



January 8, 2024

Via electronic submission

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

Re: Defining Larger Participants of a Market for General-Use Consumer Payment Applications (Docket No. CFPB-2023-0053, RIN 3170-AB17)

To whom it may concern:

The Clearing House Association, L.L.C. (“The Clearing House” or “TCH”)¹ and the Bank Policy Institute (“BPI” and, collectively with TCH, “Associations”)² appreciate the opportunity to provide comments in response to the Consumer Financial Protection Bureau’s (“CFPB” or “Bureau”) proposed rulemaking on “Defining Larger Participants of a Market for General-Use Consumer Payment Applications” (the “NPR”).³ In the NPR, the CFPB defines a market for general-use consumer payment applications and proposes to exert its statutory authority to supervise the larger non-bank participants in that market.⁴ The Associations commend the Bureau on the issuance of the proposed rule and are broadly supportive of it. We note, however, that the following issues warrant additional consideration by the Bureau:

- The Bureau should clarify whether the extension of credit by buy now, pay later (“BNPL”) applications are subject to exclusion from the definition of consumer payment transaction(s) under proposed section 1090.109(a)(2)(D), should provide illustrative examples of those consumer credit products that are covered by the rule, and if not

¹ The Clearing House Association, L.L.C., the country’s oldest banking trade association, is a nonpartisan organization that provides informed advocacy and thought leadership on critical payments-related issues. Its sister company, The Clearing House Payments Company L.L.C., owns and operates core payments system infrastructure in the U.S., clearing and settling more than \$2 trillion each day. See The Clearing House’s web page at www.theclearinghouse.org.

² The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation’s leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation’s bank-originated small business loans, and are an engine for financial innovation and economic growth.

³ Consumer Financial Protection Bureau, *Defining Larger Participants of a Market for General-Use Consumer Payment Applications*, 88 Fed. Reg. 80197, (Nov. 17, 2023).

⁴ *Id.* at 80197. The rulemaking is based on the CFPB’s authority over “larger participant[s] of a market for other consumer financial products or services” as the CFPB defines by rule. 12 U.S.C. § 5514(a)(1)(b).

intending to cover the extension of credit through BNPL applications in this rulemaking, the Bureau should do so in a subsequent rulemaking; and

- The Bureau should limit the scope of the term “funds” for purposes of this rulemaking to fiat currency and legal tender.

The Clearing House and BPI have a long history of calling for functionally similar regulation and supervision of non-banks when they engage in functionally similar activities as banks, including payments related activities.⁵ This rulemaking is an important step toward that end. As the CFPB notes in the NPR, “[c]onsumers have increasingly adopted general-use digital consumer payment applications as part of a broader movement toward non-cash payments” and non-bank general-use digital consumer payment applications are a rapidly growing segment of the overall market.⁶ Given the increased use and acceptance of non-bank general-use consumer payment applications, supervision of the larger participants in that market is needed to:

- Ensure compliance with applicable requirements of Federal consumer financial law;
- Enable the CFPB to monitor for new risks to both consumers and the market;
- Level the playing field between nonbanks and depository institutions; and
- Further the CFPB’s statutory objective of ensuring that Federal consumer financial law is enforced consistently between nonbanks and depository institutions in order to ensure fair competition.⁷

The Bureau notes in the NPR that its supervisory authority would not be limited to the products or services that qualified the person for supervision but would also include other activities of such person that involve other consumer financial products or services or are subject to Federal consumer financial law.⁸ We support this outcome. Other consumer financial products and services that are offered by larger participants in the market for non-bank general-use digital consumer payment applications can have follow-on effects on the execution and viability of market-related activities and

⁵ See, e.g., The Clearing House, “Ensuring Consistent Consumer Protection for Data Security; Major Banks v. Alternative Payment Providers,” (August 18, 2015) at p. 2 (noting the explosive growth of non-bank payment providers and the need to enhance legal and regulatory frameworks to ensure consistent consumer protection), available at <https://media.theclearinghouse.org/-/media/Files/Research/TCHConsumer-Protection-for-Data-Security-August-2015-FINAL.pdf?rev=38dd4fa85c504d6da097efa383a9f63c>; The Clearing House, letter to Consumer Financial Protection Bureau regarding nondepository supervision, (August 15, 2011) at p. 2 (“The Clearing House believes that effective consumer protection in the area of financial services – particularly in the areas of core banking functions such as deposit, payments and lending-type functions – starts with a supervisory regime that emphasizes Federal and state consumer financial protection law compliance issues...”), available at <https://media.theclearinghouse.org/-/media/Files/Association-Documents-2/20110815-TCH-Urges-Authority-over-Nondepositories.pdf?rev=9301ba071eab4bea97778626c38e43a3>. See also BPI, letter to Consumer Financial Protection Bureau regarding the CFPB’s Inquiry Into Big Tech Payment Platforms (Dec. 10, 2021) at p. 2 (“It is critical that consumers are afforded the same level of protection whether they obtain banking services from a traditional bank or a tech company.”), available at <https://bpi.com/wp-content/uploads/2021/12/BPI-CommentCFPBBigTechInquiry-12-10-21final.forsubmission-CFPB-2021-0017.pdf>.

⁶ 88 Fed. Reg. at 80201.

⁷ *Id.*

⁸ 88 Fed. Reg. at 80198, FN 7.

pose risks to consumers. Exerting broad supervisory authority over larger participants is consistent with how the CFPB supervises large banks, where every consumer financial activity that the bank engages in is subject to CFPB jurisdiction. Non-banks should be supervised in the same fashion.

More broadly, the convergence of payments and commerce has created increased risk for consumers with opportunities for companies to aggregate and monetize consumer financial data, for large players to dominate consumer's financial and commercial lives, and for non-banks to take advantage of varying regulatory requirements to effectuate regulatory arbitrage.⁹ We strongly believe that entities that are engaged in the same functional activities should be subject to the same functional regulation. While this proposed rule is an important step in ensuring that there is consistent supervision of bank and non-bank payment application providers, it will be important for the Bureau to effectuate supervision in a manner that provides consistent consumer protection and limits the effects of regulatory arbitrage.

- I. **The Bureau should clarify whether the extension of credit through BNPL applications are excluded from the definition of consumer payment transaction(s), should provide illustrative examples of those consumer credit products that are covered by the rule, and, if not intending to cover BNPL applications in this rulemaking, the Bureau should do so in a subsequent rulemaking.**

The CFPB proposes to define the market for general-use digital consumer payment applications as “providing a covered payment functionality through a digital application for consumers’ general use in making consumer payment transaction(s).”¹⁰ “Consumer payment transactions” are defined to exclude “[a]n 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.”¹¹ The CFPB notes that it is proposing this exclusion “so that the market definition does not encompass consumer lending activities by lenders through their own digital applications.”¹²

BNPL applications are increasingly popular with consumers, have grown rapidly, and are functionally similar in many ways to other consumer payment applications. BNPL applications are used to effectuate payment to a merchant for a specific good or service, and BNPL lenders are not generally considered “creditors” under TILA.¹³ In spite of their functional similarity to payment applications, it appears that such applications may be excluded by the language in § 1090.109(a)(2)(D) but the reasons the Bureau would do so are unclear. The Bureau should clarify whether BNPL applications are excluded and, if they are, should note its reasons for doing so. The Bureau should also illustrate how it intends the exclusion to apply by providing illustrative examples of consumer credit products that are covered by the proposed rule.

⁹ Consumer Financial Protection Bureau, *The Convergence of Payments and Commerce: Implications for Consumers* (August 2022), available at https://files.consumerfinance.gov/f/documents/cfpb_convergence-payments-commerce-implications-consumers_report_2022-08.pdf.

¹⁰ 88 Fed. Reg. at 80215.

¹¹ *Id.*

¹² 88 Fed. Reg. at 80204.

¹³ 12 C.F.R. § 1026.2(a)(17).

Further, for the reasons set forth above (increasing popularity, rapid growth, and functional similarity to consumer payment applications), we urge the Bureau either in this rulemaking or in a subsequent rulemaking to extend supervisory authority over larger participants in the BNPL market, which would appear to be aligned with the Bureau’s previous expression of an intent to explore the regulation of BNPL.¹⁴

II. The Bureau should limit the scope of the term “funds” for purposes of this rulemaking to fiat currency and legal tender.

“Consumer payment transaction(s)” are defined in proposed § 1090.109(a)(2) as “the transfer of funds by or on behalf of a consumer physically located in a State to another person primarily for personal, family, or household purposes.”¹⁵ The Bureau, however, does not define the term “funds” and simply notes in the preamble to the proposed rule that the term “funds” should be interpreted as encompassing consumer payment applications that use crypto-assets.

Without fully addressing the scope of that term [funds], the CFPB believes that, consistent with its plain meaning, the term “funds” in the CFPB is not limited to fiat currency or legal tender, and includes digital assets that have monetary value and are readily useable for financial purposes, including as a medium of exchange. Crypto-assets, sometimes referred to as virtual currency, are one such type of digital asset.

The inclusion of transactions denominated in anything that is not fiat currency or legal tender raises issues that warrant careful consideration, deliberation, and transparency that is missing from this proposed rulemaking. As proposed, the market will be left guessing as to what forms of value beyond “digital assets that have monetary value” are intended to be covered. Market participants that routinely deal in transfers of assets such as securities and commodities may not be adequately focused on this rulemaking and its potential implications regarding the scope of the CFPB’s authority. An interpretation of the term funds beyond fiat currency and legal tender could also raise questions, for example, in the application of Regulation E to transactions denominated in alternative assets, including the application of Regulation E’s error resolution, issuance of periodic statements, and reversal of transactions requirements.

To facilitate regulatory certainty and transparency, and to avoid unanticipated consequences, the Bureau should limit the term “funds” for purposes of this rulemaking to fiat currency and legal tender. The Bureau could then carefully consider in consultation with other

¹⁴ For example, the accompanying release remarks from Director Chopra regarding the Bureau’s 2022 report on the BNPL industry noted that CFPB staff were “identify[ing] potential interpretive guidance or rules” intended to ensure the BNPL industry follows “baseline protections” that Congress established for credit cards and ensuring BNPL companies are subject to appropriate supervisory examinations. See, *Director Chopra’s Prepared Remarks on the Release of the CFPB’s Buy Now, Pay Later Report* (September 15, 2022), available at <https://www.consumerfinance.gov/about-us/newsroom/director-chopras-prepared-remarks-on-the-release-of-the-cfpbs-buy-now-pay-later-report/>.

¹⁵*Id.*

regulatory agencies and Congress whether the term “funds” in the CFPA should include digital assets or other forms of value.

III. Conclusion

The Clearing House and BPI commend the Bureau on its work in developing the proposed rule. Consumers deserve consistent protection regardless of whether they are receiving payment services from depository institutions or non-banks. The Bureau’s exertion of its larger participant supervisory authority is a key step in ensuring that protection.

Respectfully submitted,

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