v1\\_TB.pdf](https://morningconsult.com/wp-content/uploads/2017/07/170708_crosstabs_BRANDS_v1_TB.pdf).

<sup>29</sup> 12 U.S.C. § 5512(c)(4).

<sup>30</sup> *Supra* n. 1 at 24.

<sup>31</sup> *See generally* 2021 Market Monitoring Order.

<sup>32</sup> 12 U.S.C. § 5514(c).

applications, including those offering funds transfer functionality.<sup>33</sup> Notably, many of the purported harms identified by the LPR relate not simply to consumer protection issues but also to competition,<sup>34</sup> matters which fall squarely within the FTC’s dual consumer protection and competition jurisdiction. Moreover, state financial regulators already supervise various aspects of the proposed market, imposing stringent consumer protection requirements on entities that offer financial products and services,<sup>35</sup> a factor the CFPB is expressly required to consider when determining whether to exercise risk-based supervision.<sup>36</sup>

The LPR states that the new supervisory authority would allow the CFPB to monitor the market for any risks to both consumers and the market,<sup>37</sup> noting the importance of these functions as the new product offerings blur the traditional lines of banking and commerce.<sup>38</sup> However, there is no explanation in the LPR of how a currently unidentified risk requires an increased supervision of the broad market of general-use digital consumer payment apps.

In short, the CFPB cannot claim to “prioritize supervisory activity among nonbank covered persons on the basis of risk” while failing to consider existing or comparative risks for the products it seeks to supervise. Despite having studied the market for nonbank digital consumer payment apps through extensive market monitoring orders,<sup>39</sup> the CFPB has not issued a report or pointed to other evidence that this purported market presents any such risks to consumers. Hence, it is paramount for the CFPB to carefully determine if there is a market failure or a risk for consumers that requires this additional regulation, as there is a significant risk

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<sup>33</sup> See In the Matter of PayPal, Inc., FTC Docket No. C-4651 (2018).

<sup>34</sup> See, e.g., *supra* n. 1 at 13 (citing the objective of “level[ing] the playing field between nonbanks and depository institutions . . . in order to promote fair competition”).

<sup>35</sup> See, e.g., Cal. Fin Code §§ 2000 et seq. (Money Transmission Act); Md. Code Ann., Fin. Inst. § 12-401 (Maryland Money Transmission Act); Mass. Gen. Laws ch. 169, § 1 (Receipts of Deposit for Transmittal to Foreign Countries); N.Y. Banking Law §§ 640 et seq. (Transmitters of Money).

<sup>36</sup> 12 U.S.C. § 5514(b)(2)(D) (requiring the CFPB to consider “the extent to which such institutions are subject to oversight by State authorities for consumer protection”).

<sup>37</sup> *Supra* n. 1 at 13, Markets.

<sup>38</sup> *Id.*

<sup>39</sup> In 2021, the CFPB issued a series of orders to collect information on the business practices of large technology companies operating payments systems in the United States. 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/>; Big Tech’s Role in Contactless Payments: Analysis of Mobile Device Operating Systems and Tap-to-Pay Practices, CFPB (Sept. 7, 2023), <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/>.

that the CFPB might disincentivize investment and innovation in the regulated sector and hurt American consumers.

### **1.C. The LPR Should Be Tailored to Address Specific Products, and Not Intend to Supervise Unrelated Products by Covered Persons**

The LPR states how the CFPB’s proposed supervisory activity, although designed to cover nonbank persons and protect financial consumers of risks from general-use digital consumer payment apps, is not limited to the products or services that qualify for supervision under the LPR.<sup>40</sup> For the CFPB, a product or service that qualifies a nonbank person to be subject to its supervisory activity would allow the agency to supervise and examine other activities of that entity that involve consumer financial products, or services that are subject to federal consumer financial law, even if those products or services do not meet the qualification thresholds. This is in clear conflict with the Dodd-Frank Act and Congressional intent.

First, the CFPB’s asserted authority violates the major questions doctrine.<sup>41</sup> Congress is expected “to speak clearly when authorizing an agency to exercise powers of ‘vast economic and political significance.’”<sup>42</sup> The wide-ranging power that the CFPB claims over an “entire entity” amounts to an assertion of authority to supervise great swaths of the economy, particularly in the context of a rule that would apply to large and diverse technology companies offering consumers many products and services across numerous markets. Before claiming “such sweeping and consequential authority,” the CFPB would need to identify a clear statement in the statute granting that authority.<sup>43</sup> The CFPB has not done so. Instead, the CFPB based its claim in the statute’s grant of supervisory authority over “‘covered persons’ as opposed to over particular activities.”<sup>44</sup> But that is, at most, an inference based on the statute’s mechanics; it is not the required clear statement that the CFPB would need to assert the claimed authority.

Second, and related, the CFPB’s interpretation is at odds with the careful limitations on supervision. Congress did not grant the CFPB a blanket authority to supervise any entity that

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<sup>40</sup> *Supra* n. 1. at 3, (quoting 77 Fed. Reg. 42,874, 42,880 (July 20, 2012)).

<sup>41</sup> See *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (an agency must have clear Congressional authorization to wield substantial authority over a matter of vast economic and political significance).

<sup>42</sup> *Alabama Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021).

<sup>43</sup> *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022).

<sup>44</sup> 77 Fed. Reg. at 42,880.



offers a consumer financial product or service. Instead, Congress carefully defined the CFPB’s authority to supervise only a subset of entities that offer consumer financial products or services.<sup>45</sup> The authority invoked here, however, would permit the CFPB to supervise entire entities based on whatever activity the CFPB considers a “market.”<sup>46</sup> Such an interpretation would expand the larger participant category so much that it would swallow all the other categories.

This kind of supervisory authority is specifically constrained.<sup>47</sup> If the CFPB wishes to supervise the entity’s participation in a different market, it should engage in the proper notice-and-comment procedure envisioned by the law to establish an independent LPR for that second market. A contrary position would be against the major questions doctrine.

Congress specifically provided that the CFPB’s supervisory authority would extend only to the “relevant” product market, not all product markets in which a designated entity might participate.<sup>48</sup> Even if the CFPB could substantiate its intent to supervise the proposed market for “general-use digital consumer payment applications” under the LPR, that would be the “relevant” market based on the CFPB’s risk assessment. This, however, cannot be interpreted as a general authority that grants supervision in other markets where the CFPB has promulgated no larger participant rule or in which the subject entity is not otherwise subject to supervision under the risk-based standards that Congress carefully set out. Otherwise, this would be an overreach of the supervisory authority that Congress granted.

The proposed rule should make clear that, to the extent that a company provides services covered by the proposed rule, the CFPB’s supervisory authority will only extend to those

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<sup>45</sup> See 12 U.S.C. § 5514–5517, 5519.

<sup>46</sup> *Id.* § 5514(a)(1).

<sup>47</sup> *Id.* § 5514(b)(2) (The CFPB shall exercise its authority under paragraph (1) in a manner designed to ensure that such exercise, with respect to persons described in subsection (a)(1), is based on the assessment by the CFPB of the risks posed to consumers in the relevant product markets and geographic markets, and taking into consideration, as applicable: (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 CFPB determines to be relevant to a class of covered persons.).

<sup>48</sup> See *Chamber of Commerce v. CFPB*, Case 6:22-cv-00381, slip op. (E.D. Tex. Sept. 8, 2023) (vacating update to Supervision and Examination Manual directing examiners to review supervised entities for discriminatory conduct beyond the scope of the Equal Credit).

specific aspects of the company’s operations.<sup>49</sup> As drafted, the proposed rule purports to encompass any larger participant “providing a general-use digital consumer payment application,”<sup>50</sup> which could be read to suggest that the CFPB’s supervision would extend to any financial product or service offered by a larger participant through such application in the proposed market. As a result, entities whose business only maintains a small component related to consumer payments could find themselves subject to vast supervisory requests from the CFPB covering broad aspects of their non-consumer payments business.

Hence, a clear delimitation of the tailored supervisory authority of the CFPB over the specific and clearly determined relevant market is paramount to avoid any overregulation that could likewise stifle innovation and hinder competition.

## **2. The Low Designation Thresholds Would Create Higher Barriers to Entry and Hinder Competition**

The LPR proposes a two-prong test to determine whether a nonbank covered person is a larger participant of the proposed market, subject to the supervisory authority of the CFPB. First, the nonbank covered person, as well as its subsidiaries, would need to provide general-use digital consumer payment applications with an annual volume of at least five million consumer payment transactions.<sup>51</sup> Second, the nonbank covered person must not be a small business concern based on the applicable Small Business Administration (“SBA”) size standard.<sup>52</sup>

The designation threshold, however, is extremely low reflecting a lack of consideration for the actual scope of potentially covered entities,<sup>53</sup> as well as a lack of sufficient rationale for how the threshold was determined. Recent research shows that 76 percent of Americans have

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<sup>49</sup> For example, in its previous rule defining LPs of the automobile financing market, the CFPB expressly excluded from the scope auto dealers and services, as required by the exclusions under the Dodd-Frank Act. *Defining Larger Participants of the Automobile Financing Market and Defining Certain Automobile Leasing Activity as a Financial Product or Service*, 80 Fed. Reg. 37496 (June 30, 2015).

<sup>50</sup> *See* proposed 12 C.F.R. § 1090.109(a)(1).

<sup>51</sup> *Supra* n. 1, at 5, II. Summary of the Proposed Rule.

<sup>52</sup> *Id.*, at 6, II. Summary of the Proposed Rule.

<sup>53</sup> *See, supra* n.1 at 4. The CFPB identifies 17 entities, representing 88 percent of known transactions, which would be covered by the LPR. However, the CFPB also recognizes that this is a rough estimate as it lacks sufficient information to assess whether the companies provide a general-use digital consumer payment application or whether they surpass the SBA size standard.

used at least one digital payment app at least once in their life.<sup>54</sup> Using 2022 as an example, this would mean that (at least) 254 million consumer payment transactions were processed in the U.S. – which is a conservative estimate considering that most individuals who use digital payment apps likely use those apps to process more than one transaction.<sup>55</sup> Hence, under the LPR, an entity would need to be responsible for processing less than 2 percent of the total consumer payment transactions in the country to meet the extremely low threshold of 5 million transactions.<sup>56</sup> In other words, the CFPB’s proposal would capture almost all participants of the market – which is contrary to the intended scope seeking to regulate only larger participants.<sup>57</sup>

It is also important to note that the closest SBA classification applicable for these entities is that of “other financial vehicles,” as they are neither banks nor credit unions. This would mean that the small business concern threshold for these entities would be of US\$40 million in annual receipts,<sup>58</sup> a low threshold that would capture many small businesses and start-ups.<sup>59</sup>

The LPR’s low threshold for the designation as a large participant provides an overly broad applicability of the rule to a vast number of companies with significantly different business models, which would not only affect incumbent companies but also erect barriers to entry for potential competitors. The resulting higher compliance costs under the LPR would reduce the high investment in research and development (R&D) for the fintech sector,<sup>60</sup> as well as the appeal for venture capital firms to invest in these markets.

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<sup>54</sup> *Supra* n. 1, at 10. *See also* Monica Anderson, “Payment apps like Venmo and Cash App bring convenience – and security concerns– to some users” (Sep. 8, 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/>.

<sup>55</sup> “U.S. Population Estimated at 334,233,854 on Jan. 1, 2023,” United States Census Bureau (Dec. 29, 2022), <https://www.census.gov/library/stories/2022/12/happy-new-year-2023.html> (254 million is 76 percent of the estimated 334,233,854 U.S. population).

<sup>56</sup> Given that the total estimation of 254 million digital payment transactions, the threshold of five million transactions would represent only 2 percent of the total estimated number of transactions.

<sup>57</sup> *See* 12 U.S.C. § 5514(a)(1)(B) (stating that “supervision of non-depository covered persons” applies only to “a larger participant of a market”).

<sup>58</sup> “Table of Small Business Size Standards,” U. S. Small Business Administration (Mar. 17, 2023), at 26, <https://www.sba.gov/sites/default/files/2023-06/Table%20of%20Size%20Standards%20Effective%20March%202017%20-%202023%20-%20282%29.pdf> (for 2023 “other financial vehicles” will be small businesses if their average annual receipts are \$40 million or less).

<sup>59</sup> In 2023, digital payment transactions had an average transaction value per user of US\$7,610.

<sup>60</sup> *Supra* n. 7.

CCIA strongly recommends that the CFPB carefully reconsider the proposed thresholds, as the current proposal would raise compliance costs to a level numerous smaller companies or start-ups might not be able to meet, further increasing barriers to entry to the market.

### **3. The Proposed Relevant Market is Overly Broad and Risks Stifling Innovation and Hindering Competition**

The term “relevant market” has a particular meaning, derived from decades of antitrust law and practice: “[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.”<sup>61</sup> In other words, a group of products are in the same market if they are “reasonably interchangeable by consumers for the same purposes,”<sup>62</sup> “taking into account the factors that influence consumer choices, including product function, price, and quality.”<sup>63</sup> The concept of the relevant market assists agencies in determining the effects market dynamics might have on competition, by determining the markets in which certain companies compete, the products with which they compete, and the geographic area they compete in.<sup>64</sup> Hence, a proper and tailored definition of a specific relevant market is fundamental to determine and analyze competition within a market.

The LPR does not define a market that corresponds to the commercial realities faced by consumers. Rather, the LPR proposes an inadequate relevant market for general-use digital consumer payment applications, which would include nonbank covered entities that provide funds transfer or wallet functionalities through a digital application for consumers’ general use in making consumer payments transactions.<sup>65</sup>

This definition lacks adequate clarity in defining the relevant market, including in the same group of products that are better understood as complements than as substitutes of each

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<sup>61</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

<sup>62</sup> *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956).

<sup>63</sup> *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 335 (S.D.N.Y. 2001).

<sup>64</sup> “Commission notice on the definition of relevant market for the purposes of Community competition law,” European Commission, Official Journal of the European Communities (Dec. 9, 1997), at 1-2, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31997Y1209%2801%29>.

<sup>65</sup> *Supra* n. 1, at 6.

other, while leaving behind other products that do compete with these product offerings. In other words, the proposed market is either underinclusive or overinclusive.

The overbroad market definition would include entities as disparate as, for example: (1) an entity that allows consumers to make payments from a stored value balance held by that entity; (2) an entity that itself receives funds from a consumer's bank account for transmission to a third party; (3) an entity that charges payment methods in the context of the sale of goods and services; and (4) an entity that merely holds and passes payment method details such as card numbers but never participates in the flow of funds from the consumer to the third-party recipient.

The companies covered by this market definition include very different services, all of which participate in different and more specific markets.<sup>66</sup> In particular, many of these companies will only have in common with each other the *digital* component of their service. However, most industries today have digital components and offerings that may also compete with physical ones, such as in retail and telemedicine.<sup>67</sup> Thus, digital markets are highly diverse and are not appropriate for a distinct rubric of government supervision, as digital payment apps directly compete with traditional physical payment methods such as plastic credit or debit cards,<sup>68</sup> making the latter not only competitors of digital payment apps but members of the same

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<sup>66</sup> See, e.g., Kiplinger, "Your Favorite Payment Apps May Face Federal Scrutiny" (Nov. 10, 2023), <https://www.kiplinger.com/personal-finance/banking/your-favorite-payment-apps-may-face-federal-scrutiny>; Investopedia, "What Is a Digital Wallet?" (Mar. 17, 2023), <https://www.investopedia.com/terms/d/digital-wallet.asp>; Capital One, "What are P2P payments?" (Dec. 12, 2023), <https://www.capitalone.com/learn-grow/money-management/p2p-payments/>.

<sup>67</sup> "Competitive Dynamics of Online and Brick-and-Mortar Retail Prices," Rosa Abrantes-Metz & Mame Maloney, (Aug. 2, 2022), <https://research.ccianet.org/reports/competitive-dynamics-online-brick-mortar-retail-prices/>; Harvard Business Review, "It's Time to Cement Telehealth's Place in U.S. Health Care," John Glaser and Kyle Zebley (Jan. 20, 2023), <https://hbr.org/2023/01/its-time-to-cement-telehealths-place-in-u-s-health-care>; Harvard Business Review "Which Industries Are the Most Digital (and Why)?," Prashant Gandhi, Somesh Khanna, and Sree Ramaswamy, (Apr. 01, 2016), <https://hbr.org/2016/04/a-chart-that-shows-which-industries-are-the-most-digital-and-why>.

<sup>68</sup> See, e.g., J.D. Power, As Mobile Wallets Gain in Popularity, Growing Numbers of Americans Still Prefer Convenience of Plastic (Jan. 24, 2023), <https://www.jdpower.com/business/resources/mobile-wallets-gain-popularity-growing-number-americans-still-prefer-convenience>; PYMNTS, The Mobile Wallet Challenge: Replacing Physical with Digital (Jan. 2023), <https://www.pymnts.com/study/mobile-wallet-challenge-bill-pay-consumer-finance-instant-payments/#:~:text=A%20PYMNTS%20survey%20of%202%2C059,overshadow%20physical%20wallets%20in%20popularity>; Federal Reserve Bank of Atlanta, Kevin Foster et al., "The 2021 Survey and Diary of Consumer Payment Choice: Summary Results" (Sep. 17, 2022), [https://www.atlantafed.org/-/media/documents/banking/consumer-payments/survey-diary-consumer-payment-choice/2021/sdpc\\_2021\\_report.pdf](https://www.atlantafed.org/-/media/documents/banking/consumer-payments/survey-diary-consumer-payment-choice/2021/sdpc_2021_report.pdf).

relevant market. Further, plastic cards are still the preferred payment method for consumers.<sup>69</sup> Many of the purchases made on a digital device are done by imputing the information of a physical card, rather than using a “digital payment method.”<sup>70</sup> This “failure to include ... substitutes in [the] product market definition ... makes [the CFPB’s] proffered product market unduly narrow and legally insufficient.”<sup>71</sup>

The LPR excludes from covered payment applications any “non-general use” applications such as bill payment applications, automobile purchase applications, food delivery applications, and payment applications used to purchase financial assets such as securities.<sup>72</sup> But these applications facilitate customer payments using underlying payment methods (*e.g.*, credit or debit cards) in a similar manner as payment method wallets and would seemingly pose the same apparent risks.

As stated above, the notion of substitutability is core to properly understanding and defining the relevant market.<sup>73</sup> However, this notion of substitutability seems to be misconstrued in the LPR. Digital payment apps that facilitate P2P transactions do not provide a substitutable service to those provided by digital wallets. As the LPR also notes, these are two distinct functionalities that provide differentiated services to consumers,<sup>74</sup> and the LPR does not attempt to explain how these two different “core functionalities” are “reasonably interchangeable by

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<sup>69</sup> Federal Reserve Bank of Atlanta, Kevin Foster et al., The 2021 Survey and Diary of Consumer Payment Choice: Summary Results (Sept. 17, 2022), [https://www.atlantafed.org/-/media/documents/banking/consumer-payments/survey-diary-consumer-payment-choice/2021/sdcpc\\_2021\\_report.pdf](https://www.atlantafed.org/-/media/documents/banking/consumer-payments/survey-diary-consumer-payment-choice/2021/sdcpc_2021_report.pdf) (merely 29 percent of all purchases made in October of 2021 were made with a “digital” product, 71 percent were made with a plastic card, 16 percent were made with a mobile device, and 13 percent were made with another consumer electronic product (computers, tablets, etc.)).

<sup>70</sup> See, *e.g.*, Mark Beresford & Elisabetta Nadal, The Paypers, “Will the digital wallet replace the physical payment card?” (Oct. 23, 2023), <https://thepayers.com/expert-opinion/will-the-digital-wallet-replace-the-physical-payment-card--1265066>; PYMNTS, “Tracking the Digital Payments Takeover: Catching the Coming eCommerce Wave” (May 2023), <https://www.pymnts.com/study/tracking-digital-payments-takeover-ecommerce-grocery-retail-online-shopping/> (it is estimated that physical cards account for 84 percent of card payments in the United States and Canada, while digital consumer payment applications are used only 16 percent of the time).

<sup>71</sup> *New Orleans Ass’n of Cemetery Tour Guides & Companies v. New Orleans Archdiocesan Cemeteries*, 56 F.4th 1026, 1038 (5th Cir. 2023).

<sup>72</sup> *Supra* n. 1 at 28.

<sup>73</sup> *Supra* n. 60.

<sup>74</sup> *Supra* n. 1, at 24, Covered payment functionality. The LPR distinguishes between a funds transfer functionality (in connection with a consumer payment transaction, receiving funds for purposes of transmitting them, or accepting and transmitting payment instructions) and a wallet functionality (a product or service that stores account or payment credentials, including in encrypted or tokenized form, and transmits, routes, or otherwise processes such stored account or payment credentials to facilitate a consumer payment transaction).

consumers for the same purposes.”<sup>75</sup> Rather, these distinct functionalities are linked together under the definition of a “covered payment functionality” given by the CFPB, raising significant confusion about the definition.<sup>76</sup> Importantly, the fact that these entities have a digital component to their financial services does not mean they compete with each other. These entities provide similar but not interchangeable functionalities that benefit consumers by providing expanded access to credit and financial services, speed, convenience, security, and reduced cost of services.<sup>77</sup> If anything, the CFPB’s decision to highlight and combine two different functionalities strongly suggests that the two product groups belong to different markets.

CCIA recommends a clarification of the relevant market proposed in the LPR, and a distinction of each of the separate markets affected, as the unsubstantiated market definition in the LPR cannot be reconciled with the governing statute. A detailed analysis of each one of the specific markets, products, and services is needed for an evidence-based determination of which nonbank persons would be designated as larger participants, and why these nonbank persons should be subject to significantly more supervisory authority by the CFPB than others also participating in the same markets.

#### **4. Digital Payment Apps Should Not Be Subject to the Same Supervisory Authority as Banks and Credit Unions**

Digital payment apps and nonbank entities differ from banking institutions in their function, characteristics, and capabilities.<sup>78</sup> Hence, they should not be subject to the same supervisory authority as banks and credit unions. More than direct competitors of banks,

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<sup>75</sup> *Klein v. Facebook, Inc.*, 580 F. Supp. 3d 743, 768–69 (N.D. Cal. 2022).

<sup>76</sup> *Supra* n.1, at 24, Covered payment functionality.

<sup>77</sup> See U.S. Government Accountability Office, “Financial Technology: Products Have Benefits and Risks to Underserved Consumers, and Regulatory Clarity Is Needed” (Mar. 8, 2023), at 8, <https://www.gao.gov/assets/gao-23-105536.pdf>; GDS Modellica, “7 Benefits of Fintech for Consumers” (Oct. 17, 2022), <https://www.gdslink.com/en/7-benefits-of-fintech-for-consumers/>; BBVA, “Advantages and disadvantages of Fintech companies” (Jun. 3, 2021), <https://www.bbva.ch/en/news/advantages-and-disadvantages-of-fintech-companies/>.

<sup>78</sup> See Investopedia, “Nonbank Financial Institutions: What They Are and How They Work” (Aug. 30, 2023), <https://www.investopedia.com/terms/n/nbfc.asp>; Unacademy, “Banking and Nonbanking Financial Institutions” (2023), <https://unacademy.com/content/kerala-psc/study-material/science-technology/banking-and-non-banking-financial-institutions/#:~:text=There%20are%20two%20main%20types,pension%20funds%2C%20and%20hedge%20funds.>

nonbank entities provide a valuable alternative for consumers by meeting the unmet demands by traditional banking institutions.<sup>79</sup> Even if there are some instances where banks and nonbank entities compete, the reality of the market shows that there are more instances where their synergies help consumers, providing complementary services.<sup>80</sup>

Digital wallets and payment applications rely on the banking infrastructure to provide their services to consumers. P2P payments, for example, transfer funds from a user's bank account to the recipient's bank account directly.<sup>81</sup> Similarly, digital wallets that include a stored-value feature require a credit or debit card linked to a bank to make a deposit into the user's digital account. However, wallets that do not offer stored-value simply pass digital tokens that serve as a surrogate for more sensitive payment details of bank-offered payment methods (e.g., account numbers, card security codes, and expiration dates) to the banking system. Without a banking institution, consumers would not be able to use these digital wallets as there would be no way for them to transfer or deposit funds into the wallet or make payments to merchants. These digital consumer services also differ in function, purpose, and potential risk, but the LPR seeks to regulate them all regardless of their differences.

Hence, as digitalization of the industry advances and provides more solutions and benefits to consumers, these “digital markets” are highly diverse and are not appropriate for a distinct rubric of *ex-ante* regulation and supervisory authority by the CFPB.

## 5. Conclusion

Before considering implementing supervisory authority for digital payment applications, the CFPB should first assess whether there are actual market issues that require an increased *ex-ante* regulatory approach. Even if there is a market issue that requires regulation, agencies and policymakers should first assess the markets in which participants compete and carefully

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<sup>79</sup> *Id.*

<sup>80</sup> See, e.g., European Central Bank, “Key linkages between banks and the nonbank financial sector” (May 2023), [https://www.ecb.europa.eu/pub/financial-stability/fsr/special/html/ecb.fsrart202305\\_02~1ff06bc324.en.html](https://www.ecb.europa.eu/pub/financial-stability/fsr/special/html/ecb.fsrart202305_02~1ff06bc324.en.html); McKinsey, “Sustaining digital payments growth: Winning models in emerging markets” (Oct. 13, 2022), <https://www.mckinsey.com/industries/financial-services/our-insights/sustaining-digital-payments-growth-winning-models-in-emerging-markets>.

<sup>81</sup> Stax, “What Are P2P Payments and How Can You Use Them in Your Business” (2023), <https://staxpayments.com/blog/what-are-p2p-payments/#:~:text=P2P%20payments%20connect%20the%20payer,to%20the%20payee's%20P2P%20account>.



consider and tailor the relevant market definition considering products and services that actually are in the same product market. Before subjecting these entities to the same regulatory requirements as banking institutions, it is paramount for the CFPB to consider the core characteristics of nonbank entities and their differences with banking institutions. Finally, the CFPB should engage in a realistic cost-benefit analysis regarding the impact of the LPR and align the scope of its supervisory authority with both the Dodd-Frank Act and Congressional intent.

CCIA is pleased to provide this input on the LPR and looks forward to continuing to engage on this important proposal with the CFPB.

Respectfully submitted,

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