



THE STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL

January 8, 2024

Via Federal eRulemaking Portal, www.regulations.gov

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

RE: Notice of Proposed Rulemaking: “Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications”
Docket No. CFPB-2023-0053, RIN 3170-AB17
88 Fed. Reg. 80,197 (November 17, 2023)

Dear Director Chopra:

The undersigned Attorneys General of New Jersey, California, Colorado, Connecticut, the District of Columbia, Delaware, Massachusetts, Maryland, Michigan, Minnesota, North Carolina, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Wisconsin (“the States”) write in support of the Consumer Financial Protection Bureau’s (“CFPB”) Notice of Proposed Rulemaking, “Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications,” 88 Fed. Reg. 80,197 (“proposed rule” or “2023 NPRM”).

By law, the CFPB is tasked with ensuring consumer access to fair, transparent, and competitive financial markets by consistently enforcing federal consumer financial law “without regard” to whether regulated entities are traditional banks or not.¹ Accordingly, the law authorizes the CFPB to define and supervise any nonbank that is “a larger participant of a market for . . . consumer financial products or services[.]”² The CFPB currently has a larger-participant rule that prescribes procedures, definitions, standards, and protocols that apply to all markets in which the CFPB defines “larger participants.”³ Under the proposed rule, “general-use digital consumer payment application[s]” like Cash App, PayPal, Venmo, and Zelle would be defined as “larger participants” in the digital payment market and become subject to CFPB’s existing rule.⁴ This increased oversight would significantly help consumers who rely on these digital payment applications to live, work, save, and otherwise manage their finances, yet who cannot benefit from protections that only apply to consumers using traditional banks.

¹ 12 U.S.C. § 5511(b).

² 12 U.S.C. § 5514(a)(1)(B).

³ 12 C.F.R. part 1090.

⁴ Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications, 88 Fed. Reg. 80197, 80,215-16 (proposed Nov. 17, 2023) (to be codified at 12 C.F.R. pt. 1090).

As described further below, the States have a strong interest in ensuring that traditional banks and providers of consumer financial products and services delivered through digital applications are equally subject to consumer financial protection oversight. This is particularly so because many of our consumers, including low-income individuals, do not always have ready access to traditional bank-provided digital consumer payment applications. The States therefore commend the CFPB for exercising its statutory authority and taking important steps to improve regulation of consumer financial products and services to address potential risks posed by this emerging financial market and market participants. In so doing, the CFPB will allow States to better target enforcement and outreach efforts, which will further ensure that all consumers have access to fair and transparent markets.

I. The Proposed Rule Protects Consumers from Fraud and Unregulated Investment Risks

The proposed rule closes regulatory loopholes that put vulnerable populations' financial security at risk, while simultaneously strengthening the enforcement of state consumer protection laws. The current lack of supervisory and regulatory oversight over nonbank companies' general-use digital consumer payment applications ("digital payment applications") is a concern for all users because the funds transmitted through these digital payment applications are not backed by the Federal Deposit Insurance Corporation ("FDIC"). It is especially concerning for vulnerable populations who otherwise do not have access to traditional banks or credit unions which are insured by the FDIC, and thus are more likely to keep their funds in digital payment applications for an extended period of time. Among consumers with annual incomes lower than \$30,000, about 40% use digital payment applications at least once per month and about 20% use such applications at least once per week.⁵ Overall, it is estimated that about 61% of consumers with annual incomes lower than \$30,000 use digital payment applications.⁶ Thus, a significant portion of our country's low income population maintains funds in unregulated and uninsured accounts, and is at risk of losing funds should those nonbank payment companies fail.⁷

Furthermore, the lack of regulatory oversight over digital payment applications has significantly contributed to customer service issues and complaints by consumers. Consumer complaints and concerns include, but are not limited to, having funds sent to wrong persons or scammers, and not receiving funds that were sent.⁸ While these concerns impact all digital payment application users, it is especially concerning for low income users. Research shows that about 31% of digital payment application users with annual incomes lower than \$30,000 have had one or multiple of the above-mentioned issues when using digital payment applications.⁹ Among all digital payment application users, 39% reported not getting a response from a digital payment

⁵ See Consumer Reps. Survey Grp., *Peer-to-Peer Payment Services* (Jan. 10, 2023) at 2, <https://advocacy.consumerreports.org/wp-content/uploads/2023/01/P2P-Report-4-Surveys-2022.pdf>.

⁶ 88 Fed. Reg. 80,200.

⁷ See Consumer Fin. Prot. Bureau, *Consumer advisory: Your money is at greater risk when you hold it in a payment app, instead of moving it to an account with deposit insurance* (June 1, 2023), <https://www.consumerfinance.gov/about-us/newsroom/consumer-advisory-your-money-is-at-greater-risk-when-you-hold-it-in-a-payment-app-instead-of-moving-it-to-an-account-with-deposit-insurance/>.

⁸ See Consumer Reps. Survey Grp., *supra* at 5.

⁹ *Id.* at 7.

application’s customer service provider.¹⁰ The proposed rule will allow the CFPB to use its supervisory authority to better predict which nonbank financial institutions’ policies, or lack thereof, contribute to inadequate customer service and provide solutions to resolve those issues and prevent future issues.

In addition to not being insured by the FDIC, funds stored in digital payment applications are increasingly exposed to the company’s investment risks, often times without consumer awareness. Earlier this year, the CFPB reported that the nonbank companies are able to hold and invest the funds at their discretion.¹¹ These investment activities are unregulated and not subject to the same regulatory scrutiny and oversight as traditional FDIC-backed banks and credit unions. It puts consumers at risk of losing their funds. Expanding the CFPB’s regulatory and supervisory oversight ensures that digital payment application users, especially low-income users, will have their funds protected.

The proposed rule will also benefit the States’ enforcement of their own consumer protection laws, especially in jurisdictions where any commercial practice that violates federal law is also deemed a violation of the State’s consumer protection laws. This is true for states like California, New Jersey, and New York, where, in state enforcement actions, any commercial practice that violates federal law is conclusively presumed to be an unlawful practice of the State’s consumer protection laws.¹² The proposed rule, coupled with existing state consumer protection statutes, will allow federal and state governments to work together to prevent and abate unfair, deceptive, or abusive practices in the market.

II. The Proposed Rule Further Strengthens Data Privacy Protections and Helps to Protect Consumers’ Personally Identifiable Information

The States further support the provisions of the proposed rule that will allow the CFPB to examine digital payment applications for compliance with the privacy provisions of the Gramm-Leach-Bliley Act (“GLBA”).¹³ The GLBA, through the CFPB’s implementing regulations, requires financial institutions to provide consumers with a privacy notice explaining the institution’s information-sharing practices and give consumers “opt-out rights” should the institution share nonpublic personal information with third-parties.¹⁴ This expansion of the CFPB’s examination authority will permit the CFPB to address the critical data privacy issues posed by digital payment applications.

¹⁰ *Id.* at 9.

¹¹ See Consumer Prot. Fin. Bureau, *CFPB Finds that Billions of Dollars Stored on Popular Payment Apps May Lack Federal Insurance* (June 1, 2023), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-billions-of-dollars-stored-on-popular-payment-apps-may-lack-federal-insurance>.

¹² See N.J.S.A. 56:8-4(b); see also, e.g., N.Y. Exec. Law. § 63(12) (providing that it is a violation of New York consumer protection law to commit repeated illegality by violating other state or federal laws); *Rose v. Bank of Am., N.A.*, 304 P.3d 181, 183 (Cal. 2013) (“Violations of federal statutes . . . may serve as the predicate for a [Unfair Competition Law] cause of action.”).

¹³ 15 U.S.C. § 6801, *et seq.*; CFPB Regulation P, 12 C.F.R. § 1016.

¹⁴ 15 U.S.C. § 6802.

Despite investigations into certain applications for violations of the GLBA,¹⁵ there are continued concerns about the protection of consumer data on digital payment applications. Digital payment applications collect a significant amount of consumer data and retain that data for “extended periods of time.”¹⁶ Consumer use of these applications is often contingent on assent to these data retention policies.¹⁷ The States support additional oversight from the CFPB as it will provide better insight into how applications are storing and using their collections of consumer data.

The proposed rule would also enable the CFPB to anticipate new and emerging risks associated with how these companies use consumer financial and behavioral data. The proposed rule will not only allow the agency to have a better understanding of how these nonbank financial companies are using consumer data, but it will also allow the agency to better predict concerns that may arise as a result of future technological advancements. It will also allow the agency to monitor changes to applications’ privacy policies, including as to how data is used and with whom data is shared.¹⁸ CFPB’s increased oversight would also permit exploration of regulations specific to digital payment applications, including adequate scaling up of customer support for privacy-related disputes and implementation of know-your-customer and other identity verification practices.

* * *

In short, as more consumers continue to rely on the convenient use of digital payment applications offered by nonbank financial institutions, it is essential that the nonbank financial institutions operating these platforms are held to the same level of accountability as are traditional banks and credit unions. The CFPB’s proposed rule is a step in the right direction in making sure that their supervisory and regulatory authority is equally applied to nonbank financial institutions, and it ensures that consumer funds and consumer data remain protected. The States commend the CFPB on the proposed rule and urge swift publication and implementation of a final rule in line with the 2023 NPRM.


Respectfully Submitted,

¹⁵ See, e.g., Task Force on Fin. Tech., 117th Congress, *What’s In Your Digital Wallet? A Review of Recent Trends in Mobile Banking and Payments* (Apr. 28, 2022), <https://www.govinfo.gov/content/pkg/CHRG-117hhrg47649/pdf/CHRG-117hhrg47649.pdf>; Consumer Fin. Prot. Bureau, *CFPB Orders Tech Giants to Turn Over Information on their Payment System Plans* (Oct. 21, 2021), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-tech-giants-to-turn-over-information-on-their-payment-system-plans/>; Federal Trade Comm., *PayPal Settles FTC Charges that Venmo Failed to Disclose Information to Consumers About the Ability to Transfer Funds and Privacy Settings; Violated Gramm-Leach-Bliley Act* (Feb. 27, 2018), <https://www.ftc.gov/news-events/news/press-releases/2018/02/paypal-settles-ftc-charges-venmo-failed-disclose-information-consumers-about-ability-transfer-funds>.

¹⁶ See Consumer Fin. Prot. Bureau, *Prepared Remarks of CFPB Director Rohit Chopra at the Brookings Institution Event on Payments in a Digital Century* (Oct. 6, 2023), <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-at-the-brookings-institution-event-on-payments-in-a-digital-century/>.

¹⁷ *Id.*

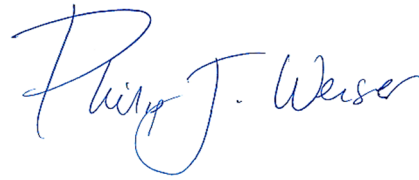
¹⁸ *Id.*



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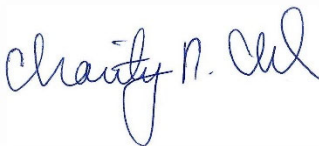
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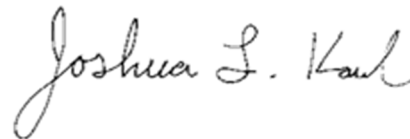
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