

Compliance Today – April 2024



Andrew E. Bigart (aebigart@venable.com) is a Partner at Venable LLP in Washington, DC.

What digital consumer payment companies need to know about CFPB supervision

by Andrew E. Bigart

Following years of market research into the fintech and payments industries, in November 2023, the Consumer Financial Protection Bureau (CFPB) announced a proposed “larger participant” rulemaking to define the market for general-use digital consumer payment applications.^[1] The proposed rule would subject companies that provide “payment apps,” “person-to-person apps,” “P2P apps,” and similar applications to CFPB supervision and examination, provided that the companies meet certain size thresholds.

The CFPB is the primary supervisor of consumer financial products and services offered by nonbank entities. The prospect of a CFPB examination can be daunting: voluminous document requests, on-site visits, and the potential for remediation and penalties if the examiners identify significant deficiencies. Providers of digital wallets and other fund transfer services in the healthcare industry should review the proposed rule carefully to determine the extent to which their products or services may fall within the covered market. With the comment period for the proposed rulemaking having closed earlier this year, providers of covered services should prepare for a future of CFPB supervision in the not-too-distant future.

What does the CFPB do?

Established by the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010, the CFPB supervises depository institutions and nonbank providers of consumer financial services. The CFPB is responsible for implementing and enforcing federal consumer financial law, including the Electronic Fund Transfer Act, the Fair Credit Reporting Act, and the Truth in Lending Act. In addition, the CFPB has enforcement and supervision authority over certain markets and market participants, as well as over unfair, deceptive, or abusive acts or practices involving consumer financial products or services.

When it comes to supervision, the CFPB has authority over large banks, thrifts, and credit unions with over \$10 billion in assets and their affiliates and service providers, as well as “larger participants” in markets for other consumer financial services, such as debt collection and credit reporting, among other activities. With the CFPB’s recently proposed rulemaking to define “larger participants” in the general-use digital consumer payment application space, prepare for general-digital consumer payment applications to join the list of industries subject to larger participant examination and supervision.

What digital consumer payment applications are covered under the proposed rule?

The proposed rule focuses on general-use digital consumer payment applications such as digital wallets and

others that facilitate consumer payment transactions through mobile phones, smartwatches, tablets, laptops, or desktops. The term “consumer payment transactions” means transferring funds by or on behalf of a consumer physically located in a state to another person primarily for personal, family, or household purposes.

Concerning payment functionalities, the proposed rule focuses on digital applications that include a “funds transfer functionality” or a “wallet functionality.” A funds transfer functionality would be defined to include (a) receiving funds to transmit them or (b) accepting and transmitting payment instructions. A wallet functionality would include a product or service that (a) stores account or payment credentials, including in encrypted or tokenized form, and (b) transmits, routes, or otherwise processes such stored account or payment credentials to facilitate a consumer payment transaction.

For healthcare companies that provide digital consumer payment applications, one of the key gating considerations will be whether the subject application meets the definition of “general use.” Under the proposed rule, general use would be defined as the absence of significant limits on the purpose of consumer payment transactions facilitated by a covered payment functionality provided through a digital consumer payment application. The definition would include a digital consumer payment application that facilitates person-to-person or peer-to-peer transfers of funds, including a “closed loop” system. Excluded from this definition—among other digital consumer payment applications that are not general purpose—would be digital consumer payment applications with functionalities used solely to purchase or lease a specific type of service, good, or property. Additionally, certain accounts that are expressly excluded from the definition of “prepaid account” in Regulation E (12 C.F.R. Part 1005) are also not considered general use and include certain tax-advantaged health medical spending accounts, dependent care spending accounts, transit or parking reimbursement arrangements, and gift certificates and gift cards, among others.

Furthermore, several additional concepts define the scope of covered activities:

- The payment transaction must result in a transfer of funds by or on behalf of the consumer. This component focuses on the sending of payments and not the receipt of payments. The proposed definition would encompass a consumer’s transfer of their own funds as well as a creditor’s transfer of funds to another person on behalf of the consumer as part of a consumer credit transaction.
- The funds transfer must be made to another person besides the consumer. For example, this could be another consumer, a business, or another type of entity. This component excludes transfers between a consumer’s own deposit accounts, transfers between a consumer deposit account and the same consumer’s stored value account held at another financial institution—such as loading or redemptions, and a withdrawal from the consumer’s own deposit account from an ATM.
- The funds transfer must be for primarily personal, family, or household purposes. For general-use digital payment applications that could also be used for commercial purposes, only consumer payment transactions for personal, family, or household purposes would fall within the scope of the proposed rule.
- The definition of “funds” includes fiat currency or legal tender and digital assets that have monetary value and are readily usable for financial purposes, including as a medium of exchange. As such, under the proposed rule, the transfer of funds in the form of digital assets by or on behalf of a consumer physically located in a state to another person primarily for personal, family, or household purposes could qualify as a “consumer payment transaction” if it would otherwise meet the definition of a “consumer payment transaction.”

Finally, the proposed rule has certain exclusions from the definition of consumer payment transaction, such as for international money remittances, an extension of consumer credit that is made using a digital application

provided by the person who is extending the credit or that person's affiliated company, and for certain payment transactions involving an online or physical store or marketplace. On this last point, the exclusion clarifies that when a consumer selects goods or services in a store or website operated in the merchant's name, and the consumer pays using account or payment credentials stored by the merchant who conducts the payment transaction, such a transfer of funds is generally not a consumer payment transaction.

Further, when a consumer pays for goods or services in an online marketplace using account or payment credentials stored by the marketplace operator or its affiliated company—such a transfer of funds—is generally not defined as a consumer payment transaction. For the transaction to qualify for the exclusion, it must be for the sale or lease of a good or service the consumer selected from a digital platform operated prominently in the name of the marketplace operator or its affiliated company.

However, the exclusion does not apply when a consumer uses a payment or account credential stored by a general-use digital consumer application provided by an unaffiliated person. For example, when a consumer selects goods or services for purchase or lease on a merchant's website and then chooses an unaffiliated person's general-use digital consumer payment application from within that website, then the exclusion would not apply, and the transaction would be considered a consumer payment transaction.

This document is only available to members. Please [log in](#) or [become a member](#).

[Become a Member](#) [Login](#)