

Congress of the United States
Washington, DC 20515

December 18, 2023

The Honorable Rohit Chopra
Director
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

Dear Director Chopra,

We write today to express our concern with the Consumer Financial Protection Bureau's (CFPB) proposed rule subjecting large participants within the general-use digital consumer payment application industry to CFPB supervision.¹ Innovation is the driving engine of the American economy and the proposed rulemaking's broad scope will have significant consequences on the ability for nonbank firms to offer innovative products and services and for consumers to benefit from competition in the market.

Scope of the Proposal

Under the proposed definition and criteria, the CFPB estimates that 17 market participants would be affected by this rule. However, the Bureau fails to identify which firms comprise that number, or to provide specific criteria that would enable market participants to determine the firms captured by the rule. It is essential that businesses and consumers understand the implications of this proposal to enable them to provide comprehensive feedback on its impact.

Further, it is important to clearly delineate the extent of the rulemaking's scope. In its current form, the proposal leaves open the possibility that entities far outside the market for general-use digital consumer payment applications will be captured. For example, the proposal specifies that the CFPB's supervisory authority "is not limited to the products or services that qualified the person for supervision."² This suggests the rule will have no boundaries, which is unacceptable and will create significant uncertainty.

While the proposed rule contains certain exclusions, these exclusions further confuse the intended scope of the proposal. For example, the definition of a covered consumer payment transaction excludes "[a] payment transaction conducted by a person for the sale or lease of goods or services that a consumer selected from an online or physical store or marketplace operated

¹ Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications, 88 Fed. Reg. 80197 (Proposed Nov. 17, 2023) (to be codified at 12 C.F.R. pt. 1090).

² *Id.*

prominently in the name or such person or its affiliated company.”³ While this exclusion seems to cover transactions between consumers and merchants using a merchant’s own payment software, the proposal later states the exemption for merchants would not apply, “if a merchant or online marketplace’s digital consumer application stores, transmits, or otherwise processes payments or financial data for any purpose other than initiating a payments transaction by the consumer.”⁴ When combined, these two provisions within the rule create further ambiguity regarding the scope of the proposal for merchants. Without a meaningful exclusion for merchants, the Bureau’s authority could extend from players in consumer payments directly to merchants across the country.

As you know, third party point of sale technology is used largely by small businesses, and the frequency with which small businesses are accepting digital payments is increasing.⁵ With this in mind, the CFPB should consider the impact this rule will have on the merchants that rely on electronic payment services to process payments. The rulemaking could have serious implications for small businesses and sole proprietors across the country, and we believe the CFPB should carefully assess the rule in this context.

Furthermore, we are concerned the CFPB neglected to fully consider the impact of increased compliance costs. The proposed rule states, “the CFPB lacks detailed information with which to predict the extent to which increased costs would be borne by providers or passed on to consumers, to predict how providers might respond to higher costs, or to predict how consumers might respond to increased prices.”⁶ However, with no analysis conducted on the compliance costs of the proposal, the rule later certifies that the proposal “would not have a significant economic impact on a substantial number of small entities”.⁷ The inability to track the costs of compliance of this proposal, and how it would be passed down to small entities, paired with an assurance that the rule will not have a significant effect on those same entities is alarming. If the Bureau believes small entities will not be significantly affected by the rule, it should provide the evidence it uses to support that claim.

Digital Assets

Lastly, we also have concerns regarding the rule’s applicability to digital assets and digital asset wallet providers. The proposed rule indicates that the purchase of a crypto asset using fiat currency would be exempted by the rule. However, the rule includes digital assets in its definition of “funds.”⁸ Taken together, these two provisions raise many questions, including what crypto asset transactions would be included in the rule and whether the rule extends to certain wallet providers.

³ *Id.*

⁴ *Id.*

⁵ Visa, “Visa Back to Business Global Study: 2022 Small Business Outlook” (December 2021), <https://usa.visa.com/dam/VCOM/blogs/visa-back-to-business-study-2022-outlook-jan22.pdf>

⁶ *Supra* note 1 at 80212.

⁷ *Supra* note 1 at 80215.

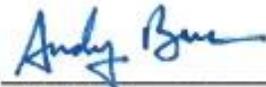
⁸ *Supra* note 1 at 80202.

The CFPB's proposed rule also comes as other jurisdictions are pushing to promote both competition and innovation in payments. Given the CFPB's track record of overreach, we strongly urge the Bureau to refrain from exceeding its authority and instead, commit to clarifying and narrowing the scope of this rule. Given the breadth of the proposal and ambiguity regarding its applicability, we urge the Bureau to extend the comment period for an additional 30 days. This additional time will give market participants the opportunity to provide comprehensive feedback.

Sincerely,



Mike Flood
Member of Congress



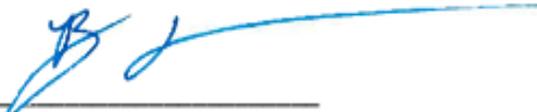
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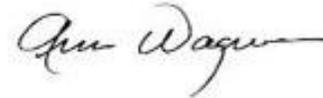
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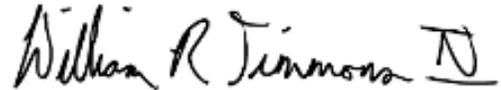
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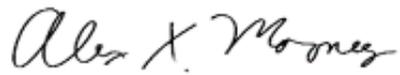
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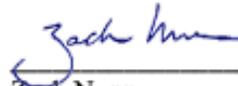
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